

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER
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DESCRIPTION

1035

2007 HOUSE JUDICIARY

HB 1035

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1035

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1-8-07

Recorder Job Number: 713

Committee Clerk Signature

*A. Penrose*

Minutes:

**Chairman DeKrey:** We will open the hearing on HB 1035.

**Rep. Delmore:** Introduced the bill. I am the prime sponsor of the bill. It came out of my committee that I chaired during the interim. I encourage a Do Pass on this bill.

**Vonette Richter, Legislative Council:** I staffed the Interim Judiciary Committee. The Committee worked very closely with the Task Force that was formed by the State Bar Association. What you have before you, is the portion of the final report dealing with Article 1. The substantive changes are summarized very briefly in the second to last paragraph, right before the actual recommendations.

**Chairman DeKrey:** Thank you. Rep. Klemin.

**Rep. Klemin:** I served on the Interim Judiciary Committee and also worked on the Task Force with the State Bar Association. (Introduced and further expounded on the bill). As of the fifth of January, according to the Uniform Law Commissioners website, this bill has been adopted in 22 states and the US Virgin Islands. It's also been introduced in 3 other states. This is a version of the Uniform Commercial Code that was initially adopted by the Legislature in 1965, revised by the Uniform Laws Commission in 2001. Article 1 is one of a number of articles relating to the Uniform Commercial Code relating to transactions and a wide variety of things.

Lowell Buttrell was the chair on the Task Force and he is able to answer your questions if you have them.

**Chairman DeKrey:** Any questions for Rep. Klemin? Thank you, Larry.

**Lowell Bottrell, State Bar Association:** (see attached testimony).

**Chairman DeKrey:** Thank you.

**Rep. Delmore:** First of all, I would like to thank you for all your hard work on the Task Force and all the time you put in. I certainly appreciate that. My area of concern that we talked some about in the committee as well, is the good faith part. Have most of the states that have adopted it, taken the same stand as you have toward good faith, not being the only reason.

**Mr. Bottrell:** Are you looking at the second item of the debate, in item 3 and letter 4. I have not, in fact, looked at what the other states did but typically that is unique to what this Task Force did. When I say that 22 states have adopted the definition of good faith, that's a different section on #3 in my report. I only went back and looked at each one of them to see what they did in that area. I can tell you, though, that when I looked at this area and from my review of the Code and from my review of the other parts, this is what was intended when this section of the Code was drafted in 1965 and enacted by many legislatures across the country, in fact all 50 states have adopted the UCC. We just wanted to make sure that there was no independent claim. When we were looking at revised Article 1, we felt it necessary to insert this in there to clarify because the comments that follow are not binding or enforceable.

**Rep. Kretschmar:** Are you aware of any cases in other states that have adopted the new Article 1, about this issue on good faith, have they supported it, a separate action that you will prohibit.

**Mr. Bottrell:** I am not aware of any case law that I can point out to you today about good faith that is taking place in other jurisdictions. Marilyn Foss might have a better handle on that, she

does publication through the National Bank Association that might have some of that recent legislation. But I'm not aware of any cases.

**Chairman DeKrey:** If there are no further questions for Mr. Bottrell, thank you for coming this morning. Any further testimony in support of HB 1035.

**Marilyn Foss, General Counsel for the ND Bankers Association:** As you know this bill was introduced in previous sessions, this is the 3<sup>rd</sup> time around. Previously we have opposed it; this time we stand in favor of it and urge a Do Pass. As Mr. Bottrell noted, I participated in the Task Force on this and participated in the resolution of the concerns that we had previously raised, that centered around the letters of credit division, which had been as originally adopted by all the states, and we are now changing the original UCC as revised to retain what is in the current law. The change with respect to the definition of good faith, as it pertains to letters of credit, the change we support. Again this change arises out of essentially academic analysis of how revised Article 1 will work and how it was drafted, and it was drafted with the intention that the change would not affect letters of credit. As you may or may not know, letters of credit are very specialized forms of contracts, and before an institution is obligated to honor a letter of credit, when a person is claiming funds under a letter of credit, has to adhere specifically to every single condition of the letter of credit. While the definition of good faith was not to apply in Article 5, in looking at this that may well be your intention but Article 5 was drafted before you revised Article 1 and there may be any number of provisions in Article 5 that would be affected by this new definition, even though that was not your intention and we believe that we have addressed that issue in accordance with the intention of the drafters. That is the same situation that the change to the obligation of good faith. It is very clear that the drafters of revised Article 1, through the comments and with everything else, by adding language to the definition of good faith, did not intend to change how it operates and it confused between

people that they put that premise and foundation for the drafting in comments are not law.

Rep. Kretschmar asked if there is any case law that would give rise to the concern that the courts would not, essentially, honor the intentions of the drafter of the UCC and my answer to that is "yes there is". There is a Supreme Court case \_\_\_\_\_ vs. Maine Family Credit Union, and it is a case in which the credit union was sued by non-customers, so there was no contact and said that the credit union had acted unreasonably with respect, to I think cashing some kind of check. The credit union argued that there was no basis for this lawsuit. The people suing the credit union argued that definition of good faith, specifically language adding reasonable standards of care vs. commercial standards of fair dealing issues. The Supreme Court in looking at this, said yes, we see that the comments to the revised article are confusing, it happened to be article 3 to what they were doing. It does say that there was no change intended by this and you weren't supposed to be able to sue a party with whom you didn't have a contract, for breaching an obligation of good faith. But the Supreme Court said we are presuming that the change was made for some reason, so despite what the comments said, and whatever, the Maine Supreme Court said yes, you can go ahead and do the credit. Once the primary scholars of the UCC, a professor, James White, did an analysis of the tape and said here it is, a clear example of the court's misinterpreting what was intended in the change of this definition. As far as other states making the change like ND, the Task Force was comprised of people such as myself. This change was recently discussed at a national meeting looking at this issue so I think it actually, I don't know if we will be unique, but we are first, and it is because the Supreme Court looked at this and said, we're not going to follow the comments as they were written by the people who drafted these changes. I guess I would urge you to adopt all of the changes in the Task Force. We feel that these changes are

reflective of what other states have done, what other states will do, and the intentions of the drafter of revised Article 1.

**Rep. Kretschmar:** So that 41-01-18 in the bill, page 16, is properly corrected.

**Marilyn Foss:** Yes, it is. The language in this is taken from the comments.

**Chairman DeKrey:** Thank you. Further testimony in support of HB 1035. Testimony in opposition to HB 1035.

**Clara Jenkins, Secretary of State's Office:** (see attached testimony). We would like to offer some amendments.

**Chairman DeKrey:** So basically this is a technical correction, and not substantive.

**Clara Jenkins:** Exactly.

**Chairman DeKrey:** Thank you for appearing. That testimony was neutral. Is there any testimony in opposition to HB 1035? Marilyn, do you have a comment on the amendment.

**Marilyn Foss:** No, I certainly would not object to a technical correction.

**Chairman DeKrey:** Okay, we will close the hearing on HB 1035.

The bill was taken up after lunch.

**Chairman DeKrey:** We will look at HB 1035.

**Rep. Klemin:** I move that HB 1035 be amended to include the amendments proposed by the Secretary of State.

**Rep. Kingsbury:** Seconded.

**Chairman DeKrey:** Further discussion on the amendments. Voice vote: Motion carried. We now have the bill before us as amended. What are the committee's wishes.

**Rep. Kingsbury:** Move a Do Pass as amended.

**Rep. Delmore:** Seconded.

**DO PASS AS AMENDED**

**13-0-1**

**Carrier: Rep. Klemin**

**House Amendments to HB 1035 (70141.0201) - Judiciary Committee 01/09/2007**

Page 2, line 16, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

**House Amendments to HB 1035 (70141.0201) - Judiciary Committee 01/09/2007**

Page 3, line 2, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 3, line 17, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

**House Amendments to HB 1035 (70141.0201) - Judiciary Committee 01/09/2007**

Page 24, line 4, overstrike "as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 24, line 19, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

**House Amendments to HB 1035 (70141.0201) - Judiciary Committee 01/09/2007**

Page 25, line 4, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 25, line 19, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Re-number accordingly



Date: 1/8/07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB1035

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number 70141.0201 Title: .0300

Action Taken Do Pass As Amended

Motion Made By Rep. Kingsbury Seconded By Rep. Delmore

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman					
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 1 Rep. Koppelman

Floor Assignment Rep. Klemin

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

**REPORT OF STANDING COMMITTEE**

**HB 1035: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1035 was placed on the Sixth order on the calendar.

Page 2, line 16, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 3, line 2, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 3, line 17, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

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Page 25, line 19, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Renumber accordingly

2007 SENATE JUDICIARY

HB 1035

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1035

### Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: February 28, 2007

Recorder Job Number: 4122

Committee Clerk Signature

*Mona L. Solberg*

**Minutes:** Relating to Uniform Commercial Code-general provisions contracts and leases.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following hearing:

#### Testimony in Favor of the Bill:

**Vonette Richter**, Legislative Council Staff for Interim Committee- Introduced the bill with the study – Att. #1 and referred to the amendment in the House – Att. #2

**Rep. Lawrence R. Klemin**, Dist. #47 Introduced the bill with his testimony Att. #3a, including the other states that have adopted the law – Att. 33b

**Sen. Nelson** spoke to the major “harmonization” of two parts of the law and the two portions they kept as ND law (meter 7:40) Choice of law and the definition of good faith.

**Bill Neumann**, ND Lawyers Assoc. (meter 8:30) Att. #4 Referred to **Lowell Bottrell’s**

Testimony – Att. #5

**Marilyn Foss**, Legal Council for the ND Bankers Assoc. (meter 14:02) We are in support of the bill. In the past we were against, while not all of our issues have been addressed, the major issues are and we are ok with the bill.

**Testimony Against the bill:**

None

**Testimony Neutral to the bill:**

None

**Senator David Nething**, Chairman closed the hearing.

**Sen. Lyson** made the motion to Do Pass HB 1035 and **Sen. Olafson** seconded the motion.

All members were in favor and the motion passes.

Carrier: **Sen. Nelson**

**Senator David Nething**, Chairman closed the hearing.

Date: 2-28-07  
Roll Call Vote # 10A1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1035

Senate \_\_\_\_\_ Judiciary \_\_\_\_\_ Committee \_\_\_\_\_

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass

Motion Made By Sen. Lyson Seconded By Sen. Olafson

Senators	Yes	No	Senators	Yes	No
Sen. Nething	✓		Sen. Fieblger	✓	
Sen. Lyson	✓		Sen. Marcellais	✓	
Sen. Olafson	✓		Sen. Nelson	✓	

Total Yes 6 No 0

Absent 0

Floor Assignment Sen. Nelson

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

**REPORT OF STANDING COMMITTEE (410)**  
February 28, 2007 3:38 p.m.

**Module No: SR-38-4136**  
**Carrier: Nelson**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1035, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1035 was placed on the Fourteenth order on the calendar.**

2007 TESTIMONY

HB 1035





## A Few Facts About The...

### REVISED UNIFORM COMMERCIAL CODE ARTICLE 1, GENERAL PROVISIONS (2001)

**PURPOSE:**

Updates the general provisions section of the Uniform Commercial Code, to harmonize with ongoing UCC projects and recent revisions.

**ORIGIN:**

Completed by the Uniform Law Commissioners and the American Law Institute in 2001.

**APPROVED BY:**

American Bar Association

**STATE ADOPTIONS:**

Alabama	Nebraska
Arizona	Nevada
Arkansas	New Hampshire
California	New Mexico
Colorado	North Carolina
Connecticut	Oklahoma
Delaware	Texas
Hawaii	U.S. Virgin Islands
Idaho	Virginia
Kentucky	West Virginia
Louisiana	
Minnesota	
Montana	

**2006 INTRODUCTIONS:**

Florida  
Kansas  
Massachusetts

For any further information regarding the Revised UCC Article 1, please contact John McCabe, Michael Kerr or Katie Robinson at 312-915-0195.

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211 E. Ontario Street, Suite 1300  
Chicago, Illinois 60611

tel: (312) 915-0195 | fax: (312) 915-0187 | e-mail: [nccusl@nccust.org](mailto:nccusl@nccust.org)

ALVIN A. JAEGER  
SECRETARY OF STATE

HOME PAGE [www.nd.gov/sos](http://www.nd.gov/sos)



PHONE (701) 328-2900

FAX (701) 328-2992

E-MAIL [sos@nd.gov](mailto:sos@nd.gov)

## SECRETARY OF STATE

STATE OF NORTH DAKOTA  
600 EAST BOULEVARD AVENUE DEPT 108  
BISMARCK ND 58505-0500

January 8, 2007

TO: Rep. DeKrey, Chairman, and Members of the House Judiciary Committee  
FR: Clara Jenkins, Director, Business Division, on behalf of Al Jaeger, Secretary of State  
RE: HB 1035 – Uniform Commercial Code – general provisions, contracts, and leases

House bill 1035 contains cross references between other chapters in the Century Code that pertain to business entities regulated by the Secretary of State's office and the proposed 41-01-09 in this bill.

Section 41-01-09 is the section in this bill providing the general definitions of the terms used throughout the proposed new chapter 41-09.

The Secretary of State's office believes the cross-references of section 41-01-09 in the business entity chapters are not necessary. Therefore, we respectfully request the committee's favorable consideration of the attached amendments to remove the cross references.

The adoption of these amendments will make the language in the business entity chapters listed below consistent with other legislation introduced during this session.

The proposed amendments pertain to the following chapters:

Section 3, page 2: Chapter 10-19.1 relates to the business corporation act

Section 4, page 2: Chapter 10-32 relates to the limited liability company act

Section 5, page 3: Chapter 10-33 relates to nonprofit corporations

Section 24, page 23: Chapter 41-05 relates to the uniform limited partnership act

Section 25, page 24: Chapter 45-13 relates to partnerships

Section 27, page 25: Chapter 45-23 relates to limited liability limited partnerships

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1035

Page 2, line 16, overstrike "as provided under section"

Page 2, line 16, replace "41-01-09" with "with the present intention to authenticate that record"

Page 3, line 2, overstrike "as provided under section"

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January 8, 2007

HOUSE JUDICIARY COMMITTEE  
HB 1035

CHAIRMAN DUANE L. DEKREY AND COMMITTEE MEMBERS:

My name is Lowell Bottrell. I am an attorney in Fargo and am appearing on behalf of the State Bar Association of North Dakota, specifically the Uniform Commercial Code Task Force ("Task Force"), which was appointed by Mike Williams, the SBAND President in a letter dated October 17, 2005. The Task Force included Paul Hubbard of Fargo, Dick Olson of Minot, Sean Smith of Bismarck, Marilyn Foss of Bismarck, Jon Brakke of Fargo, Representative Lawrence Klemin of Bismarck and myself. I was appointed Chair of the Task Force. Bill Neumann, the Executive Director of SBAND was also an ex officio member of the Task Force.

Meetings were conducted on November 16, 2005, January 10, 2006 and February 8, 2006. At those meetings we considered the suggested adoption of House Bill 1035, which deals with the revised provisions to Article 1 of the Uniform Commercial Code, among other things. There was robust discussion about the changes to the Revised Article 1, specifically dealing with the issue of good faith. The Task Force's consensus was to adopt Revised Article 1 as set forth in House Bill 1035.

There were three main points of discussion on Revised Article 1.

1. The Task Force felt that the definition of "good faith" for Article 1 should mean "honesty in fact and the observance of reasonable commercial standards of fair dealing." Hopefully, as you will see in Section 20 of the proposed legislation, the committee felt it necessary that 41-05-02 should reflect that the definition of good faith be different in part 5 of Article 41 than it is in part 1 of Article 41. Specifically, as you will see from Section 20, the definition of good faith found at 41-01-09, does not apply to Article 5 of the Uniform Commercial Code. The reason for this change and the differentiation between Article 1 and 5 is that some legal scholars have raised an issue regarding the potential for the Article 1 change and the change to the definition of good faith (as set forth above) to affect Article 5 (letters of credit). There is a general agreement that no change to Article 5 was intended by the Article 1 change to the definition of good faith and that the language that is recommended in 41-05-02 makes that clear.

The definition of good faith found at House Bill 1035 as N.D.C.C. § 41-01-09(2)(t) and the definition of good faith that is used in other aspects of the code, including Article 9, which was adopted by the Legislature a few sessions back. However, to avoid any confusion with letters of credit, the Task Force's suggestion was to leave the revised definition alone in Article 1 and make the change to Article 5 that is suggested.

2. A secondary concern for the Task Force was the proposed revised Section 1-301 dealing with choice of law. The committee felt that North Dakota's current version of 41-01-05 (old 1-105) was an adequate section and worked much better than suggested language to 1-301. Therefore, the Task Force recommended that the language for 41-01-05 come forward into the new

legislation, which it has and it is now recodified at 41-01-15 and found on page 13 of the House Bill.

The best that I could find on the Internet concerning the adoption of revised Article 1 and good faith was a report from September 15, 2006. California was the 22<sup>nd</sup> state to enact Revised Article 1 and the 22<sup>nd</sup> state to also reject Revised Article 1-301, and the 16<sup>th</sup> state to adopt the revised article definition of good faith found under Revised Article 1-201(b)(20). These are the same changes suggested by the Task Force. It is this Task Force's recommendation that the legislation go forward as in House Bill 1035, and 41-01-15 be adopted dealing with territorial applicability and powers of parties to choose applicable law.

3. The third area of concern of the Task Force dealt with Revised Section 1-304, which is current codified at 41-01-18. The suggested change to 1-304 was to insert language into the current statute on good faith to indicate that this section does not support an independent claim for relief. Therefore, under 41-01-18 of House Bill 1035, this section has been changed. The change that is being suggested from the current version of North Dakota law is as follows: "This section does not support an independent claim for relief for failure to perform or enforce in good faith and does not create a separate duty of fairness and reasonableness which can be independently breached."

The reason that this section was suggested was to show that there was no independent claim for relief for a breach of this section. There is ample support for this change in the law. This language is supported by the UCC Code comments to this section and in fact the language was lifted in part from the comment to the Code. Moreover, Permanent Editorial Board Comment 10 ( the opinion of the drafters of the code) indicates that there should be no lawsuit based solely upon this provision of good faith. With that said, there may be courts and litigants that still may contend that there is a separate claim for relief based upon this section. Because of this concern the Task Force felt it necessary that North Dakota eliminate any chance that any court would interpret this section as an independent basis for a lawsuit.

The Task Force would hope that the legislature would adopt the legislation as proposed in House Bill 1035.

If you have any questions, I would be happy to try and answer them. Thank you for this opportunity to appear before you and report on the work of the Bar Association's Uniform Commercial Code Task Force.

Uniform Commercial Code Task Force

By \_\_\_\_\_  
Lowell P. Bottrell  
Its \_\_\_\_\_  
Chair

**UNIFORM COMMERCIAL CODE  
REVISED ARTICLE 1 -  
GENERAL PROVISIONS STUDY**

Senate Concurrent Resolution No. 4032 directed a study of the Uniform Commercial Code Revised Article 1 - General Provisions (2001). The purpose of the study was to determine the feasibility and desirability of adopting Revised Article 1. In 2005 the Legislative Assembly considered Senate Bill No. 2143, which would have provided for the adoption of Revised Article 1. Senate Bill No. 2143 failed to pass the Senate. Supporters of Senate Concurrent Resolution No. 4032 testified that an interim study of Revised Article 1 would provide opponents of harmonization of the various articles of the Uniform Commercial Code an opportunity to identify those provisions that should be unique to North Dakota.

**Background**

**North Dakota Statutory Provisions**

North Dakota's current version of the Uniform Commercial Code Article 1 - General Provisions is contained in NDCC Chapter 41-01. Article 1 was adopted by the Legislative Assembly in 1965. This chapter provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code.

**Revised Article 1 of the Uniform Commercial Code**

According to the national conference, the purpose of Revised Article 1 is to update the General Provisions section of the Uniform Commercial Code and to harmonize Article 1 with ongoing Uniform Commercial Code projects and recent revisions. Revised Article 1 was completed by the national conference and the American Law Institute in 2001. Revised Article 1 has been approved by the American Bar Association, Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Texas, United States Virgin Islands, Virginia, and West Virginia have adopted Revised Article 1.

Uniform Commercial Code Article 1 provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code. According to the national conference, as other parts of the Uniform Commercial Code have been revised and amended to accommodate changing business practices and development in the law, these modifications need to be reflected in an updated Article 1. In addition, over the years it has been in place, the national conference reports that certain provisions of Article 1 have been identified as confusing or imprecise. Several changes reflect an effort to add greater clarity in light of this experience. According to the national conference, developments in the law have led to the conclusion that

certain changes of a substantive nature needed to be made.

The first substantive change is intended to clarify the scope of Article 1. Section 1-102 now expressly states that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the Uniform Commercial Code. The statute of frauds requirement aimed at transactions beyond the coverage of the Uniform Commercial Code has been deleted. Second, amended Section 1-103 clarifies the application of supplemental principles of law, with clearer distinctions about where the Uniform Commercial Code is preemptive. Third, the definition of "good faith" found in 1-201 is revised to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing." This change conforms to the definition of good faith that applies in all of the recently revised Uniform Commercial Code articles, except Revised Article 5. Finally, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

Another change in Revised Article 1 deals with default choice of law provisions found in Section 1-301, which replaces previous Section 1-105. Under Article 1, before the 2001 amendments, parties to a transaction could agree to be governed by the law of any jurisdiction that bears a reasonable relation to that transaction. Revised Article 1 provides a different basic rule that applies except for consumer transactions in certain circumstances.

With respect to all transactions, an agreement by the parties to use the law of any state or country is effective, regardless of whether the transaction bears a reasonable relation to that state. However, if one of the parties to a transaction is a consumer, such a choice of law provision in a contract may not deprive the consumer of legal protections afforded by the law of the state or country in which the consumer resides, or of the state or country where the consumer contracts and takes delivery of goods. Also, with respect to all transactions, an agreement to use the law of a designated state or country is ineffective to the extent that application would violate a fundamental public policy of the state or country that has jurisdiction to adjudicate a dispute arising out of the transaction. The forum state's law will govern the transaction if the contract is silent on the issue of choice of law.

**Previous Studies and Legislation**

The 2001-02 interim Judiciary A Committee, pursuant to NDCC Section 54-35-02, studied the Uniform Commercial Code Article 1 - General Provisions (2001). The committee made no recommendation regarding Revised Article 1. During the 2003 legislative session, the Legislative Assembly considered House Bill No. 1069, which would have codified the changes proposed in Revised Article 1. The bill was withdrawn from consideration.

In addition to the 2001-02 study of Revised Article 1, a number of other articles of the Uniform Commercial Code have been studied in recent years. The 2001-02 interim Judiciary A Committee and the 2003-04 interim

Judicial Process Committee studied Uniform Commercial Code Article 2 - Sales, Article 2A - Leases, Article 3 - Negotiable Instruments, and Article 4 - Bank Deposits and Collections. The 2003-04 interim Judicial Process Committee also studied Uniform Commercial Code Article 7 - Documents of Title, which was adopted by the Legislative Assembly in 2005. The 1999-2000 interim Judiciary Committee studied Uniform Commercial Code Article 9 - Secured Transactions, which was adopted by the Legislative Assembly in 2001.

### **Testimony and Committee Considerations**

The committee received extensive testimony and information from the national conference, the State Bar Association of North Dakota, and the North Dakota Bankers Association regarding Uniform Commercial Code Revised Article 1 and the feasibility and desirability of adopting Revised Article 1 in North Dakota. The committee also received extensive information and recommendations from the Uniform Commercial Code Revised Article 1 Task Force, a group formed by the State Bar Association of North Dakota to conduct an indepth review of Revised Article 1. The task force provided to the committee information and recommendations regarding Revised Article 1.

The committee received testimony that the primary objections to the adoption of Revised Article 1 during the 2003 and 2005 legislative sessions were the choice of law provisions of Revised Article 1 and how the definition of "good faith" and "fair dealings" would apply. It was noted that every state that has adopted Revised Article 1 has removed the choice of law provision. It was also noted that those states that have adopted Revised Article 1 have done so with substantive changes. According to the testimony, the choice of law provision in Revised Article 1 creates uncertainty in the choice of law issue.

### **National Conference of Commissioners on Uniform State Laws**

The committee received information and testimony from a representative of the national conference regarding Revised Article 1. Article 1 of the Uniform Commercial Code provides definitions and general provisions that, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code. According to the testimony, Revised Article 1 contains technical nonsubstantive modifications, such as reordering and renumbering sections, and adding gender-neutral terminology. It was noted that because of developments in the law, certain substantive changes in Article 1 have been made as well. According to the testimony, Revised Article 1 contains a number of necessary changes that every state should adopt, including a change in the scope of Article 1. This section provides that the substantive rules of Article 1 apply only to transactions governed by other articles of the Uniform Commercial Code. Revised Section 1-103 clarifies the application of supplemental principles of law and provides clearer distinctions about where the Uniform Commercial Code is preemptive.

Section 1-201 of Revised Article 1 adopts the objective standard of "good faith" which applies in all of the recently revised Uniform Commercial Code articles, except Revised Article 5. The default choice of law provisions have been revised and are now found in Section 1-301 to replace former Section 1-105. With respect to all transactions, an agreement by the parties to use the law of any state or country is generally effective regardless of whether the transaction bears a reasonable relation to that state. According to the testimony, it appears that most states want to keep their current choice of law provisions.

### **Uniform Commercial Code Revised Article 1 Task Force**

The Uniform Commercial Code Revised Article 1 Task Force, a group formed by the State Bar Association of North Dakota to conduct an indepth review of Revised Article 1, provided to the committee information and recommendations regarding Revised Article 1, the feasibility and desirability of adopting Revised Article 1 in North Dakota, and proposed changes to Revised Article 1. Several committee members served on the task force.

Throughout the course of the committee's study of Revised Article 1, the committee received extensive information and frequent updates from representatives of the task force regarding its review of Revised Article 1. According to a representative of the task force, there was robust discussion about the changes to Revised Article 1, specifically dealing with the issue of the definition of good faith. According to the testimony, the consensus of the task force was to adopt Revised Article 1 with certain changes. It was noted that 2005 Senate Bill No. 2143 was used as the base document for the task force review of Revised Article 1.

The first recommended change of the task force was that instead of adopting Revised Section 1-301, the current version of NDCC Section 41-01-05 should be retained. It was noted that the task force determined it necessary to retain the current version of Section 41-01-05 because to date no state has adopted Revised Section 1-301. It also was noted that there does not seem to be a problem with jurisdiction under the current statute and it is not necessary to cause any further confusion adopting Revised Section 1-301.

The second recommended change was that Revised Section 1-304, codified as NDCC Section 41-01-18 should be modified to provide that "[t]his section does not support an independent claim for relief for failure to perform or enforce in good faith, and does not create a separate duty of fairness and reasonableness which can be independently breached." According to the testimony, the reason this section was suggested is to show that there is no independent claim for relief for a breach of this section. It was noted that there is ample support for this change in the law. It was also noted that this language is supported by the Uniform Commercial Code comments to this section and that the language was lifted, in part, from the comment to the Uniform Commercial Code. According to the testimony, the Uniform Commercial Code's Permanent Editorial Board

Comment 10 indicates that there should be no lawsuit solely based upon the provision of good faith. According to the testimony, there may be courts and litigants that still may contend that there is a separate claim for relief based upon this section. Because of this concern, it was noted that North Dakota should eliminate any chance that anyone would interpret this section as an independent basis for a lawsuit.

The third recommended change was that NDCC Section 41-05-02(1)(g) be amended to clarify that the definition of good faith contained in Article 1 does not apply to Article 5. The testimony indicated that there is general agreement that no change to Article 5 was intended by the Revised Article 1 change to the definition of good faith and that adding this language to Section 41-05-02 makes that clear. According to the testimony, there was extensive discussion about the definition of good faith and whether the revised definition of good faith should be adopted. It was noted that the recommendation of the task force is to accept the revised definition of good faith.

Based upon the recommendations of the task force, the committee considered a bill draft relating to the Uniform Commercial Code Revised Article 1 - General Provisions. Testimony in explanation of the bill draft indicated that the bill draft is substantially similar to the version considered by the Legislative Assembly in 2005; however, the bill draft includes the changes recommended by the task force. Those changes included retaining NDCC Section 41-01-05 instead of adopting Revised Section 1-301; modifying Revised Section 1-304, codified as Section 41-01-18 to provide that "[t]his section does not support an independent claim for relief for failure to perform or enforce in good faith, and does not create a separate duty of fairness and reasonableness which can be independently breached; and amending the definition of good faith to clarify that the definition of good faith contained in Article 1 does not apply to Article 5.

### **Recommendation**

The committee recommends House Bill No. 1035 to adopt the Uniform Commercial Code Revised Article 1 - General Provisions. The bill provides definitions and general provisions that, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code. The bill also includes changes recommended by the Uniform Commercial Code Revised Article 1 Task Force.



**NDLA, H JUD**

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**From:** Marilyn Foss [Marilyn@ndba.com]  
**Sent:** Wednesday, January 10, 2007 9:04 AM  
**To:** NDLA, H JUD  
**Subject:** RE: Testimony

I didn't and don't have written testimony. However, the jist of mine was to support the interim committee draft and task force versions of UCC 1, to endorse retention of current law for the choice of law provisions (as the bill draft does), to endorse the changes to UCC Article 5 pertaining to letters of credit because it makes it clear that the new definition of good faith does not apply in any way to letters of credit under Article 5 ( a subject of academic debate/concern) and to support the inclusion of the new language (taken from the comments to Revised Article 1) to provide that an alleged breach of an obligation of good faith does not support an independent cause of action. I noted that North Dakota is the first state to add this type of language to UCC 1, but that it does express the intention of the drafters of Article 1 and the assumptions upon which they proposed other changes to the Article. I also noted that the change may be considered by other states going forward. In response to a question by Representative Kretchmar (re whether any courts had looked at this issue of the definition change and an independent cause of action) I briefly discussed a Maine Supreme Court case involving the Maine Family Credit Union. I noted that the Maine Supreme Court recognized the comment, but said the change to the definition must have meant some change in how the law works was intended and held that there was an independent cause of action for an alleged breach of the new obligation of good faith. I noted that the task force included members who represent industry, such as myself, and other members who presented consumer interests and that there was unanimous agreement to add the comment language to the section on the obligation of good faith. I hope this helps.

Marilyn Foss  
General Counsel  
North Dakota Bankers Association  
701-223-5303

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**From:** NDLA, H JUD [mailto:hjud@nd.gov]  
**Sent:** Tuesday, January 09, 2007 2:52 PM  
**To:** Marilyn Foss  
**Subject:** Testimony

Marilyn,

Could you please e-mail me your testimony for yesterday's hearing, or at least the jist of it. I couldn't hear on the tape very well and a lot of what you said was missed because the microphone didn't pick up your voice very well.

We have a new system, and everyone needs to speak very loudly and clearly to get picked up.

Thanks for any information you can send my way.

Sincerely,  
Dawn Penrose  
House Judiciary Clerk

1/10/2007

AH #1  
2-28-07

## EXCERPT FROM 2007 LEGISLATIVE COUNCIL FINAL REPORT REGARDING HOUSE BILL NO. 1035

### UNIFORM COMMERCIAL CODE REVISED ARTICLE 1 -GENERAL PROVISIONS STUDY

Senate Concurrent Resolution No. 4032 directed a study of the Uniform Commercial Code Revised Article 1 - General Provisions (2001). The purpose of the study was to determine the feasibility and desirability of adopting Revised Article 1. In 2005 the Legislative Assembly considered Senate Bill No. 2143, which would have provided for the adoption of Revised Article 1. Senate Bill No. 2143 failed to pass the Senate. Supporters of Senate Concurrent Resolution No. 4032 testified that an interim study of Revised Article 1 would provide opponents of harmonization of the various articles of the Uniform Commercial Code an opportunity to identify those provisions that should be unique to North Dakota.

#### Background

##### North Dakota Statutory Provisions

North Dakota's current version of the Uniform Commercial Code Article 1 - General Provisions is contained in NDCC Chapter 41-01. Article 1 was adopted by the Legislative Assembly in 1965. This chapter provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code.

##### Revised Article 1 of the Uniform Commercial Code

According to the national conference, the purpose of Revised Article 1 is to update the General Provisions section of the Uniform Commercial Code and to harmonize Article 1 with ongoing Uniform Commercial Code projects and recent revisions. Revised Article 1 was completed by the national conference and the American Law Institute in 2001. Revised Article 1 has been approved by the American Bar Association. Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Texas, United States Virgin Islands, Virginia, and West Virginia have adopted Revised Article 1.

Uniform Commercial Code Article 1 provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code. According to the national conference, as other parts of the Uniform Commercial Code have been revised and amended to accommodate changing business practices and development in the law, these modifications need to be reflected in an updated Article 1. In addition, over the years it has been in place, the national conference reports that certain provisions of Article 1 have been identified as confusing or imprecise. Several changes reflect an effort to add greater clarity in light of this experience. According to the national conference, developments in the law have led to the conclusion that certain changes of a substantive nature needed to be made.

The first substantive change is intended to clarify the scope of Article 1. Section 1-102 now expressly states that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the Uniform Commercial Code. The statute of frauds requirement aimed at transactions beyond the coverage of the Uniform Commercial Code has been deleted. Second, amended Section 1-103 clarifies the application of supplemental principles of law, with clearer distinctions about where the Uniform Commercial Code is preemptive. Third, the definition of "good faith" found in 1-201 is revised to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing." This change conforms to the definition of good faith that applies in all of the recently revised Uniform Commercial Code articles, except Revised Article 5. Finally, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

Another change in Revised Article 1 deals with default choice of law provisions found in Section 1-301, which replaces previous Section 1-105. Under Article 1, before the 2001 amendments, parties to a transaction could agree to be governed by the law of any jurisdiction that bears a reasonable relation to that transaction. Revised Article 1 provides a different basic rule that applies except for consumer transactions in certain circumstances.

### **Testimony and Committee Considerations**

The committee received extensive testimony and information from the national conference, the State Bar Association of North Dakota, and the North Dakota Bankers Association regarding Uniform Commercial Code Revised Article 1 and the feasibility and desirability of adopting Revised Article 1 in North Dakota. The committee also received extensive information and recommendations from the Uniform Commercial Code Revised Article 1 Task Force, a group formed by the State Bar Association of North Dakota to conduct an indepth review of Revised Article 1. The task force provided to the committee information and recommendations regarding Revised Article 1.

The committee received testimony that the primary objections to the adoption of Revised Article 1 during the 2003 and 2005 legislative sessions were the choice of law provisions of Revised Article 1 and how the definition of "good faith" and "fair dealings" would apply. It was noted that every state that has adopted Revised Article 1 has removed the choice of law provision. It was also noted that those states that have adopted Revised Article 1 have done so with substantive changes. According to the testimony, the choice of law provision in Revised Article 1 creates uncertainty in the choice of law issue.

### **National Conference of Commissioners on Uniform State Laws**

The committee received information and testimony from a representative of the national conference regarding Revised Article 1. Article 1 of the Uniform Commercial Code provides definitions and general provisions that, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code. According to the testimony, Revised Article 1 contains technical nonsubstantive modifications, such as reordering and renumbering sections, and adding gender-neutral terminology. It was noted that because of developments in the law, certain substantive changes in Article 1 have been made as well. According to the testimony, Revised Article 1 contains a number of necessary changes that every state should adopt, including a change in the scope of Article 1. This section provides that the substantive rules of Article 1 apply only to transactions governed by other articles of the Uniform Commercial Code. Revised Section 1-103 clarifies the application of supplemental principles of law and provides clearer distinctions about where the Uniform Commercial Code is preemptive. Section 1-201 of Revised Article 1 adopts the objective standard of "good faith" which applies in all of the recently revised Uniform Commercial Code articles, except Revised Article 5. The default choice of law provisions have been revised and are now found in Section 1-301 to replace former Section 1-105. With respect to all transactions, an agreement by the parties to use the law of any state or country is generally effective regardless of whether the transaction bears a reasonable relation to that state. According to the testimony, it appears that most states want to keep their current choice of law provisions.

### **Uniform Commercial Code Revised Article 1 Task Force**

The Uniform Commercial Code Revised Article 1 Task Force, a group formed by the State Bar Association of North Dakota to conduct an indepth review of Revised Article 1, provided to the committee information and recommendations regarding Revised Article 1, the feasibility and desirability of adopting Revised Article 1 in North Dakota, and proposed changes to Revised Article 1. Several committee members served on the task force.

Throughout the course of the committee's study of Revised Article 1, the committee received extensive information and frequent updates from representatives of the task force regarding its review of Revised Article 1. According to a representative of the task force, there was robust discussion about the changes to Revised Article 1, specifically dealing with the issue of the definition of good faith. According to the testimony, the consensus of the task force was to adopt

Revised Article 1 with certain changes. It was noted that 2005 Senate Bill No. 2143 was used as the base document for the task force review of Revised Article 1.

The first recommended change of the task force was that instead of adopting Revised Section 1-301, the current version of NDCC Section 41-01-05 should be retained. It was noted that the task force determined it necessary to retain the current version of Section 41-01-05 because to date no state has adopted Revised Section 1-301. It also was noted that there does not seem to be a problem with jurisdiction under the current statute and it is not necessary to cause any further confusion adopting Revised Section 1-301.

The second recommended change was that Revised Section 1-304, codified as NDCC Section 41-01-18 should be modified to provide that "[t]his section does not support an independent claim for relief for failure to perform or enforce in good faith, and does not create a separate duty of fairness and reasonableness which can be independently breached." According to the testimony, the reason this section was suggested is to show that there is no independent claim for relief for a breach of this section. It was noted that there is ample support for this change in the law. It was also noted that this language is supported by the Uniform Commercial Code comments to this section and that the language was lifted, in part, from the comment to the Uniform Commercial Code. According to the testimony, the Uniform Commercial Code's Permanent Editorial Board Comment 10 indicates that there should be no lawsuit solely based upon the provision of good faith. According to the testimony, there may be courts and litigants that still may contend that there is a separate claim for relief based upon this section. Because of this concern, it was noted that North Dakota should eliminate any chance that anyone would interpret this section as an independent basis for a lawsuit.

The third recommended change was that NDCC Section 41-05-02(1)(g) be amended to clarify that the definition of good faith contained in Article 1 does not apply to Article 5. The testimony indicated that there is general agreement that no change to Article 5 was intended by the Revised Article 1 change to the definition of good faith and that adding this language to Section 41-05-02 makes that clear. According to the testimony, there was extensive discussion about the definition of good faith and whether the revised definition of good faith should be adopted. It was noted that the recommendation of the task force is to accept the revised definition of good faith.

Based upon the recommendations of the task force, the committee considered a bill draft relating to the Uniform Commercial Code Revised Article 1 - General Provisions. Testimony in explanation of the bill draft indicated that the bill draft is substantially similar to the version considered by the Legislative Assembly in 2005; however, the bill draft includes the changes recommended by the task force. Those changes included retaining NDCC Section 41-01-05 instead of adopting Revised Section 1-301; modifying Revised Section 1-304, codified as Section 41-01-18 to provide that "[t]his section does not support an independent claim for relief for failure to perform or enforce in good faith, and does not create a separate duty of fairness and reasonableness which can be independently breached; and amending the definition of good faith to clarify that the definition of good faith contained in Article 1 does not apply to Article 5.

### **Recommendation**

The committee recommends House Bill No. 1035 to adopt the Uniform Commercial Code Revised Article 1 - General Provisions. The bill provides definitions and general provisions that, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the Uniform Commercial Code. The bill also includes changes recommended by the Uniform Commercial Code Revised Article 1 Task Force.

AH #2  
2-28-07

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1035

Page 2, line 16, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 3, line 2, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 3, line 17, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 24, line 4, overstrike "as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 24, line 19, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 25, line 4, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Page 25, line 19, overstrike ", as provided under section" and replace "41-01-09" with "with the present intention to authenticate that record"

Renumber accordingly

Att # 3a  
2-28-07

House Bill No. 1035  
Testimony of Rep. Lawrence R. Klemin  
Senate Judiciary Committee  
February 28, 2007

Mr. Chairman and members of the committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here today to testify in support of House Bill 1035.

House Bill 1035 relates to Article 1 of the Uniform Commercial Code, which was originally adopted in North Dakota in 1965, and which is contained in Chapter 41-01 of the North Dakota Century Code. This chapter provides definitions and general provisions which, in the absence of other specific provisions, apply as default rules to the other articles in the Uniform Commercial Code. The UCC is in effect in all 50 states, the District of Columbia, and the US Virgin Islands.

I am a member of the North Dakota Uniform Laws Commission and represent the House on the National Conference of Commissioners on Uniform State Laws. The National Conference approved the revision of UCC Article 1 in 2001. The purpose of revised Article 1 is to update the general provisions of the UCC and to harmonize them with changes that have been made in other articles of the UCC. Revised Article 1 has thus far been adopted by 22 other states and the US Virgin Islands, including Minnesota and Montana, and is currently under consideration in six other states in addition to North Dakota. The states are listed on the fact sheet attached to my testimony.

In the 2005 to 2006 interim between the sessions, the interim Judiciary Committee studied revised UCC Article 1 in cooperation with a task force organized by the State Bar Association. The task force recommended adopting revised Article 1 in North Dakota, with a few changes in order to retain certain provisions of existing

North Dakota law relating to choice of law and good faith, which were deemed preferable.

First, the task force recommended that North Dakota retain its current provisions on choice of law contained in Section 41-01-05 and not adopt the changes recommended by the National Conference. This is the section of the law that says which law governs a transaction in the event of a dispute. It was noted that no state had adopted the new version on choice of law. North Dakota's current law says that the parties are free to decide which state's law governs their rights and duties, and, in the absence of an agreement on this subject, the laws of North Dakota apply to a North Dakota transaction.

Second, the task force recommended that the definition of "good faith" in the general provisions should not apply to Article 5 of the UCC, which relates to letters of credit, in order to keep the separate definition of "good faith" which is already contained in Article 5, and which is slightly different, but should be retained due the specialized nature of letters of credit.

Finally, the task force recommended that that the definition of "good faith" should contain a provision stating that a breach of the obligation of good faith by itself does not support an independent claim for relief for failure to perform or enforce in good faith. In other words, a party cannot sue another party for breach of good faith without more. This is consistent with the official comments to Article 1 of the UCC.

The interim Judiciary Committee introduced House Bill 1035 with the changes recommended by the State Bar Association task force. The bill was amended in the Judiciary Committee in this session to include technical corrections recommended by the Secretary of State. Section 6 of this bill adopts the new Chapter 41-01, while Section 29 of the bill repeals existing Chapter 41-01 and 2 other

related provisions. The other sections in this bill either delete old language relating to the definition of good faith, or update cross references to the UCC in other statutes.

Mr. Chairman and members of the Committee, I urge your support for House Bill 1035.





**A Few Facts About The...**

**REVISED UNIFORM COMMERCIAL CODE ARTICLE 1,  
GENERAL PROVISIONS (2001)**

**PURPOSE:**

Updates the general provisions section of the Uniform Commercial Code, to harmonize with ongoing UCC projects and recent revisions.

**ORIGIN:**

Completed by the Uniform Law Commissioners and the American Law Institute in 2001.

**APPROVED BY:**

American Bar Association

**STATE ADOPTIONS:**

- |             |                     |
|-------------|---------------------|
| Alabama     | Nebraska            |
| Arizona     | Nevada              |
| Arkansas    | New Hampshire       |
| California  | New Mexico          |
| Colorado    | North Carolina      |
| Connecticut | Oklahoma            |
| Delaware    | Texas               |
| Hawaii      | U.S. Virgin Islands |
| Idaho       | Virginia            |
| Kentucky    | West Virginia       |
| Louisiana   |                     |
| Minnesota   |                     |
| Montana     |                     |

**2007 INTRODUCTIONS:**

- Florida
- Indiana
- Kansas
- North Dakota
- Rhode Island
- South Dakota
- Utah

For any further information regarding the Revised UCC Article 1, please contact

att #4  
2-28-07

February 28, 2007

Sixtieth Legislative Assembly  
Senate Judiciary Committee

HB 1035

CHAIRMAN NETHING AND COMMITTEE MEMBERS:

My name is Bill Neumann, and I am appearing on behalf of the State Bar Association of North Dakota in support of House Bill 1035.

HB 1035 deals with the Uniform Commercial Code, called the UCC for short; the UCC deals with just about all of the business transactions that take place in North Dakota. Since 1985 the UCC has undergone a lot of amendments and revisions. HB 1035 deals with the first part of the UCC—Article 1—and brings it up to date to fit with the amendments to the other parts of the UCC that have already been made.

When these proposed amendments first came up they were referred to an interim legislative committee for study, and the State Bar Association created a task force to assist with that study. That task force was chaired by Lowell Bottrell, a Fargo attorney, who unfortunately could not be here today because of a scheduling conflict in federal court. I will try to fill in for Lowell, even though I know next to nothing about the UCC.

HB 1035 does several things with Article 1 of the UCC. First, it narrows the scope of some substantive rules of law in Article 1 to prevent those rules from being applied outside the UCC, something that could cause serious unintended consequences and confusion.

Second, it clarifies when rules of law from outside the UCC apply. Other law from outside the UCC clearly supplements the UCC. The clarifications in HB 1035 reduce interpretation problems, and reduce the possibility of unnecessary litigation that might result.

Third, these amendments address the definition of good faith for the UCC, as outlined in Representative Klemin's testimony.

HB 1035 addresses "course of performance," a concept presently used in Articles 2 and 2A of the UCC. The concept refers to certain evidence that courts may use to try to figure out the real intent of the parties. These amendments make course of performance evidence available for all transactions covered by the UCC, not just those arising under Articles 2 and 2A.

And finally, there is the statute of frauds. The statute of frauds is a very old law that requires certain kinds of contracts to be in writing, and to be signed by the party who is to be bound by the writing. In HB 1035, old statute of frauds language referring to writing and signature requirements is deleted to make way for provisions for electronic records and electronic signatures that are already contained in other parts of the UCC.

And that, in a nutshell, is HB 1035. If you have any questions, I will be happy to try to answer them, even though the UCC is definitely not my area of expertise.

Thank you for your time.

Att # 5  
2-28-07

February 28, 2007

SENATE JUDICIARY COMMITTEE  
HB 1035

CHAIRMAN NETHJING AND COMMITTEE MEMBERS:

My name is Lowell Bottrell. I am an attorney in Fargo and am appearing on behalf of the State Bar Association of North Dakota, specifically the Uniform Commercial Code Task Force ("Task Force"), which was appointed by Mike Williams, the SBAND President in a letter dated October 17, 2005. The Task Force included Paul Hubbard of Fargo, Dick Olson of Minot, Sean Smith of Bismarck, Marilyn Foss of Bismarck, Jon Brakke of Fargo, Representative Lawrence Klemin of Bismarck and myself. I was appointed Chair of the Task Force. Bill Neumann, the Executive Director of SBAND was also an ex officio member of the Task Force.

Meetings were conducted on November 16, 2005, January 10, 2006 and February 8, 2006. At those meetings we considered the suggested adoption of House Bill 1035, which deals with the revised provisions to Article 1 of the Uniform Commercial Code, among other things. There was robust discussion about the changes to the Revised Article 1, specifically dealing with the issue of good faith. The Task Force's consensus was to adopt Revised Article 1 as set forth in House Bill 1035.

There were three main points of discussion on Revised Article 1.

1. The Task Force felt that the definition of "good faith" for Article 1 should mean "honesty in fact and the observance of reasonable commercial standards of fair dealing." Hopefully, as you will see in Section 20 of the proposed legislation, the committee felt it necessary that 41-05-02 should reflect that the definition of good faith be different in part 5 of Article 41 than it is in part 1 of Article 41. Specifically, as you will see from Section 20, the definition of good faith found at 41-01-09, does not apply to Article 5 of the Uniform Commercial Code. The reason for this change and the differentiation between Article 1 and 5 is that some legal scholars have raised an issue regarding the potential for the Article 1 change and the change to the definition of good faith (as set forth above) to affect Article 5 (letters of credit). There is a general agreement that no change to Article 5 was intended by the Article 1 change to the definition of good faith and that the language that is recommended in 41-05-02 makes that clear.

The definition of good faith found at House Bill 1035 as N.D.C.C. § 41-01-09(2)(t) and the definition of good faith that is used in other aspects of the code, including Article 9, which was adopted by the Legislature a few sessions back. However, to avoid any confusion with letters of credit, the Task Force's suggestion was to leave the revised definition alone in Article 1 and make the change to Article 5 that is suggested.

2. A secondary concern for the Task Force was the proposed revised Section 1-301 dealing with choice of law. The committee felt that North Dakota's current version of 41-01-05 (old 1-105) was an adequate section and worked much better than suggested language to 1-301. Therefore, the Task Force recommended that the language for 41-01-05 come forward into the new

legislation, which it has and it is now recodified at 41-01-15 and found on page 13 of the House Bill.

The best that I could find on the Internet concerning the adoption of revised Article 1 and good faith was a report from September 15, 2006. California was the 22<sup>nd</sup> state to enact Revised Article 1 and the 22<sup>nd</sup> state to also reject Revised Article 1-301, and the 16<sup>th</sup> state to adopt the revised article definition of good faith found under Revised Article 1-201(b)(20). These are the same changes suggested by the Task Force. It is this Task Force's recommendation that the legislation go forward as in House Bill 1035, and 41-01-15 be adopted dealing with territorial applicability and powers of parties to choose applicable law.

3. The third area of concern of the Task Force dealt with Revised Section 1-304, which is current codified at 41-01-18. The suggested change to 1-304 was to insert language into the current statute on good faith to indicate that this section does not support an independent claim for relief. Therefore, under 41-01-18 of House Bill 1035, this section has been changed. The change that is being suggested from the current version of North Dakota law is as follows: "This section does not support an independent claim for relief for failure to perform or enforce in good faith and does not create a separate duty of fairness and reasonableness which can be independently breached."

The reason that this section was suggested was to show that there was no independent claim for relief for a breach of this section. There is ample support for this change in the law. This language is supported by the UCC Code comments to this section and in fact the language was lifted in part from the comment to the Code. Moreover, Permanent Editorial Board Comment 10 ( the opinion of the drafters of the code) indicates that there should be no lawsuit based solely upon this provision of good faith. With that said, there may be courts and litigants that still may contend that there is a separate claim for relief based upon this section. Because of this concern the Task Force felt it necessary that North Dakota eliminate any chance that any court would interpret this section as an independent basis for a lawsuit.

The Task Force would hope that the legislature would adopt the legislation as proposed in House Bill 1035.

If you have any questions, I would be happy to try and answer them. Thank you for this opportunity to appear before you and report on the work of the Bar Association's Uniform Commercial Code Task Force.

Uniform Commercial Code Task Force

By \_\_\_\_\_  
Lowell P. Bottrell  
Its \_\_\_\_\_  
Chair