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2003 HOUSE JUDICIARY

HB 1069

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10/2/03

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1069

House Judiciary Committee

☐ Conference Committee

Hearing Date 1-13-03

Tape Number	Side A	Side B	Meter #
3	xx		6-31
Committee Clerk Signature <i>APenrose</i>			

Minutes: 11 members present, 2 members absent (Rep. Bernstein & Rep. Wrangham)

Chairman DeKrey: Rep. Kretschmar, do you want to explain HB 1069 to us.

Rep. Kretschmar: I will try. HB 1069 is an ongoing project of the National Commissioners on Uniform State Law. Their flagship bill or code is the Uniform Commercial Code. North Dakota adopted the code in 1965, and every state of the union has it in place now, and the idea that having uniform laws in the commercial area is because commerce, of course, in our 50 states is interstate commerce and if the laws in all the states in commercial transactions, are the same or nearly the same, it makes less work for lawyers sometimes, and really helps commerce flow along in the way it should without undue restraints. The Uniform Law Commission started in the 1890's, and I believe their first product was, what was known, when I went to the law school, as the Negotiable Instruments law. I think it's part of Article 4 or 5 of the Uniform Commercial Code now. As time went on, the Uniform Law Commission adopted uniform sections in just about every area of commerce, and our work was completed on the original in the late 1950's and

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the state starting adopting it. Since that time the Commission, beginning in the 1980's, started to revise the Uniform Commercial Code in all of the sections. We in North Dakota have adopted I think just about every one of those revised sections now and the last one before us on HB 1069 is the definition section of the Uniform Commercial Code and continues basically with the definitions of the terms of their use in that Code and then there are some amendments to statutes we've put in North Dakota so that certain other amendments would comply with the amendments of HB 1069. I think last session, we adopted Article 9 and there are a couple of other Articles still being worked on. There's considerable difficulty on the one that contains leases of computer related equipment in terms and that hasn't been completed by the Uniform Law Commission yet. North Dakota has their own Uniform Law Commission, which at the present time, I am the chairman, and there currently members from each house of the legislators, Rep. Klemin from the House, and Sen. Tom Trenbeath. I am a gubernatorial appointment on the commission and there are three or four others gubernatorial appointments; a judge, a lawyer and a University professor. Each summer the National Commission meets and goes over these bills word for word, and makes some decision on it. Then we go before the American Law Institute, another group that looks at uniform laws. When we get the blessing from the American Bar Association, the laws are sent out to the states for potential adoption. We are hopeful that this bill will get adopted this session in North Dakota, that we have a new revised definition section of the Uniform Commercial Code in place in North Dakota. There will be a couple more coming along in other future sessions for adoption when the work on them is completed by the Uniform Commercial Code. I think it is a good revision. With more and more international commerce, we hope that the committee will approve it and that the House and Senate will also, so it becomes law.

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Chairman DeKrey: I don't see any questions from the committee. Is there anyone else in support of HB 1069. I know there are people who are not particularly thrilled with parts of that bill, but that they are not necessarily opposed to it. I guess we will go to the opposition now.

Marilyn Foss, ND Bankers Association: (see testimony) In opposition to HB 1069.

Rep. Eckre: This has not been adopted by any other state at this point?

Marilyn Foss: That is correct. It has been introduced in four other states, but was killed in those states. So its adoption in North Dakota will make the law non-uniform. (gave further testimony - reading from the bill) The bill doesn't give guidance about what are the fundamental qualities of our state's laws or how that is supposed to be determined. If HB 1069 is adopted, it will make a lot more work for lawyers and consumers that enter into contracts that involve two different states. We are also troubled by the provision that seeks to restrict circumstances under which a lender can call a demand note. As I noted before, adoption of this bill does not promote uniformity among the laws of this state, because no state has adopted it. It's been rejected in the only four states in which it was introduced; California, Connecticut, Hawaii, and Oklahoma. There is organized opposition to it in at least 30 other states. I don't think that this Article 1 has been appropriately addressed, we don't think the case has been made for it in this state or in the other states; and so for that reason we going to give it a Do Not Pass recommendation. Another provision that I didn't address in my written testimony, but which troubled me when I read it, that's on page 10, it talks about giving notice and how a person can be deemed, to have received notice, and then the statute says whether or not the person actually comes to know of it. We think that's problem too. We think this particular bill is ill-advised. We think the current law is

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better than the revised version. We found that the current articles of the UCC operate just fine with the current definitions and we urge your Do Not Pass recommendation for it.

Rep. Klemin: You mentioned three areas you don't agree with, but it seems to be a lot more to the bill than just those three things, and why do you want to kill the whole thing, as opposed to just changing the parts you don't like?

Ms. Foss: The definitional changes that are made here are unnecessary, and most of the other provisions in the bill relate to signing, and they are taken care of under e-sign legislation. So this seems to be unnecessary. The commercial community finds it to be unnecessary and undesirable. Desiring change for the sake of change, when I don't have a good explanation for why the other changes are necessary or appropriate.

Rep. Klemin: On page 14, line 5

Ms. Foss: Start on page 13 (Territorial), there is a different set of rules for consumer transactions start on page 14 line 5 and goes through line 19, the exception section starts on line 20-29.

Rep. Klemin: You said the demand note issue is on page 17?

Ms. Foss: The demand note is on page 17, line 12-17.

Rep. Klemin: The third area not in your testimony is on page 10.

Ms. Foss: It's on page 10, starting on line 21-23, where it provides that a notice will be effective whether or not the recipient actually comes to know about it. One of the reasons one would oppose the entire bill, as opposed to the specific lines, is that the other states are not adopting it, so our definitions will be different for what is supposed to be a uniform code.

Rep. Delmore: How many states have looked at this?

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Ms. Foss: My understanding that it came before Uniform Law Commission a year ago, and has been introduced in four states according to the information I found on the web site, it has been killed in all four states, and has been organized opposition in at least 30 other states.

Rep. Maragos: If this is adopted by a majority of those 30 states that are left, even though there is opposition, would you be uncomfortable if the idea that they've adopted it and North Dakota hasn't and that we should just wait a couple of years. Is that a desirable situation to you.

Ms. Foss: If it were adopted in 40 states, that would be information that would be available to this legislative assembly in the future and one might take another look at it, but one thing about it is that the code is operating now just fine with the definitions that we have. So deferring doesn't create a problem.

Chairman DeKrey: Thank you. Any further testimony in opposition to HB 1069. If not, we will close the hearing on HB 1069.

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1069

House Judiciary Committee

☐ Conference Committee

Hearing Date 1-14-03

Tape Number	Side A	Side B	Meter #
2		XX	6-8
Committee Clerk Signature <i>APinose</i>			

Minutes: 12 members present, 1 member absent (Rep. Bernstein)

Chairman DeKrey: We will take a look at HB 1069.

Rep. Kretschmar: I talked with Jay Buringrud, and he called the office in Chicago and talked with John McCabe. We did find out that the bill was passed in the Virgin Islands, and defeated in Hawaii, and California and Oklahoma, it has passed one house and is in the other house. It's a new thing. Our opinion was that perhaps we in North Dakota should wait until we see what is going on, we did find out from Mr. McCabe, that the American Bankers Association is opposing it wherever it rears its ugly head. I think sometimes the bankers are a little afraid of anything new. At this point in time, I would recommend that the bill be withdrawn and take it down to the floor and move to have it withdrawn. I would rather have that than to kill the bill.

Chairman DeKrey: The other alternative would be to put a Do Not Pass on it, but you don't want it to fail, just withdraw. I will take care of it. I will withdraw the bill.

2003 TESTIMONY

HB 1069

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10/2/03

**TESTIMONY OF MARILYN FOSS IN OPPOSITION TO HB 1069
(On Behalf of the North Dakota Bankers Association)**

Chairman DeKrey, members of the judiciary committee, I am Marilyn Foss, general counsel for the North Dakota Bankers Association. I appear before you today to oppose the adoption of HB 1069. I am authorized to tell you that the Independent Community Banks of North Dakota and North Dakota Credit Union League also oppose the bill and join in these comments.

Numerous provisions in HB 1069 are ambiguous and create uncertainty rather than clarity, interfere with contracting parties' choices, and establish different sets of concepts for interpreting and enforcing consumer commercial transactions than apply to other transactions. As recently as last session this legislative assembly joined numerous other state legislatures and rejected the latter approach to law making in revised Article Nine. From our perspective there are two big problem areas: restrictions on enforcing the parties' choice of law in a consumer transaction and limits on a lender's ability to call a demand note.

Under existing law, the parties are free to agree to designate the laws of any state to apply to enforce the agreement, so long as the transaction bears a reasonably relationship to the state which has been designated. Under HB 1069 this changes for consumer transactions because the bill requires consumer laws of the consumer's home state to apply if those laws have a "no waiver" provision, even though the consumer wishes to apply the laws of another state to the transaction or even if the consumer transaction was created in a state other than the state of the consumer's residence and goods or services are delivered in a state other than the state of the consumer's residence. This interferes with the parties' rights to contract because the choices of the drafters of revised Article I are substituted for choices of the

contracting parties. It creates uncertainty from the outset, because the state of the consumer's residence may change over the life of the contract.

Another provision also breeds uncertainty. It invalidates the parties' agreement to apply the laws of another state if the agreement is deemed to be contrary to "a fundamental policy of law that would otherwise govern." However, there is nothing which articulates what constitutes a fundamental policy of a state's laws or how that is to be determined.

The drafters of Revised Article I did attempt to create exemptions from its rules governing choice of law by the parties for transactions involving sales of identified goods in a contract of sale, deposit and checking accounts in financial institutions, letters of credit, sales, registration or transfer of a security and secured loans, but the exemptions themselves are also unclear and raise questions. They include whether proposed provisions relating to consumer statutes and fundamental state policy apply to a negotiable note or a deposit account and if so, which statutes or policies apply; where a bank or branch is located for purposes of an exemption and how financial institutions are supposed deal with apparent conflicts with federal banking statutes such as 12 USC 85 and 12 USC 1831d (a).

Let me give you one concrete example of the difficulties which will be created if HB 1069 is adopted: Joe Consumer lives in a border community such as Grand Forks. He visits a store in East Grand Forks, Minnesota to buy a new stove and signs a retail installment contract at the East Grand Forks store. The contract which complies with Minnesota law, contains a choice of law provision which says Minnesota law will govern. Mr. Consumer then returns to Grand Forks and takes delivery of the stove in Grand Forks. If a problem arises, and the laws of North Dakota and Minnesota are inconsistent so that compliance with

both is not possible, with HB 1069 neither Mr. Consumer nor the seller know whether Minnesota or North Dakota law will be deemed to apply until they have litigated the issue.

We are also troubled by provisions which seek to restrict the circumstances under which a lender can call a demand note. (A demand note is one which is due on the lender's demand, rather than being payable on a specific maturity date.) HB 1069 interferes with the parties' agreement by prohibiting the demand for payment unless the lender (not necessarily a bank or other "corporate" lender) actually fears the debtor can't or won't pay. While fear of nonpayment is one reason for a demand to pay, it isn't the only reason. For example, a lender may demand payment because the lender needs the money or because the statute of limitation on enforcing repayment is about to run. Circumstances such as these aren't addressed in the bill.

Adoption of HB 1069 will not promote uniformity among the laws of the state because no state has adopted it. It has been rejected in the only four states in which it was introduced, California, Connecticut, Hawaii and Oklahoma, and there is organized opposition to it in at least thirty other states.

Frankly, we don't think the proponents of Revised Article I have made their case in the other states or here. For that reason, we urge you to give the bill a DO NOT PASS recommendation. Thank you.