MINUTES

MONTANA HOUSE OF REPRESENTATIVES
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Bill Strizich, on March 12, 1991, at 8:08 a.m.

ROLL CALL

Members Present:
- Bill Strizich, Chairman (D)
- Vivian Brooke, Vice-Chair (D)
- Arlene Becker (D)
- William Boharski (R)
- Dave Brown (D)
- Robert Clark (R)
- Paula Darko (D)
- Budd Gould (R)
- Royal Johnson (R)
- Vernon Keller (R)
- Thomas Lee (R)
- Bruce Measure (D)
- Charlotte Messmore (R)
- Linda Nelson (D)
- Jim Rice (R)
- Angela Russell (D)
- Jessica Stickney (D)
- Howard Toole (D)
- Tim Whalen (D)
- Diana Wyatt (D)

Staff Present: John MacMaster, Leg. Council Staff Attorney
Jeanne Domme, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

HEARING ON SB 214
INCREASE CIVIL JURISDICTION OF JUSTICE'S COURT AND SMALL CLAIMS COURT

Presentation and Opening Statement by Sponsor:

REP. TOWE, SENATE DISTRICT 46, stated that this bill increases Civil Jurisdiction of Justice Courts from $3500 to $5000 and also increase the jurisdiction of small claims courts from $2500 to

$3000. He stated that the bill was brought into the Legislature at the request of Pedro Fernandez, Justice of the Peace. The smaller courts believe they can handle more civil work and relive the District Courts of some of their workload. The District Court always seems to be overburdened and by putting more cases into the Justice Courts the overburden on the District Court could be avoided.

Proponents' Testimony:

Riley Johnson, National Federation of Independent Business, stated that the members of the NFIB really uses the small claims courts in disputes over supplies, suppliers and saves them a lot of money. He felt that one benefit of raising the small claims court is that small appliances run in the area of $2500 to $3000 for the members that deal in that business and it would be easier and less expenses to take care of their cases in the small claims courts. He encouraged the committee for their favorable consideration of SB 214 to help the small business community to avoid some of the higher costs of handling small claims in civil matters.

Tom Hopgood, Montana Association of Realtors, stated that his association supports SB 214. He stated there are occasions where a real estate commission or an escrow fee becomes controversial and the association believes that it is in the best interest of the members of the association to have easy access to the courts of small jurisdiction. He asked the committee for their support of the bill.

Bob Ryfer, Vice President - Montana Credit Unions League, stated that credit unions find themselves in small claims courts and the League feels that SB 214 will improve the overall emancipation of justice and lower some costs. He urged the committee for their do pass recommendation.

John Cameron, Montana Collections Association, stated the his association is in support of SB 214 and urges the committee for their support.

Opponents' Testimony: NONE

Questions From Committee Members: NONE

Closing by Sponsor:

SEN. TOWE stated that it only costs $25 to file a claim in Justice Courts and $100 to file in District Court. He felt that it was quite a large savings for the small business citizens of Montana.

Pat Bradly, Montana Magistrates Association, gave written testimony in favor of SB 214. **EXHIBIT 1**

HEARING ON SB 398
ALLOW COMMUNITY SERVICE SENTENCING FOR MINORS IN POSSESSION

Presentation and Opening Statement by Sponsor:

SEN. TOWE, SENATE DISTRICT 46, stated that SB 398 is a committee bill. He stated that a judge handed down a decision that the language in section 45-5-624, that deals with sentence that cannot be imposed for a juvenile who is found guilty of possession of intoxicating substance, is so unreadable, that it is not possible to sentence someone to do community service. He stated that there will be a huge problem if juveniles cannot be sentences to community service which is an appropriate punishment for being found guilty of possession of alcohol because they are a minor. He stated that this bill states that a judge can sentence a juvenile to community service.

Proponents' Testimony:

Pat Bradly, Montana Magistrates Association, gave written testimony in favor of SB 398. **EXHIBIT 2**

Opponents' Testimony: NONE

Questions From Committee Members: NONE

Closing by Sponsor:

SEN. TOWE stated that there is a possible conflict with HB 668 and he stated he would propose a coordination instruction that would say if HB 668 passes then the statute in SB 398 would have to be put in a different place.

EXECUTIVE ACTION ON SB 398

Motion: **REP. LEE MOVED SB 398 BE CONCURRED IN.**

Motion/Vote: **REP. LEE** moved to amend SB 398 with the coordination instruction to be worded by John MacMaster. Motion carried.

Motion/Vote: **REP. LEE MOVED SB 398 BE CONCURRED IN AS AMENDED.** Motion carried unanimously.

HEARING ON SB 441
REVISE JUDICIAL NOMINATION PROCEDURES

Presentation and Opening Statement by Sponsor:

SEN. MAZUREK, SENATE DISTRICT 22, stated that SB 441 would revise procedures that the Judicial Nominating Commission uses in making appointments when vacancies occur in the District Courts, Supreme Courts, Chief Water Judge or Worker's Compensation Judge. He stated he received a comment from a member of the Judicial Nominating Commission suggesting that some changes might be appropriate to the statute because the timing of the procedure wasn't working well. He stated that another concerned was that the law provided a staggered term for members of the Judicial Nominating Commission and the problem was that the three lawyers go out at the same time. Almost half of the commission turns over every two years. Sen. Mazurek stated that section one of the bill requires the two attorneys be from different geographical areas of the state. He stated that section two sets up staggered terms. It doesn't change the length of the term, but no person will be able to serve more than two full four year terms beginning with appointments being made next January 1992. Section 3 requires the commission to adopt and publish rules and the rules must include a explanation of the format for the reports the commission files when making a nomination. There has to be a 30 day application period and must allow a reasonable period of public comment. The Chief Water Judge and the Worker's Compensation Judge must be added to the list of to whom the list applies.

<u>Proponents' Testimony</u>:

Alen Chronister, State Bar, stated that SB 441 tries to bring out the judicial nominee process to the eyes of the public. He felt that it is important to make the process as open and accessible to the public as possible and that SB 441 does do that. He stated that under section 3, the total time the commission has to make its recommendation known is 90 days, plus the 30 days the Governor has to review it, there is a potential for 120 days for the process. He stated that if the sitting judge is waiting for that decision there is a real possibility for a gap between judgeship positions which can be a real hardship for the people of that area. He stated that the committee should consider making the 90 days a shorter period of time. Mr. Chronister thought the committee should be the word "consecutive" in the wording of "two full four year terms" to read "two consecutive full four year terms. He thought this would allow a person to serve two terms and then be off for a while and come back to serve another two terms if chosen.

<u>Opponents' Testimony</u>: NONE

<u>Questions From Committee Members</u>:

REP. TOOLE asked **SEN. MAZUREK** how he felt about putting the word "consecutive" into the phrase "two full four year terms"? **SEN. MAZUREK** stated that he didn't think there was a problem with the wording two full four year terms and he felt others didn't have a problem with it either.

<u>Closing by Sponsor</u>: NONE

HEARING ON SB 1
REVISE UCC

Presentation and Opening Statement by Sponsor:

SEN. MAZUREK, SENATE DISTRICT 22, stated that SB 1 has been worked on over the past interim. He stated that the bill would generally revise the Uniform Commercial Code. He stated the premier product of the National Conference of Commissioners on Uniform State Laws is the Uniform Commercial Code and was propagated in 1951 and adopted in every state in the union. It is the basic law that governs all commercial transactions in the country. He stated that SB 1 proposes to modernize the Uniform Commercial Code in several key areas. He provided an explanatory statement of each of the section of the bill. **EXHIBIT 3.** He stated that one section deals with leases. He felt there is a great deal of leasing being done in Montana at the present time. There is no general law dealing with leases of personal property in a business sense. Section 7 adopts article 2a of the Uniform Commercial Code dealing with leases of personal property.

He stated the next portion of the bill is a new section called article 4a in section 189 to 226 that deals with electronic fund transfers. He felt that not many people will have a need for electronic fund transfers because this section deals only with the computerized transfer of large sums of money, generally averaging $5,000,000, between major banks. He stated that this was an attempt to make a set of rules that would govern how large sums of money be transferred between banks across the country.

He stated that the third section of the bill is in section 87 through 188 is a modernization of the negotiable instruments laws of the country that deals the use of electronic transfers that allows one to pay money directly out of a checking account. The state is trying to avoid the Federal Government from taking over these areas. It is an area that has always been left to the state, but because the Uniform Commercial Code didn't move in and take up the slack in these areas, the Federal Government is wanting to deal with regulations in these areas.

He stated that the fourth area of the bill deals with the repealer. A lawyer that has been involved in the sale or purchase of a business have probably come in compliance of article 6 of the Uniform Commercial Code which is the Bulk Sales Provision. He stated that this bill would repeal those provisions which have been ignored in Montana because the law requires one to give letters to your creditors before the sale was completed and if the buyer didn't see that was done they could become responsible for the debts. The process was cumbersome, expensive and time consuming and generally not complied with by agreeing if the person didn't pay the debts the buyer could offset.

Proponents' Testimony:

Bob Pyfer, Vice President - Montana Credit Unions League, stated that he attests to the process that includes the Montana Uniform State Commission of Law goes through and the expertise and talent they have at their disposal is very awesome. He stated that SB 1 would have impact on credit unions and his national association has a UCC committee that did have input into the bill and feels that the bill takes a balanced approach that modernizes the law by filling in some gaps. He urged the committee to give SB 1 a favorable consideration.

Opponents' Testimony: NONE

Questions From Committee Members:

REP. TOOLE asked **SEN. MAZUREK** if there is anything going on, nationally, that would suggest that any of these proposals have not been successfully adopted? **SEN. MAZUREK** stated, "no," but if he was asked that four years ago regarding leases, he would have said yes. He said that leases had gone back to the drawing board and now is widely accepted and working in many states. Now there is a major push to adopt the article dealing with leases.

REP. BROOKE asked **SEN. MAZUREK** asked if the Federal Government has control of regulation these codes? **SEN. MAZUREK** stated that the consumer transfers to credit cards machines are not governed by article 4a but by Federal Law. He stated that he hoped states would look at bank charges as opposed to the Federal Government doing it. He felt that it one of the arguments for the code to be modernized.

Closing by Sponsor:

SEN. MAZUREK urged the committee to give SB 1 a do pass consideration.

HEARING ON SB 7
UNIFORM FRAUDULENT TRANSFERS ACT

Presentation and Opening Statement by Sponsor:

SEN. MAZUREK, SENATE DISTRICT 22, stated that SB 7 would replace the Uniform Fraudulent Advances Act with the Uniform Fraudulent Transfers Act. He passed the committee an explanation of the Uniform Fraudulent Transfers Act and some arguments as to why it should be adopted. **EXHIBIT 4.** He stated that the theme of the act is that citizens of society are only as good as their word as to the extent in which they honor their obligations. Obligations which are incurred should not be avoided by manipulation. He stated that the bill recognizes how important creditors are to society and attempts to assure availability by providing protection to creditors against debtors who seek to avoid their debts by the transfer of property. The main reason the bill comes to the committee is modernization of the old Fraudulent Transfer Act in the state and it arises because the changes of the old bankruptcy act necessitate for the revisiting of how this was dealt with in the past.

Proponents' Testimony: NONE

Opponents' Testimony: NONE

Questions From Committee Members:

REP. BOHARSKI asked **SEN. MAZUREK** if he felt that the bill now makes it a little more difficult to file bankruptcy? **SEN. MAZUREK** stated that the bill will not effect someone's ability to file bankruptcy because that is determined by Federal Law. The changes relate to the definition of when someone is insolvent. When someone is insolvent and transfers property then there is a presumption created that the transfer was fraudulent. This bill narrowly defines the term insolvency to tighten up the definition.

Closing by Sponsor: NONE

EXECUTIVE ACTION ON SB 214

Motion/Vote: **REP. GOULD MOVED SB 214 BE CONCURRED IN.** Motion carried unanimously.

EXECUTIVE ACTION ON SB 228

Motion: **REP. GOULD MOVED SB 228 BE CONCURRED IN.**

Discussion:

REP. DARKO stated that she was asked by Sen. Svrcek to move the amendments he had prepared by Greg Petesch. **EXHIBIT 5**

Motion: **REP. DARKO** moved to amend SB 228 with proposed amendments by Sen. Svrcek.

Discussion:

REP. BROWN stated that a lawyer doing a reasonable business in Montana is not going to take the jump to be a judge because of the low salary. He felt that the Senate kept the salary down to a reasonable level and in this case the state gets what they pay for. He stated there will be three seats opening very soon and he felt the state should try and get the very best people for those jobs because it is an important branch of government and the salary should be better than what has been given now.

REP. GOULD stated that he opposes the amendment. He felt that the judges should get a higher pay raise than what the Senate amended the bill to be and felt that the amendment by Sen. Svrcek was not a reasonable salary raise. He stated that the pay has to be commiserate with the quality of people that the people of Montana want as their judges.

Vote: Motion fails.

Motion: **REP. DARKO** moved to amend SB 228.

Discussion:

REP. DARKO stated that her amendment is proposed by Sen. Svrcek that ties future salary increases to whatever state employees get each year. She stated that if the state wants to continue and retain good state employees, we need to pay them accordingly.

REP. BOHARSKI stated that he resists the amendment. He stated that the statistics show that state employees rank about 13th in the nation in regards to state employees pay. He felt that the judges pay should be held separately from state employees.

Vote: Motion fails.

Motion: **REP. BOHARSKI** moved to amend SB 228 with an amendment to be explained by John MacMaster.

Discussion:

John MacMaster stated that the amendment would be on page 12, line 19, make a new section 5 titled "Applicability". He stated that it would read "For each District Court Judge, in office on the effective date of this act, no salary increase in section 2 unless he is reelected in which event an increase would take effect on his next term of office."

REP. DARKO stated that the reason that Legislators are not able to set their salaries and the judges are not setting their salaries. She disagreed with the amendment.

REP. GOULD stated that he also disagrees with the amendment. He stated that it is different when setting your own salary than when someone else is setting it.

Vote: Motion Fails.

Motion: **REP. GOULD** moved to amend SB 228 with Sen. Yellowtail amendment which restores the salary increase to $12,000.

Discussion:

REP. GOULD stated that the bill has two more places to go which is Appropriations and second reading. He was sure that Appropriations and second reading will take a chunk out of the bill. He wanted to see the bill come out of the committee at the $12,000 so when they do take a chunk out of the salary increase it may make it for the $8,000 increase as it is now.

REP. WHALEN stated that he supports the amendment. He stated that there isn't high turnover rate in judgeships and the types of lawyers that go to the bench are the ones that don't need the money and already have substantial wealth. He felt that this amendment would bring other lawyers that do need to keep their salary range up with what they make in their private practice, to consider being a judge.

Vote: Motion fails 8 to 11. **EXHIBIT 6**

Vote: (Rep. Gould's motion SB 228 be concurred in) Motion carried 17 to 3 with Rep's: Lee, Clark and Nelson voting no.

EXECUTIVE ACTION ON SB 327

Motion: **REP. DARKO MOVED SB 327 BE CONCURRED IN.**

Motion: **REP. DARKO** moved to amend SB 327 with a coordination instruction with SB 501.

Motion: **REP. WYATT MADE A SUBSTITUTE MOTION THAT SB 327 NOT BE CONCURRED IN.**

Discussion:

REP. WYATT stated that because the bill conflicts with SB 501 she felt that SB 327 should not pass out of the committee.

REP. TOOLE stated that he felt that SB 327 should not be concurred in also. He stated that section 3 deals allows photographs of evidence to be substituted for the actual items and he felt that whenever a crime involves property, the actual item is an essential element to the case.

Motion: **REP. BROWN MADE A SUBSTITUTE MOTION** to amend SB 327 by striking section 3.

Discussion:

REP. BROWN stated that his amendment would take out the section that Rep. Toole was concerned about.

REP. CLARK stated that he agreed that the actual evidence is very important and effective in court.

Motion/Vote: **REP. WHALEN MOVED SB 327 BE TABLED.** Motion failed 8 to 12. **EXHIBIT 7**

Vote: (Motion by Rep. Brown) Motion carried 11 to 9. **EXHIBIT 8**

Motion: **REP. BROWN MOVED SB 327 BE CONCURRED IN AS AMENDED.**

Motion: **REP. MEASURE** moved to amend SB 327 by striking lines 7 - 11 on page 5.

Discussion:

REP. MEASURE stated that it raised the penalty that is out of context with existing law. He felt that it is an agricultural addition to the bill that has nothing to do with shoplifting.

Vote: Motion carried 12 to 8 with Rep's: Boharski, Johnson, Clark, Rice, Lee, Keller, Gould and Brown voting no.

Vote: (Wyatt motion to Do Not Concur) Motion failed 18 to 2 with Rep's: Wyatt and Whalen voting yes.

Motion: **REP. BROWN MADE A SUBSTITUTE MOTION** to amend SB 327 with a coordination amendment that would say SB 327 would take precedence over HB 501.

Discussion:

REP. BROWN stated that he felt SB 327 is more substantive than HB 501 and that SB 327 would deal better with shoplifters.

REP. TOOLE stated that he felt HB 501 is a better bill than SB 327. Section one of SB 327 says anyone who shoplifts is liable to the owner for a penalty whether or not the item has been returned in the amount no greater than $100 or the retail value of the goods. He stated that the floor has been elevated from .50 cents to $100. He finds HB 501 more reasonable.

REP. DARKO stated she also felt that HB 501 is a better bill than SB 327.

CHAIRMAN STRIZICH stated that what is in HB 501 is a better way of dealing with shoplifters.

Vote: Motion fails 11 to 9 with Rep's: Gould, Lee, Messmore, Clark, boharski, Johnson, Rice, Keller and Brown voting yes.

Vote: (Rep. Darko motion of coordination instruction with HB 501) Motion passed 11 to 9 with Rep's: Gould, Messmore, Clark, Johnson, Boharski, Lee, Rice, Keller and Brown voting no.

Motion/Vote: **REP. DARKO MOVED SB 327 BE CONCURRED IN AS AMENDED.** Motion carried 16 to 4 with Rep's: Measure, Wyatt, Whalen and Brooke voting no.

ADJOURNMENT

Adjournment: 11:15 a.m.

Bill Strizich

BILL STRIZICH, Chair

Jeanne Domme

JEANNE DOMME, Secretary

BS/jmd

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL **DATE** 3-12-91

NAME	PRESENT	ABSENT	EXCUSED
REP. VIVIAN BROOKE, VICE-CHAIR	✓		
REP. ARLENE BECKER	✓		
REP. WILLIAM BOHARSKI	✓		
REP. DAVE BROWN	✓		
REP. ROBERT CLARK	✓		
REP. PAULA DARKO	✓		
REP. BUDD GOULD	✓		
REP. ROYAL JOHNSON	✓		
REP. VERNON KELLER	✓		
REP. THOMAS LEE	✓		
REP. BRUCE MEASURE	✓		
REP. CHARLOTTE MESSMORE	✓		
REP. LINDA NELSON	✓		
REP. JIM RICE	✓		
REP. ANGELA RUSSELL	✓		
REP. JESSICA STICKNEY	✓		
REP. HOWARD TOOLE	✓		
REP. TIM WHALEN	✓		
REP. DIANA WYATT	✓		
REP. BILL STRIZICH, CHAIRMAN	✓		

3-12-91
7DR

HOUSE STANDING COMMITTEE REPORT

March 12, 1991

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 214 (third reading copy -- blue) be concurred in .

Signed: ______________________
Bill Strizich, Chairman

Carried by: Rep. Gould

HOUSE STANDING COMMITTEE REPORT

March 12, 1991

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 228 (third reading copy -- blue) be concurred in .

Signed: ______________________
Bill Strizich, Chairman

Carried by: Rep. Gould

HOUSE STANDING COMMITTEE REPORT

March 14, 1991

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 327 (third reading copy -- blue) be concurred in as amended.

Signed: ______________________
Bill Strizich, Chairman

And, that such amendments read:

1. Title, lines 9 and 10.
Strike: "ALLOWING" on line 9 through "EVIDENCE;" on line 10

2. Page 5, lines 7 through 11.
Strike: "A person" on line 7 through "both." on line 11

3. Page 5, line 16, through page 6, line 17.
Strike: sections 3 and 4 in their entirety
Insert: "NEW SECTION. Section 3. Coordination instruction. If House Bill No. 501 is passed and approved and if it contains an amendment to 27-1-718, then [section 1 of this act] is void."

Montana Magistrates Association

EXHIBIT 1
DATE 3-12-91
SB 214

March 12, 1991

SB 214, an act to increase civil jurisdiction and small claims jurisdiction in justice courts.

Testimony by Pat Bradley, Lobbyist for MMA
before the House Judiciary committee

Mr. Chairman and Committee Members:

Every legislative session, the jurisdiction of the courts of limited jurisdiction increases. Judges, through their continuing legal education under the auspices of the Supreme Court, rise to the occasion.

The expansion of jurisdiction to justice courts helps to ease the workload for district courts. Conversely, it taxes the time and operating expenses of the lower courts. The judges trust that with growing duties the legislature bestows on them, confidence and support will continue to follow.

The judges of the Montana Magistrates Association support SB 214.

Thank you.

Pat Bradley

EXHIBIT 2
DATE 3-12-91
SB 398

Montana Magistrates Association

March 12, 1991

SB 398, an act providing that a minor in possession of an intoxicating substance may be sentenced to community serv ce

Testimony before the House Judiciary Committee by Pat Bradley

Mr. Chairman and Committee Members:

The Montana Magistrates support the community- service sentencing option in SB 398, just as we do the discretionary sentencing provisions of Rep. Darko's HB 668. The courts of limited jurisdiction handle many minor-in-possession actions and appreciate the rehabilitative measure options which we feel are more effective than monetary fines in subsequent offenses by minors in alcohol-related activities.

We ask your favorable ruling for SB 398.

Thank you.

Pat Bradley

EXHIBIT 2
DATE 3-12-91
SB 1

WHY STATES SHOULD ADOPT ARTICLE 2A
OF THE UNIFORM COMMERCIAL CODE – LEASES

The leasing of large scale items ranging from oil-drilling platforms to automobiles is big business in this country, with an estimated dollar volume reaching $150 billion. Yet the laws governing leasing have not kept pace with the intricacies of today's leasing arrangements, resulting in considerable uncertainty for lessors and lessees alike.

To fill this gap, the Uniform Law Commissioners approved a new amendment to the Uniform Commercial Code: Article 2A – Leases. UCC–2A provides for the fundamentals of the leasing contract, including the formation of the contract, provisions for express and implied warranties, and damages for breach of a leasing contract.

Historically, we have thought of financed purchase transactions as conditional sales. As sales, such transactions fall under the UCC, particularly Articles 2 and 9. But a leasing transaction, even though very similar to a conditional sale in many ways, is not clearly subject to the UCC. The rights and remedies of the lessor and lessee, therefore, are not well defined, and courts have characterized these transactions differently from jurisdiction to jurisdiction. Many troubling issues have been extensively and confusingly litigated.

(1) Finance Lease
(2) Consumer Lease

UCC–2A gives leasing transactions an appropriate underpinning in the law. Because of the broad similarities between lease and sales transactions, that underpinning is largely derived from the sales article of the UCC – Article 2. Hence the new article is 2A, indicating its relationship to Article 2. Article 2 has been adopted in every state except Louisiana.

There are a number of reasons all states should adopt UCC – Article 2A, Leases:

(1) LEASES SHOULD BE A PART OF THE UCC

Since leases are an important part of business and commercial law, they should be governed by the Uniform Commercial Code. Further, the leasing business is interstate in character. Uniformity is as important to the conduct of leasing transactions as it is to sales transactions.

(2) LEASES AS SECURED TRANSACTIONS

Perhaps the most important question answered in UCC–2A is when leases are subject to UCC–Article 9 on "Secured Transactions." Certain lease contracts establish what effectively are conditional sales, in which the lessor is no different from a creditor subject to Article 9.

The prior law has never effectively dealt with the issue, and concrete standards are established in UCC–2A and an accompanying amendment to UCC-1-

201(37), which is a basic definition section in the UCC. Under these provisions, a secured transaction occurs when the lessor has no meaningful residual rights in goods when the lease expires. In a true lease, the rights to the goods revert to the lessor when the lease term ends. But if the contract terms indicate that the rights to this residue are valueless, then it can be inferred that the lease really amounted to a conditional sale of the goods. Article 9 then should and would apply.

3 FINANCE LEASES

UCC–2A creates a separate category of leases called "finance leases" to eliminate existing confusion over the rights of parties in such leases. Finance leases are characterized by the unique position of the lessor – as purchaser of goods only for the purpose of delivering them to a lessee pursuant to a lease contract.

Because the lessor is not the real supplier of the goods, and acts merely to finance the goods in the hands of the lessee, certain of lessee's rights are best served by imposing obligations on the real supplier and by limiting some rights against the lessor. UCC–2A does not give a lessee implied warranties against a lessor in a finance lease, but passes the lessor's warranties against the real supplier under Article 2 on the lessee.

UCC–2A also further limits a lessee's already limited rights to reject goods, once accepted under the contract, or to cancel, terminate, modify, excuse or substitute performance under the lease contract. The lessee relies upon warranty rights against the supplier, and the lessor is treated as the financing entity it really is.

4 REMEDIES

Prior law does not provide clear remedies for leasing transactions. Because the parties to lease contracts share substantial characteristics with the parties to sales contracts, the full panoply of UCC – Article 2 remedies can easily be translated and applied to lease contracts.

UCC–2A not only provides clear measures of damages upon breach of contract, but also provides: clear standards for anticipatory repudiation by a party to a contract when anticipated performance by another party becomes insecure; for rejection of goods that do not conform to the contract; for excused non–performance of the contract; and for specific performance under appropriate circumstances.

UCC–2A remedies carry over the original Article 2 policies of encouraging cure of default without litigation and of mitigation of damages whenever and wherever possible.

5 WARRANTIES

UCC–2A establishes and standardizes warranties for true leases. It follows closely Article 2 of the UCC, but it does not protect title, since title remains with the lessor. Rather than title, UCC-2A warrants against infringement with lease rights.

There are two kinds of implied warranties: merchantability and fitness for a particular purpose. Both are directly derived from Article 2 of the UCC. The warranty of merchantability assures the resalability of goods between merchants. The fitness warranty presumes a purpose and reliance upon the lessor to supply goods fit for the purpose. These warranties can be excluded or modified by agreement.

UCC-2A implied warranties do not apply to finance leases. In that case the implied warranties under Article 2 of the supplier to the lessor are passed on to the lessee.

6 **CONSUMER LEASES**

UCC-2A defines a consumer lease as a lease in which the lessee takes the lease primarily for a personal, family or household purpose, when the total payments do not exceed $25,000. UCC-2A does provide some protection for lessees in a consumer lease. Among other things, there is a burden on the lessor to justify acceleration of rentals in a consumer lease. But most consumer protection is left to other laws.

FIXTURE AND ACCESSION PROBLEM

UCC-2A settles recurring problems of what to do with leased goods that become fixtures and accessions and who has priority in each case.

Fixtures are defined as "goods so related to particular real estate that an interest in them arises under real estate law." Generally, if goods are leased and become fixtures, the lessor with prior interest in them has priority over those with the real estate interests – if the lessor perfects his or her prior interest with a fixture filing under UCC – Article 9.

An accession occurs when leased goods are "installed in or affixed to other goods." Any existing rights in a lease contract are superior to any rights in the whole in which leased goods become accession after the lease contract is entered.

CONCLUSION

The changes in leasing transactions in recent years make it clear that modernization is long overdue. States now depend on the common law to resolve disputes over lease contracts. This creates great uncertainty, particularly for companies that conduct business in more than one state, since case law conflicts from state to state. Additionally, some important issues have never been adequately addressed in the common law, and UCC – 2A answers these immediate needs.

Exhibit # 3
3/12/91 SB 1

UNIFORM COMMERCIAL CODE, ARTICLE 2A – LEASES

– A Summary –

The Uniform Commercial Code (UCC) Article 2A – Leases, governs true leases of goods. In a true lease, the lessor gives possession and right to use the goods to the lessee for a fixed period of time in return for rent. The title to the property and a meaningful residual interest remain with the lessor.

A "finance lease" is a true lease in which the lessor is not the fundamental supplier of the goods leased, but leases goods to lessees as a means of financing their acquisition. UCC – 2A governs "finance leases" as well as other true leases, but "finance leases" are treated differently from other true leases in certain respects. The principal differences in treatment will be discussed in subsequent paragraphs of this summary.

UCC – 2A is largely derived from the sales article of the UCC – Article 2. It provides basic contract rules, including matters of offer and acceptance, statutes of frauds, warranties, assignment of interests, and remedies upon breach of contract. There are five parts to the UCC – 2A: (1) General Provisions, (2) Formation and Construction of a Lease Contract, (3) Effect of a Lease Contract, (4) Performance of a Lease Contract, and (5) Default.

1 General Provisions

The General Provisions include the large, general definitions section and general rules pertaining to the construction of leasing contracts, including conflict of law provisions, choice of forum rules, and interpretation of remedies. Most of these provisions are drawn from Article 2 of the UCC.

UCC – 2A creates an entity called the "lessee in the ordinary course of business." The definition parallels the "buyer in the ordinary course of business" in the UCC. Both take property free of prior encumbrances, under the appropriate conditions, and are essential to commercial enterprise.

UCC – 2A also defines "supplier" as "a person from whom a lessor buys or leases goods to be leased under a finance lease." This definition is important because goods in a "finance lease" must come from another source than a lessor.

2 Formation and Construction of a Lease Contract

In a sale transaction, the UCC provides warranties of title and against infringement by any claims of another person. There are similar warranties in UCC – 2A, although title is not protected, since title remains in the lessor. But the lessor does warrant the lessee's enjoyment of the leasehold interest against "a claim to or interest in the goods that arose from an act or omission of the lessor." This warranty applies to all lease contracts. Infringement, however, is not warranted against in finance leases, and this warranty only binds a merchant-lessor, who deals regularly in goods of the kind.

Implied warranties are of two kinds, merchantability and fitness for a particular purpose. Both kinds of implied warranty are directly derived from the Article 2 of the UCC. The warranty of merchantability operates between merchants, and assures the resalability of goods. The fitness warranty presumes a purpose and reliance upon the lessor to supply goods fit for the purpose. Both kinds of implied warranties can be excluded or modified by agreement.

Implied warranties of quality (and against infringement) by lessors do not similarly apply to finance leases. UCC – 2A instead passes any implied warranties of the supplier-seller to the lessor-buyer under Article 2, to the lessee under a finance lease. The finance lessor does not directly make such warranties.

(3) Effect of a Lease Contract

Generally, a lessee's rights under a lease contract or the residual rights of a lessor are freely transferable, unless the contract prohibits the transfer or unless transfer risks the other party's contract rights. An assignment, so-called, of lease rights is treated as any transfer is, and is presumed to transfer both rights and obligation, unless otherwise specified in the agreement.

If a subsequent lease is entered when there is an existing lease, the subsequent lease is subject to the prior lease. However, a subsequent "lessee in the ordinary course of business," who deals with a lessor who is a merchant dealing in goods of the kind leased and to whom the goods are entrusted under the prior lease, will take goods free of the prior, existing lease contract.

Another third party issue dealt with in Part 3 of UCC – 2A is lien priorities. Here, UCC – 2A becomes analogous to provisions in UCC, Article 9. A statutory materialmen's lien has priority over any interest in a lease contract, unless other law sets a different priority. Otherwise, lessee's creditors take subject to the lease contract. Lessor's creditors with prior interests to those arising under a lease contract, generally, take priority over interests arising under the contract.

However, a "lessee in the ordinary course of business" takes free of any prior perfected security interests, unless the lessee has specific knowledge of their existence. A prior interest of a lessee takes priority over a subsequent interest of a lessor's creditor. But there are special instances in which a creditor of a lessor has priority over a lessee's interest, even though the lease interest is prior in time. Included are instances in which depriving the creditor of possession of the collateral would be fraudulent to the creditor "under any statute or rule of law."

Goods that become fixtures present priority problems when leased. Fixtures are defined as goods "so related to particular real estate that an interest in them arises under real estate law." Who has priority between the lessor and those holding the real estate interests?

Generally, if goods are leased and become fixtures, the lessor with prior interest in them has priority over those with the real estate interests - if the lessor perfects his or her prior interest with a fixture filing under Article 9 of the UCC. A fixture filing is made by placing an appropriate financing statement in the real estate records. There are instances in which a lessor can retain an interest against the real estate holder without filing, but a fixture filing will generally be essential.

"Accessions" also present a special problem. An "accession" occurs when leased goods "are installed in or affixed to other goods." Any existing rights in a lease contract are superior to any rights in the whole in which leased goods become accession after the lease contract is entered. If the lease contract arises at the time goods become accessions or after, earlier interests in the whole have priority, If someone purchases the whole after a lease contract, rights under the lease contract take priority over the purchaser's rights. However, a "buyer in the ordinary course of business," or a prior creditor who makes advances without knowledge of the lease contract, takes priority over a lessor or lessee, even though the lease contract precedes the purchase or advance in time.

4 Performance of a Lease Contract

Part 4 of UCC – 2A deals with performance and repudiation of a contract, with substituted performance and with excused performance. If performance is to be impaired, however, UCC – 2A gives contracting parties the latitude to minimize losses.

For example, a party to a lease contract who has reasonable grounds for insecurity as to the performance of the other party, may demand written assurance of performance. Until written assurance is provided, the demanding party may suspend his or her performance. If assurance is not given in a reasonable time, the contract may be treated as repudiated.

When performance is impaired without the fault of either party, because of such events as failure of an agreed means of transport, a commercially reasonable substitute must be accepted. There are instances in which performance may be excused: "If performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was basic assumption on which the lease contract was made." The lessor must notify the lessee (and the supplier if there is a finance lease) of delay or non–delivery. These are examples of the options open to contracting parties.

5. Default

Upon default, UCC – 2A provides remedies in Part 5, including damages and equitable remedies, such as specific performance. UCC – 2A permits cover. That is, a party may seek goods from another source to limit losses. Mitigation of damages is encouraged. The general measure of any damage is actual loss.

Lease Transactions as Secured Transactions

The last issue of importance addressed in UCC – 2A is an added appendix, consisting of a crucial amendment to Section 1-201(37) of the UCC, which defines the term security interest. If a lease involves a "security interest," it is subject to Article 9 of the UCC. A lease involves a security interest, dependent upon four alternative factors or characteristics.

If the term of the lease is equal or greater than the remaining economic life of the goods; if there is a renewal option for no additional consideration or nominal consideration; if there is mandatory renewal or the lessee becomes owner at the end of the lease term; or if the lessee has the option to purchase at the end of the lease term for no additional consideration, or any combination of these factors, the lease would tend to be treated as creating a security interest and would be subject to Article 9.

Conclusion

UCC – 2A is comprehensive, dealing with every phase of leasing transactions. It draws a great share of its concepts from Article 2 of the UCC, but it is adapted to the peculiarities of the leasing form. It is an important advance in commercial law.

Exhibit # 3
3/11/91 SB 1

UNIFORM COMMERCIAL CODE ARTICLE 2A AMENDMENTS (1990)

— A Summary —

Article 2A of the Uniform Commercial Code (UCC), when it was promulgated in 1987, marked the first addition to the UCC since its original promulgation in 1951. The subject of this new addition is Leasing, confined to the leasing of personal property. Most of the UCC is comprised of earlier uniform acts that were promulgated by the Uniform Law Commissioners between 1896 and 1947. Each article had a substantial legal and legislative history before it was brought into the UCC.

UCC 2A did not have the advantage of so much history. Leasing as a means of financing the acquisition of capital goods is a phenomenon of roughly the 20 years just preceding the promulgation of UCC 2A. Therefore, the Uniform Law Commissioners (ULC) and the American Law Institute, its partner in the UCC, were moving into new territory, entirely, in the promulgation of this new article. To form an appropriate bridge between the familiar and the new, the drafters of UCC 2A modeled the new article on the tried and familiar principles of UCC Article 2, the Sales article. But inevitably, an effort to move into a new subject is an effort with some risks.

UCC 2A had its initial consideration in the California and Oklahoma legislatures. In California, it was subjected to an extensive study by the California Bar, and the scrutiny of others with interests in the area of leasing law. The result was a series of amendments to the act. Because of the large interest in this new piece of legislation, nationally, the California amendments were circulated throughout the country. There were more bar association studies, a symposium in the Alabama Law Review, and finally, a review by the New York Law Revision Commission. Two things emerged from all this intense scrutiny: *(1)* The initial decision to follow the principles of UCC Article 2 was fundamentally the correct decision and the basic structure of UCC Article 2A is sound; and *(2)* Some issues needed to be readdressed by amendment.

The ULC was gratified by the first conclusion that universally arose from that scrutiny. It was not particularly surprised at the second. This is entirely new legislation. That further scrutiny might find some issues to address is a logical expectation. So the ULC has proceeded to address these very few issues with amendments in 1990.

Most of the amendments proposed in 1990 are meant to clarify specific provisions of the act or to readjust them in fairly minor ways. There are three significant issues that are addressed. The three issues addressed involve the definition of a finance lease, the power to restrict assignments in a lease contract, and the character of remedies in the event a lease contract is breached. 1 2 3

A finance lease is a lease in which the lessor does not supply the goods that are leased. The lessor acts as a financier for the acquisition of those goods. Under the original UCC 2A, a lease was not a finance lease unless the lessee received a copy of the contract between the lessor and the supplier of the goods evidencing the acquisition of the goods, or unless the lease contract conditioned its effectiveness upon the lessee's approval of the purchase contract between the lessor and the supplier of the goods. In many leasing situations, which involve finance leasing, the lessor cannot comply with these requirements, thereby losing the attributes of a finance lease.

It is possible to satisfy the lessee's interest in the contract of supply between lessor and supplier of the goods without the strict requirement of the original definition of finance lease.

In the amendments a lease qualifies as a finance lease if the lessor provides a statement of the terms of the supply contract or notifies the lessee where the information may be obtained from the supplier, as well as by providing the supply contract, itself.

Original UCC 2A followed UCC Article 2 with respect to freedom of contract, including the freedom to contract for restrictions on either party's ability to assign rights or obligations. Freedom of contract is a primary underlying policy of both acts. However, there are some differences between sales and leases that make the pure form notion of freedom of contract an uneasy fit for leases. Finance lessors commonly assign a security interest in the right to receive rents under a lease contract to a lending institution. This security interest is a UCC Article 9 interest. In this aspect of leasing, the transaction more clearly resembles a secured transaction under UCC 9. As a matter of policy in protecting the rights of secured parties, UCC 9 limits the power of parties to certain kinds of contracts in so far as assignment of rights as security interests is concerned.

It was decided, therefore, to amend UCC Article 2A, following UCC Article 9 precedent, to limit the freedom of contract in lease contracts, but only for that narrow purpose of protecting the interests of secured parties. Thus a restriction on assignment rights cannot affect a holder of a security interest in the right to receive rents under a lease contract. Otherwise, freedom of contract is carefully preserved.

The third significant issue addressed in the UCC 2A 1990 amendments appears in the aggregate of amendments to several sections in Article 5. This article deals with remedies when a lease contract is breached. In the scrutiny to which UCC 2A was subjected, it was pointed out that there is no way in original UCC 2A to distinguish between material breaches of contract that allow the contract to be rescinded, fully, and breaches that are not so material as to call for absolute recision, but may still call for the payment of damages. The amendments eliminate this deficiency.

These are the significant aspects of the 1990 amendments to UCC 2A. They are provided in the spirit of enhanced uniformity, and will make the entire UCC 2A a better act.

Exhibit # 3
3/12/91 SB 1

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New

UNIFORM COMMERCIAL CODE
ARTICLE 4A – FUNDS TRANSFERS

– A Summary –

The payment of obligations is of vital importance to almost all commercial transactions. Occasionally problems arise when payment is not made, or is made improperly. It is neither convenient nor prudent to pay large or even modest obligations in actual cash. So, individuals and corporations, big account holders and small, have turned to bank accounts and bank credit, and have paid obligations by written instruments that accomplish a transfer of bank credit - check, money order, bank draft, etc. For the past twenty years, in every state, the rights and obligations of parties to payment by check have been governed by Articles 3 and 4 of the Uniform Commercial Code (UCC). Checks will remain the method by which many obligations are paid for the foreseeable future. However, electronic technology is now a fact of life and new methods for transferring bank credit for the purposes of payment are a result. Article 4A is a reflection of this fact.

How has technology affected systems of payment? Most people are aware of automated teller machines for their personal use. Indeed, these machines have become very popular. But such technology is widely used to make large transfers of funds that satisfy obligations arising from commercial transactions as well. The technology is simply too convenient and too fast not to be used for the transfer of large sums around the world.

The amounts which move through the large value automated systems are truly staggering. In 1989 as Article 4A is promulgated, one trillion dollars are transferred on an average day. In 1989, a record day of three trillion dollars was recorded. This is roughly the 1989 gross national product of the United States. Undoubtedly, this record will be surpassed in due course and probably frequently in the future. Such figures indicate the impact of the technology. They also indicate the need for some governing law.

In 1989, as the new Article 4A is proposed to the states for adoption, there is no backstop statutory law to govern funds transfers. The rules for checks in Articles 3 and 4, which utilize the signatures and endorsements on the check as the basis for determining liability, do not apply to electronic funds transfers. Nor are the rules governing the liability of banks to customers under Article 4 helpful. Many transfers in the United States are effected through electronic transfer networks; one is owned and operated by the Federal Reserve and is known as FedWire and the other is owned and operated by the New York Clearing House and is known as CHIPS (Clearing House Interbank Payments Systems). Each of these systems has rules to govern transactions between participating banks, but they do not affect bank customers. Outside FedWire and CHIPS, common-law contract rules are the basis for determining liability. However, serviceable, negotiated contracts are rare. Bank customers usually need a funds transfer immediately and do not take the time to negotiate a contract. Transfers are frequently made in a legal void.

Article 4A is the remedy for this void. Because the total volume of funds transfers is very great and because many individual transactions are very large, the cost of uncertainty in the law could be very high. Article 4A is necessary to the continued usage of existing funds transfers and for the anticipated future expansion in this usage.

Some terminology is necessary to follow a funds transfer under Article 4A. A "sender" is any person or entity who sends a "payment order." The first sender is the originator, and subsequent senders are banks participating in the transfer. A sender communicates a "payment order" to a "receiving bank." Receiving banks become senders if they forward "payment orders" to other banks. The last bank in the communications chain is the beneficiary's bank, and it can never be a sender with respect to the specific funds transfer. The "beneficiary" is the entity that the sender intends to pay. A "payment order" is simply the form of communication that the parties to a funds transfer agree to use. The payment order's salient characteristics are that it calls for an unconditional payment of money from the sender to the beneficiary and that it is transmitted to a receiving bank.

Unless the persons or entities involved in a payment of money use the same bank, a funds transfer involves at least four parties: the originator of the payment; the bank to which the originator communicates the first payment order; the beneficiary's bank that receives the final payment order; and last, the beneficiary. Intermediary receiving and sending banks also may be involved. These are banks that act as conduits of payment when there is no capacity to communicate directly between the originator's bank and the beneficiary's bank.

An example illustrates the process of a funds transfer. Suppose Alpha Corporation wants to pay money to Beta Corporation to satisfy a large contractual obligation. Alpha is in New York, and Beta is in California. Alpha has a bank account with a balance sufficient to pay Beta at First Bank in New York. Beta maintains an account at Second Bank in California. The process of payment is simple. Alpha orders First Bank to pay the owed money to Beta through a transfer to Second Bank. Alpha's order is pursuant to an agreement that Alpha has with First Bank. When First Bank receives the payment order from Alpha, it communicates with Second Bank. The communication indicates that a specific amount at First Bank held for Alpha will be transferred to Second Bank with the understanding that it will be passed on to Beta. Second Bank accepts this second payment order and notifies Beta that the money is available to Beta. Value passes between the two banks through accounting entries in a process known as settlement.

With simple transactions, why do we need a whole new article in the Uniform Commercial Code? New law - or any law - isn't necessary if everything works. But what if something goes wrong? What if First Bank makes a mistake as to the amount to be paid? What happens if Second Bank doesn't notify Beta? What happens if the payment order is fraudulent, and not actually issued by Alpha? What happens if there is a bank failure? These are a few examples of possible errors.

A funds transfer is like a string of Christmas lights: everything is fine until a light burns out. There must be a remedy for the burned out light, and to the extent there are losses they must be paid. What are the remedies if someone takes a loss? Who bears the risk of loss at a given time in the transactional process? No adequate answers to these questions exist without a backstop statutory law that allocates the loss at the appropriate places in the funds transfer. Article 4A provides clear and reliable answers, and thereby keeps the string of lights burning.

To resolve the problem of who is responsible when something in a funds transfer goes wrong, Article 4A divides the actions of the parties to a funds transfer into three essential parts. First, a funds transfer is initiated by the originator and accepted by the originator's bank. Part 2 of Article 4A, entitled "Issue and Acceptance of Payment Order," governs the relationship between the sender of a payment order and the receiving bank that will execute the payment order. What constitutes acceptance and rejection (both rightful and wrongful) of a payment order, and what must be done to amend a payment order, are determined by the rules of Part 2, as these involve the relationship between the sender and receiving bank in a funds transfer. 1

As between sender and receiving bank, who suffers a loss if there is a mistake? Part 2 of Article 4A resolves this critical issue. Two kinds of mistakes can occur between sender and receiving bank, an unauthorized payment order and an erroneous payment order. The key to the rules on an unauthorized payment order is the "security procedure" that exists between sender and receiving bank. This is the agreed procedure that verifies the authenticity of a payment order or other relevant communication. In electronic funds transfer systems, the security procedure is an important element, and may involve codes, encryption, callback procedures, and the like. Any procedure that can be devised to protect the transaction is eligible. To be legally effective, it must only be commercially reasonable.

The security procedure determines who takes the risk of loss when there is an unauthorized payment order. If there is a commercially reasonable security procedure that is followed by the receiving bank, the sender must absorb the loss. If the sender proves that the security procedure was not followed or was breached by someone outside the control of the sender, the receiving bank takes the loss. The assumption is that the security procedure, if followed and not breached, will verify the authenticity of payment orders. 3

The risk of loss for an erroneous payment order also hinges upon compliance with a security procedure for detecting error. If the sender proves that it complied with the security procedure, the receiving bank takes the loss. Otherwise, the sender is responsible for erroneous orders.

The second part of a funds transfer is the passage of funds from receiving bank to receiving bank, until the beneficiary's bank is contacted. This is covered by Part 3 of Article 4A, which is entitled "Execution of Sender's Payment Order by Receiving Bank."

Rules governing the relationship between receiving banks are contained in this part. A principal obligation of a receiving bank (other than the beneficiary's bank) is to "execute" a payment order once it has accepted the order - that is, pass it on to the next bank in the string. It executes by issuing a payment order to the next bank. (The beneficiary's bank has a different obligation. It must pay the obligation to the beneficiary, and that is covered in Part 4 of Article 4A.) Unless agreed otherwise, a bank may use any commercially reasonable method to issue a payment order. A receiving bank is, generally, responsible for any error it commits in issuing a payment order. If a receiving bank overpays the beneficiary of a payment order, the excess is recovered from the beneficiary, not from prior senders. If a receiving bank pays a person or entity that is not the intended beneficiary, recovery is from the person receiving the money, and not from any prior sender. Only if a receiving bank underpays in a payment order, may the bank recover from prior senders, and then only an amount to cover the error and only if it issues a curative order.

Part 3 of Article 4A covers other issues pertaining to receiving banks. For instance, rules on reporting an erroneous payment order and late execution of a payment order are furnished.

The last part of a funds transfer involves actual payment to the beneficiary. It is the subject of Part 4 of Article 4A, "Payment." Each sender, going back to the originator, is obligated to pay. At a given time, the beneficiary is considered to have been paid. There is a two step approach to actual payment, although the steps are accomplished simultaneously if the transfer is made by Fedwire. First, credit is extended by each receiving bank to each sender when the sender's payment order is accepted - basically, a communications function. The second stage involves settling up between participants - the actual passage of value.

Perhaps the most important section in Part 4 is Section 4A-402. It provides that a sender of a payment order is obliged to pay the amount of the order to the receiving bank if the funds transfer is properly completed. It is essential to distinguish, in this regard, a payment order from a check.

A check is a kind of payment order. When a person writes a check on an account, it orders the institution in which the account resides to pay money to a named person (whose technical name is the payee). Although a check suspends the liability of the person who writes it for an underlying obligation until the instrument is rightfully presented for payment and paid at the institution in which the account resides, it can be passed from person to person as payment for other obligations and accrues and extinguishes liabilities for those persons as it passes between them. If the institution refuses to pay when the check is presented, then the person who initially wrote the check is liable for the underlying obligation as well as for the check. In contrast, acceptance of a payment order for a funds transfer by a receiving bank obligates the sender to pay that bank, and that bank alone. There is no instrument that may be passed from hand to hand as payment between other people. There are no lingering liabilities that result from the negotiability of an instrument. A payment order for a funds transfer is simple and direct.

How does settlement take place? If the sender is a bank, and the funds transfer is through one of the funds transfer systems, payment takes place according to the rules of the system that govern settlement between banks. Typically, payment is a matter of debiting an account of the sender with the receiving bank, and crediting the receiving bank's account. These methods hold whether the sender is an individual or a bank.

The beneficiary's bank, the last bank in the string, is responsible for paying the beneficiary. Payment generally takes place by crediting an account of the beneficiary, although satisfaction of a beneficiary's debt also constitutes payment, and payment in general occurs when the funds are available to the beneficiary for withdrawal. The originator of a payment order, that first light in the string of lights, generally is deemed to have paid the beneficiary on the underlying commercial obligation when the beneficiary's bank accepts the payment order. If it seems premature to discharge the originator, it is because at the time of acceptance by the beneficiary's bank, the originator has done all in its power to see that the beneficiary has obtained a credit balance at the beneficiary's bank in the agreed-upon amount. It is analogous to a situation where the originator has deposited cash to the beneficiary's account at beneficiary's bank. At that point, the originator's obligation to the beneficiary should be considered satisfied.

Finally, there are some other features of Article 4A to be considered. First, any transaction that is subject to the Electronic Funds Transfer Act of 1978 is not subject to Article 4A. This express exclusion places consumer transactions outside Article 4A, and leaves them to federal law. Second, the regulations and operating circulars of the Federal Reserve Board supersede any inconsistent provision of Article 4A. Third, transfer system rules will prevail if inconsistent with any part of Article 4A. Fourth, it is possible to vary the effect of most of the provisions of Article 4A, honoring the general Uniform Commercial Code policy of freedom of contract.

The fifth matter of special interest needs extra emphasis. Funds transfers occur and are useful so long as it is fast, efficient and inexpensive to use current and future electronic methods. A great deal of money can be passed through the current system for very little comparative cost. Therefore, Article 4A limits consequential damages for improper payment orders. Consequential damages might raise costs, reduce transaction speed by requiring the exercise of discretion by management, and increase uncertainty.

Article 4A of the Uniform Commercial Code is essential law. The continuance and viability of funds transfers depends upon its advancement in the states. And uniformity is an absolute requirement in every state, unconditionally and without deviation. Otherwise, there will be impairment of the functioning of funds transfers for the long term.

Exhibit # 3
3/12/91 SB 1

Why states should adopt Article 4A of the UCC

New Article 4A of the Uniform Commercial Code concerns a type of payment made through the banking system called a "funds transfer." (A popular term for the bulk of these kinds of transfers is "wholesale wire transfer." This term is not used in Article 4A because all "funds transfers" are not "wholesale" and not "wire" transfers.) A "funds transfer" is, generally, a large, rapid money transfer between commercial entities. In the average "funds transfer" $5,000,000.00 changes hands. In most instances, such transfers will occur between banks using computers and electronic communications. (Consumer transfers through credit cards and ATM machines are not governed by Article 4A, but are governed by federal law.) Article 4A provides a body of law on the rights and obligations connected with "funds transfers."

There is currently no comprehensive body of law that defines the rights and obligations that arise from "funds transfers." Some aspects of "funds transfers" are governed by rules of the principal transfer systems. Transfers made by the Federal Reserve network (Fedwire) are governed by Federal Reserve Regulation J and transfers over the Clearing House Interbank Payment System (CHIPS) are governed by CHIPS rules. But these rules apply to only limited aspects of "funds transfer" transactions.

Article 4A will provide:

CERTAINTY

Currently, no participant in a "funds transfer" can know with certainty what the rights and obligations of parties are. Enactment of Article 4A solves the problem.

BALANCE

Article 4A carefully addresses the interests of banks, commercial users of this payment method and the public. It seeks a fair balance between interests involved in "funds transfers."

REMEDIES

What law exists does not provide clear remedies for "funds transfers" when something goes wrong. UCC-4A establishes who takes the risk of loss, who will be liable and what will be the damages.

Modernization

Exhibit # 3
3/12/91 SB 1

Benefits of Revised UCC Article 3

(With Miscellaneous and Conforming Amendments to Articles 1 and 4)

Revised Article 3 to the Uniform Commercial Code (UCC), with conforming amendments to Articles 4 and 1, constitutes a companion to Article 4A. Both are needed to update the provisions of the UCC to provide essential rules for the new technologies and practices in payment systems since the UCC was promulgated nearly four decades ago. In 1990 the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) approved revisions to Articles 3 and 4, and they are now offered for enactment in the various states.

When the UCC was first promulgated, three billion checks were handled annually. Currently, over 50 billion checks are processed annually. To handle the increased load with greater reliability, computer and other technologies – such as the MICR line – have made the much needed faster processing possible.

In addition, the Expedited Funds Availability Act of 1987 requires banks to clear checks and to make funds more quickly available. This, too, has accelerated the need for automation and speed in the processing of checks.

The present Articles 3 and 4, written for a paper based system, cannot adequately address issues of responsibility and liability for the new technologies now employed and the procedures required by the Expedited Funds Availability Act and the Regulation CC. While agreements among parties to particular transactions have long provided some relief, such stop gap measures are no longer adequate.

Revised Article 3 is necessary to update, improve and maintain the viability of Articles 3 and 4. Absent such an update, further Federal preemption of state law is even more likely to occur.

Benefits in the Public Interest

Certainty – Revised Articles 3 and 4 remove numerous uncertainties that exist in the current provisions.

Speed and Reliability – The revisions remove encumbrances to use of new technologies of automation, and better conform to Regulation CC to expedite the availability of funds to customers and reduce risks to banks.

Lowers Costs – By providing for the new technologies, lower costs are possible to banks and thus to their customers.

Reduced Litigation – By clarification of troublesome issues – and by the provisions of Sections 3–404 through 3–406, which reform rules for allocation of loss from forgeries and alterations – the revisions should significantly reduce litigation.

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Benefits to Users

"Good Faith" – The definition of good faith under Sections 3–103(a)(4) and 4–104(c) is expanded to include observance of reasonable commercial standards of fair dealing. This objective standard for good faith applies to performance of all duties and obligations established under Articles 3 and 4, and thus tracks the standard under Article 4A.

Fiduciary Provisions – Section 3–307 protects drawers and persons owed a fiduciary responsibility by imposing stricter standards for obtaining holder in due course rights by a person dealing with the defaulting agent or fiduciary. It also spells out the circumstances under which a person receiving funds has notice of a breach of fiduciary duty, and resulting liability.

Accord and Satisfaction – Under Section 3–311 payees can avoid unintentional accord and satisfactions by returning the funds or by giving a notice that requires checks to be sent to a particular office where such proposals can be handled. On the other hand, the drawer of a full settlement check is protected from the instrument being endorsed with protest and thus losing the money and being liable on the balance of the claim.

Cashier's Checks – Section 3–411 and related provisions considerably improve the acceptability of bank obligations like cashier's checks as cash equivalents by providing disincentives to wrongful dishonor, such as recovery of consequential damages.

Indorser Liability – Section 3–415 gives more time to hold a check before the user loses endorser liability.

Reporting Forgeries – Section 4–406 increases the time a customer has to report forged checks or alterations up to thirty days. It also requires a bank truncating checks to retain the item or the capacity to furnish legible copies for seven years.

Individual Agent and Corporate Liability – Section 3–402, as to corporate instruments signed by agents, (except as against the holder in due course), allows a representative to show the parties did not intend individual liability. It affords full protection to the agent that signs a corporate check, even though the check does not show representative status. Also, Section 3–403(b) makes it clear that a signature of an organization is considered unauthorized if more than one signature is required and it is missing.

Direct Suits – Section 3–420 allows a person whose indorsement is forged to sue the depository bank directly, rather than each drawee of the check involved.

Benefits to Banks

Certainty – Section 3–104 and related provisions clarify what types of contracts are within Article 3, thus promoting certainty of legal rules and reducing litigation costs and risks. Included as fully negotiable are checks that may omit "words of negotiability;" confusion over travelers checks is eliminated; variable rate instruments are included; and there is clarification of the impact of the FTC "Holder" Rule, clarification of the ability of parties to an instrument that is not included in Article 3 to contract for the application of its rules to their contract;

and clarification of money orders as checks rather than bank obligations.

"Ordinary Care" — In Sections 3–103(a)(7) and 4–104(c) ordinary care is defined, making clear that financial institutions taking checks for processing or for payment by automated means need not manually handle each instrument if that is consistent with the institutions's procedures and the procedures used do not vary unreasonably from general usage of banks. This clarification is designed to accommodate and facilitate efficiency, thus lowering costs and lowering expedited funds availability risks. The definition of ordinary care relates to those specific instances in the Code where the standard of ordinary care is set forth.

Statute of Limitations — Sections 3–118 and 4–111 include statutory periods of limitations which will make the law uniform rather than leaving the topic to widely varying state laws.

Employee Fraud — Section 3–405 expands a *per se* negligence rule to the case of an indorsement forged by an employee. It also covers that of a faithless employee who supplies a name and then forges the indorsement, but does not require a precise match between the name of the payee and the indorsement.

Bank Definition — The definition of bank is expanded for the purposes of Articles 3 and 4 to clearly include savings and loans and credit unions so that their checks are directly governed by the Code. Section 4–104 clarifies that checks drawn on credit lines are subject to the rules for checks drawn on deposit accounts.

Truncation — Section 4–110 authorizes electronic presentment of items and related provisions remove impediments to truncation. Truncation will reduce risks from mandated funds availability and improve the check collection process. Section 4–406 allows an institution the benefit of its provisions even though it does not return the checks due to truncation. If both the customer and the institution fail to use ordinary care, a comparative negligence standard is used rather than placing the full loss on the institution.

20#1

EXHIBIT 4
DATE 3-12-91
SB 7

1) We are only as good as extent to which we honor our word or obligations
2) If we incur obligations we should honor them — not artificially avoid by manipulation of assets
2) Credit is impt. to our society — availability critical. This act assures credit availability by providing protections to creditors against debtors who seek to avoid payment by tfer of property

WHY STATES SHOULD ADOPT THE UNIFORM FRAUDULENT TRANSFER ACT

Are we only as good as the extent to which we honor our obligations? Many would argue for this proposition. And when our obligations are financial, the argument is reinforced by law. It is to this proposition that the Uniform Fraudulent Transfer Act is addressed. If we have acquired debt we should not be able to manipulate our assets so that creditors will be deprived of their value when we default on our debt. We should not be able to plan an artificial insolvency by transferring assets to others against the interests of our creditors.

3) Uniformity impt. here because of bankruptcy
a) old act into bktcy 1978 act / state law should conf so we have unif at fed & bet. sta & fed — avoid shopp.

The Uniform Fraudulent Transfer Act works as a deterrent, preventing such transgressions against obligations incurred, and provides creditors with a remedy when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

While the issue of obligation is preeminent, the economic issue is no less important. Credit is essential to the economic life of this country. Consumer credit, commercial credit, secured and unsecured credit enter into our lives, everyday. Credit remains available so long as those who extend it are given certain assurances about their rights at default. The Uniform Fraudulent Transfer Act provides assurances to creditors that help make credit available to all of us.

This economic issue leads directly to the issue of uniformity. The availability and the health of the credit mechanism require national standards. The principles of the old Uniform Fraudulent Conveyance Act became applicable to every person in every state because it was incorporated into the Federal Bankruptcy Act. Much of what is in the newer Fraudulent Transfer Act duplicates the Bankruptcy Reform Act of 1978. Uniformity has become not only a question of law between states, but also between state and federal law. Without uniformity, credit becomes less available, and the credit mechanism is less reliable. To avoid confusion and expense, the same rules must apply throughout the country. Public expectations are the same in every state and jurisdiction.

Associated with the issue of uniformity is the issue of modernity. The original Fraudulent Conveyance Act, which the Fraudulent Transfer Act replaces, was promulgated in 1918. Changes in federal bankruptcy law, in creditor-debtor relations in general, even in the rules governing the conduct of lawyers, make it clear that a modernization is overdue. The Uniform Fraudulent Transfers Act answers that immediate need.

DURRETT, THE UNIFORM FRAUDULENT TRANSFER ACT, AND FEDERAL BANKRUPTCY LAW - SORTING OUT CONFUSION

There has been much confusion over the relationship of mortgage foreclosures, however done, and fraudulent conveyance statutes, including the 1984 Uniform Fraudulent Transfer Act (UFTA). The confusion results from a single, now notorious case, Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980). The Court, in Durrett, held a noncollusive mortgage foreclosure conducted pursuant to Texas law a constructively fraudulent transfer under Section 67d of the Bankruptcy Act. The Bankruptcy Act has fraudulent transfer provisions directly analogous to the UFTA.

Durrett has not been followed in all circuits of the federal courts. It has been directly rejected in the Sixth and Ninth Circuits, for example. Its influence on state law in the interpretation of the 1918 Uniform Fraudulent Conveyance Act (UFCA) and those states still following the common law is not yet clear. Much speculation attends the possibilities in that regard, however.

Why is Durrett so important? Its holding calls the validity of the bulk of mortgage foreclosure sales into question. Almost never do such sales realize the current market price for real estate bought and sold in the ordinary course. A key element in fraudulent conveyance analysis is the concept of "fair consideration" or "reasonably equivalent value." In Durrett, the foreclosure sale realized less than 70% of the alleged market value, and was a fraudulent transfer for that fact.

As a result of Durrett, buyers in foreclosure sales lose assurance of title. Lenders cannot be sure of lending practices. The uncertainty that Durrett forecasts has large economic impact in real estate markets.

UFTA attempts to alleviate the difficulties that Durrett suggests. In Section 3(b), value is "reasonably equivalent value" if given in "a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." Adoption of this provision would preclude a Durrett type of holding in any state adopting UFTA. Only private, non-public types of transfers, such as some kinds of deed in lieu of foreclosure, would be vulnerable. But these are exactly the kinds of transfers UFTA is designed to remedy anyway. UFTA Section 3(b) removes the uncertainty that Durrett has created, insofar as state law is concerned.

We must be clear, however, on the distinction between federal and state law, the Bankruptcy Act and state fraudulent conveyance law. Durrett still applies in federal bankruptcy law, even when the UFTA applies in state actions. Indeed, in the 1984 amendments to the Bankruptcy Act, the holding in Durrett was reinforced. Durrett continues to be a problem in bankruptcy proceedings.

Why eliminate Durrett-type holdings? Durrett reflects dissatisfactions with the state of foreclosure procedures and perceived inequities that result from them. And that may be a legitimate concern. Using notions of fraudulent transfer to redress those inequities, however, is an oblique approach at best and a meat axe at the worst.

UFTA, its predecessor UFCA, and all fraudulent conveyance law preceding them primarily protect unsecured creditors (those for which no property acts as collateral) from certain actions of debtors that most everybody can agree are actually or constructively fraudulent. Durrett tends to turn that notion on its head. It would turn the remedy against secured creditors who are using accepted, legal procedures to recover loss after a default. This is not a role that fraudulent transfer law was ever designed to fill.

Not only does Durrett turn the remedy against an inappropriate defendant, it clouds every subsequent sale until the statute of limitations runs on any possible fraudulent transfer action. Every title examination after a foreclosure must inevitably result in exceptions for fraudulent transfer actions, leaving subsequent purchasers exposed. These are costs that are borne by sellers and buyers who are not involved in the foreclosure. If there are inequities in foreclosure actions, attacking them with fraudulent transfer theories merely spreads their burden to others. Nothing is really done to remedy them. UFTA Section 3(b) is an appropriate, timely response to the problem.

Exhibit # 4
3/12/91 SB 7

THE UNIFORM FRAUDULENT TRANSFER ACT

by

FRED H. MILLER
Professor of Law at the University of Oklahoma

Section by Section Analysis of the Act

Section ~~1~~ 2 contains definitions. 4 Section ~~2~~ 3 also contains the definition of "insolvent," and Section ~~3~~ the definition of "value." The definition of "asset" in Section 3 ~~2~~(2), together with the latter definitions of "insolvent" and "value," in a general sense formulate the core concept of the act: the transfer of an asset (or incurring an obligation) for inadequate value by an insolvent debtor or one rendered insolvent by the transaction is a fraudulent transfer. Subsection 4(2) is worth particular note in this respect because it overrules for state law the controversial holding in Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980), that a regularly conducted mortgage foreclosure that produces a price "too low" may be avoided as a fraudulent conveyance. By clouding property titles the Durrett rule virtually is a self-fulfilling prophecy.

Section ~~4~~ 5 Subsection ~~1~~(a) states the basic rule of the act: a transfer made or an obligation incurred with actual intent to hinder, delay or defraud creditors is actionable by creditors. How does a creditor prove the debtor's actual intent? Subsection b sets out "badges of fraud" if several of these appear it is strong evidence. Subsection ~~1~~(b), on the other hand, sets out two cases where the law decrees the intent exists if the facts are as stated.

Section ~~5~~ 6 states two further cases where the law decrees the transaction is fraudulent, but only as to present creditors and not also as to creditors arising later as is the case for transfers covered by Section 5.

Section ~~6~~ 7 defines when a transaction occurs. It occurs when it can prejudice the rights of third parties, and not when it actually occurs between the parties to it. For example, a creditor does not need this act to set aside a fraudulent security interest that is never filed; the creditor can defeat that interest under the Uniform Commercial Code. Subsection 5 of this Section also states the time when an obligation is incurred.

Section ~~7~~ 8 describes the remedies a creditor has to attack and avoid a fraudulent transfer or obligation.

Section ~~8~~ 9, however, protects a good faith purchaser for reasonably equivalent value who did not share in the debtor's fraudulent purpose and subsequent good faith transferees for value who are sufficiently remote. Subsection (4) also gives a good faith transferee or obligee against whom the transaction can be avoided protection for any value given.

Subsection (5) is important as protecting lease terminations and security interest enforcement against "Durrett type" attacks, and Subsection (6) allows "workouts" and the like to occur.

Section ~~9~~ 10 prescribes statutes of limitation specifically for the act.

Section ~~10~~ 11 states the act is supplemented by other law and Section ~~11~~ 12 specifies that in interpreting the act, precedent from other states that have enacted it should be used to maintain uniformity.

Section ~~12~~ 13 provides the title.

Section ~~13~~ 14 repeals the current statutes on the subject, including any old predecessor versions of this act.

Exhibit # 4
3/12/91 SB 7

UNIFORM FRAUDULENT TRANSFER ACT

When we say a person "owns" something, we tend to think in all or nothing terms. Whatever a person owns is at that person's disposal - to sell, to give, to abandon, or to pledge as security for a debt. But relationships between people over property are never so simple or so unqualified. A creditor-debtor relationship, for example, may materially change an owner's power over the property owned. A mortgage, clearly, restricts what an owner may do with mortgaged real estate. The creditor has legally protected rights in the real estate securing the debt. Under Article 9 of the Uniform Commercial Code, secured creditors, also, obtain rights in collateral that are protected.

A less clear category, but important to the maintenance of credit, is that of the unsecured creditor-debtor relationship in which the debtor manipulates property to defeat the creditor's interest solely for that purpose and for no other. Perhaps the debtor foresees insolvency and tries to conceal property that a creditor might use to satisfy the debt. Perhaps the debtor never intends to satisfy the debt and manipulates property to make himself judgment-proof. Should the creditor be without recourse, and should the debtor's rights to deal with property be unrestricted in these kinds of cases?

The National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 as an answer to that question. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, and which introduced the concept of the fraudulent conveyance into the law of every American jurisdiction, with or without enactment. The UFCA was adopted in twenty-six states, and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The intent of the UFTA is the same as the UFCA - it classifies a category of transfers as fraudulent to creditors and provides creditors with a remedy for such transfers. The fundamental remedy is the recovery of the property for the creditor. Why a new Act at this time? (1) The terminology of the UFCA had become considerably archaic, and needed to be modernized. (3) The Bankruptcy Reform Act of 1978 changed the federal law on fraudulent transfers in significant ways, and made it imperative to reconsider state law. (4) And creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking. In 1984, the UFTA is ready to promote the modernization of this subject area of law.

UFTA creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value in return. But not all such transfers are fraudulent to every creditor.

Fraud. Xfers

UFTA distinguishes between present and future creditors, and specifies the kinds of transfers that are fraudulent to each of the two categories of creditors. Both present and future creditors may recover property when there is a transfer with intent to defraud. Both may recover when a transfer is made without receiving reasonably equivalent value when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in which the debtor is engaged or about to be engaged. Also, present and future creditors can both recover when a debtor transfers property without receiving reasonably equivalent value when intending to incur debts beyond the ability to pay.

Present creditors, however, can recover property when it is transferred by a debtor to another person without receiving reasonably equivalent value if the debtor is insolvent or becomes insolvent as a result of the transfer. A transfer to an "insider" without receiving reasonably equivalent value when the debtor is insolvent, is also fraudulent to present creditors. The term "insider" is defined, and is someone with a special relationship to the debtor. Examples are relatives or business partners (when the debtor is a partner). To be liable, an "insider" must have reasonable cause to believe that the debtor is insolvent.

Remedies

The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. UFTA allows "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim...." Whatever is necessary to obtain the property is provided for, including attachment, injunctive relief, appointment of a receiver, or "any other relief the circumstances may require." If the creditor has reduced the claim to a judgment, the court may levy execution against the recovered assets. This means that the property can be sold to satisfy the amount of the judgment.

Differences New ACT

Much of the UFTA resembles the UFCA, its predecessor. What, then, are some of the differences? (A more detailed comparison is available from the ULC.) To begin with, the term 1 "transfer" taken from the Federal Bankruptcy Act replaces the term "conveyance." 2 UFCA uses the term "fair consideration" instead of "reasonably equivalent value." "Reasonably equivalent value" does not include the element of good faith as "fair consideration" does, and is more sharply defined than "fair consideration" is in the UFCA. 3 UFTA overcomes the problem raised in the case of

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), a case that jeopardized mortgage foreclosure sales. Under UFTA, a properly conducted foreclosure sale is not a fraudulent transfer, notwithstanding the fact that it does not recover an amount somewhat near the actual market value of the property. 5 The concept of the "insider" is new in the UFTA. 6 UFTA provides for defenses of transferees and for a statute of limitations. Both issues are not addressed in the UFCA.

The Uniform Fraudulent Transfer Act continues the concept of a civil action for transfers fraudulent to creditors first created in the Statute of 13 Elizabeth, and comprehensively continued in the Uniform Fraudulent Conveyance Act. The new Act takes into account the considerable development in both law and practice in creditor-debtor relationships since 1918. The ULC hopes that it will be adopted uniformly in all states.

Exhibit # 4
3/12/91 SB 7

A SHORT COMPARISON OF THE UNIFORM FRAUDULENT TRANSFER ACT WITH THE UNIFORM FRAUDULENT CONVEYANCE ACT

The Uniform Fraudulent Transfer Act (UFTA) is a modernization of the Uniform Fraudulent Conveyance Act (UFCA) that was originally promulgated by the Uniform Law Commissioners in 1918. Since the rights and remedies between the earlier and later Acts are much the same, what are the differences, and what advantages accrue from adopting the UFTA over the UFCA? A short summary of the substantive differences follows[1]:

1. There are a number of more precisely defined terms in UFTA in Section 1 than are found in Section 1 of the UFCA. These new definitions include the words "affiliate," "claims," "debtor," "insider," "lien," "person," "property," "relative," "transfer," and "valid lien." The newly defined terms result in greater clarity throughout the UFTA and facilitate new provisions that will be discussed a little further on. Of the definitions, the one giving the UFTA its new title is "transfer." "Transfer" replaces the word "conveyance" as found in Section 1 of the UFCA. Both are comprehensive terms, but "transfer" comes from Section 101(48) of the Bankruptcy Code and is the more accepted modern term.

2. Both UFTA and UFCA define "insolvency" in Section 2, but UFTA establishes a rebuttable presumption of insolvency in Section 2(b) when a debtor is not generally paying his or her debts as they become due. Section 2(d) of UFTA prevents any fraudulently transferred property from being included in the debtor's assets when determining whether the debtor is insolvent or not. Section 2(e) of the UFTA prevents any obligation secured by a valid lien on the debtor's property, that is not an asset under Section 4, from being included as a debt for the purposes of determining insolvency. UFCA has no provisions similar to UFTA Sections 2(b), (d) or (e).

3. UFTA Section 3 replaces the term "reasonably equivalent value" for the term "fair consideration" as found in UFCA Section 3. "Reasonably equivalent value" is somewhat different from "fair consideration." "Good faith," which is an element in "fair consideration," is not an element in "value." "Good faith" becomes an element of defenses raisable under UFTA

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[1] A complete overview of the UFTA is contained in the summary that accompanied this comparison.

Section 8. Also, "reasonably equivalent value" does not "include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." "Fair consideration" under UFCA does not explicitly exclude such an unperformed promise, and there is a split in authorities as to whether such promises are or are not "fair consideration." Generally, under UFTA, "reasonably equivalent value" is to be considered from the point of view of the creditor. Would the value received in the transfer be available to satisfy the debt?

Section 3(b) of the UFTA deals specifically with the problem raised by Durrett v. Washington National Insurance Company, 621 F.2d 201 (5th Cir. 1980), in which a foreclosure sale of a debtor's property under a mortgage was held a fraudulent transfer when the sale resulted in a recovery of less than 70% of the property's value. Section 3(b) of UFTA provides that "reasonably equivalent value" results when a properly conducted foreclosure sale takes place, no matter the amount recovered. UFCA includes no comparable rule.

UFTA Section 3(c) defines "present value." No similar rule is included in the UFCA.

4. UFTA Section 4(a) combines Sections 5, 6 and 7 of UFCA with clarifications. Section 4(b) of UFTA is new. Section 4 of UFTA generally provides for those actions that are fraudulent to present and future creditors. A future creditor under this Section is, simply, one whose claim "arose . . . after the transfer was made or the obligation incurred."

Section 4(b) lists a series of factors that may be considered to determine the issue of intent under Section 4(a)(1). The list of factors includes most of the badges of fraud construed by courts over the history of the UFCA and predecessor legislation. The list is non-exclusive.

5. UFTA Section 5 provides for transfers fraudulent to creditors only. Section 5(a) is derived from Section 4 of the UFCA. Section 5(b) is new, and identifies a kind of transfer, the "insider" transfer, that is not specifically a fraudulent transfer in the UFCA. The "insider" transaction in Section 5(b) of the UFTA is derived from prior case law. An "insider" is defined in Section 1(7) of the UFTA and includes relatives or family members, partners, a corporate director, and the like.

In part, Section 8 of the UFCA is subsumed in

Exhibit # 4
3/12/91 SB 7

Section 5(b) of the UFTA. Section 8 of the UFCA deals with transactions between partners and with a person not a partner that results in the insolvency of the partnership. Although partners are "insiders" under the UFTA, liability occurs when an insider "had reasonable cause to believe that the debtor was insolvent." Under Section 8(a) of the UFCA, a partner was, per se, liable, a rule deemed unduly favorable to partnership creditors and unduly burdensome to a partner's creditors. UFTA has no specific sections dealing with partnership transfers such as Section 8 of the UFCA.

6. Section 6 of the UFTA is entirely new. It was created to eliminate questions about the time a transfer is made or an obligation is incurred.

7. Section 7 of the UFTA incorporates Sections 9 and 10 of the UFCA. The UFTA makes no distinction between claims of creditors that have matured as opposed to those that are unmatured, as the UFCA does. Remedies under Section 7 are available to all creditors. Section 7(a)(2) provides for attachment, subject to constitutional constraints. But attachment is offered as an alternative remedy in the UFTA because of the uncertainty over the constitutional problems. A jurisdiction may reject Section 7(a)(2) without impairing uniformity, therefore.

8. Section 8 of the UFTA is entirely new. The UFCA does not provide for transferee defenses and protection of transferee interests. Note that good faith is an element of the defense established in Section 8(a).

9. UFTA Section 9 is new. It establishes statutes of limitations, a subject not addressed at all in the UFCA.

Exhibit # 4
3/12/91 SB 7

R.F. HIBBS 1906-1985
HUGH SWEENEY
'ON E. DOAK
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HORTON H. KOESSLER
OF COUNSEL

January 16, 1991

VIA TELEFAX

Senator Bruce D. Crippen
Capitol Station
P. O. Box 156
Helena, MT 59620

RE: Senate Bill No. 7: "An Act Replacing the Uniform Fraudulent Conveyances Act, etc."

Dear Senator Crippen:

My legal practice primarily involves debtor/creditor, bankruptcy and collection matters. In my practice, I have regular contact with the Uniform Fraudulent Conveyances Act, and the exemption, voidable preference and fraudulent conveyance provisions of the Bankruptcy Code. In the foregoing context, I have reviewed Senate Bill No. 7 and believe it to be flawed in several respects.

I have three principal objections to the languge of Senate Bill 7. First, I believe the definition of "debt" to be too broad and unworkable because the definition of "claim" broadly includes unliquidated, contingent and disputed obligations. Secondly, the definition of "insolvency" in Senate Bill 7 seems to me overbroad and unworkable insofar as it would include in "debts" all disputed and contingent obligations. The "insolvency" definition is also inconsistent with the definition of "insolvency" in Section 101(31) of the Bankruptcy Code. Thirdly, Section 4(2) of SB 7, regarding value, seems to insulate from examination any foreclosure sale or execution of a power of sale regardless of the relative disparity between the obligation owed and the value of the debtor's interest in the property foreclosed.

I also find the proposed statute vague in its definition of "property", its use of the term "substantially all" in Section 5(2)(e); use of the term "shortly after" in Section 5(2)(i); and use of "shortly before or shortly after" in Section 5(2)(j).

Under the proposed statute, "debt" means liability on a claim. A "claim" includes, however, a right to payment whether or not disputed. A purported debtor would not seem under current law to be liable on a claim disputed in good faith until the dispute is resolved. Under the proposed statutory scheme, even "claims" asserted in bad faith or those subject to bona fide dispute are included in determining the solvency or insolvency of the purported debtor.

The broad "insolvency" definition would also in my view wreak havoc on legitimate commercial transactions. A party who was a guarantor of a fully secured corporate liability which is being and has been paid in its ordinary course by the corporation may nevertheless be deemed insolvent if the contingent liability on the guarantee, when added to the guarantor's other obligations, causes his liabilities to exceed his assets.

The "insolvency" definition under the Bankruptcy Code compares "debts" with the debtor's "property". The "insolvency" definition in Senate Bill 7 compares "debts", broadly defined, with the debtor's "assets," a term much more narrow than "property". Any significant guaranty obligations, suretyship, or other contingent liability, secured by a lien on the debtor's property, may render the debtor insolvent under the proposed definition, regardless of the fact that the obligation guaranteed is fully secured by property of the primary obligor.

Also of concern to me is the potentially unsettling effect the proposed law may have on legitimate transactions with those broadly defined as "insiders" for four or more years. Under the Bankruptcy Code, preferential transfers are voidable for 90 days as to third parties and one year as to insiders; while fraudulent conveyances are subject to a two year limitation under current law. Four years seems too long.

After comparing the proposed law with the existing Uniform Fraudulent Conveyances Act, I remain convinced the existing law fills the need for creditor protection adequately without introducing the vagueries and commercial uncertainty I see likely under the proposed law. I will be pleased to expand on the foregoing views if requested to do so.

Sincerely,

SWEENEY & DOAK

Jon E. Doak

JED:lca

Exhibit # 4
3/12/91 SB 7

MAZUREK

UNIFORM FRAUDULENT TRANSFER ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-THIRD YEAR
IN KEYSTONE, COLORADO
JULY 27 - AUGUST 3, 1984

ULC Uniform Law Commissioners

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Detroit, Michigan, February 18, 1985

EXHIBIT 5
DATE 3-12-91
SB 228

Amendments to Senate Bill No. 228
Third Reading Copy

Requested by Senator Svrcek
For the Committee on Judiciary: would leave intact the increases proposed in SB228, and tie judicial salaries to the state employee pay matrix, for the purposes of any future increases.

Prepared by Greg Petesch
March 6, 1991

1. Page 3, lines 3 and 4.
Following: "1992"
Strike: remainder of line 3 through "1993" on line 4
Following: "and" on line 4
Insert: "must be increased by the percentage increase for a classified state employee occupying the most nearly equivalent grade and step on the pay matrix as determined by the department of administration for"

2. Page 3, lines 11 and 12.
Following: "1992"
Strike: remainder of line 11 through "1993" on line 12
Following: "and" on line 12
Insert: "must be increased by the percentage increase for a classified state employee occupying the most nearly equivalent grade and step on the pay matrix as determined by the department of administration for"

3. Page 3, lines 21 and 22.
Following: "1992"
Strike: remainder of line 21 through "1993" on line 22
Following: "and" on line 22
Insert: "must be increased by the percentage increase for a classified state employee occupying the most nearly equivalent grade and step on the pay matrix as determined by the department of administration for"

4. Page 4, line 9.
Strike: "$70"
Insert: "$65"

5. Page 4, line 10.
Strike: "$70"
Insert: "$65"

6. Page 4, line 11.
Strike: "$110"
Insert: "$105"

7. Page 4, line 13.
Strike: "$110"
Insert: "$105"

8. Page 4, line 15.
Strike: "$50"

3-12-91
SB 228

Insert: "$45"

9. Page 4, line 17.
Strike: "$35"
Insert: "$30"

10. Page 5, line 13.
Strike: "$60"
Insert: "$55"

11. Page 5, line 17.
Strike: "$45"
Insert: "$40"

12. Page 8, line 7.
Strike: "$10"
Insert: "$5"

13. Page 8, line 17.
Strike: "$80"
Insert: "$70"

14. Page 8, line 18.
Strike: "$80"
Insert: "$70"

15. Page 8, line 19.
Strike: "$120"
Insert: "$110"

16. Page 8, line 21.
Strike: "$120"
Insert: "$110"

17. Page 8, line 23.
Strike: "$60"
Insert: "$50"

18. Page 8, line 25.
Strike: "$45"
Insert: "$35"

19. Page 9, line 21.
Strike: "$70"
Insert: "$60"

20. Page 9, line 25.
Strike: "$55"
Insert: "$45"

21. Page 12, line 15.
Strike: "$20"
Insert: "$10"

EXHIBIT 6
DATE 3-12-91
~~HB~~ SB 228

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL VOTE

DATE 3-12-91 BILL NO. 228 NUMBER ________

MOTION: Gould amendment

NAME	AYE	NO
REP. VIVIAN BROOKE, VICE-CHAIR	✓	
REP. ARLENE BECKER		✓
REP. WILLIAM BOHARSKI		✓
REP. DAVE BROWN	✓	
REP. ROBERT CLARK		✓
REP. PAULA DARKO		✓
REP. BUDD GOULD	✓	
REP. ROYAL JOHNSON		✓
REP. VERNON KELLER		✓
REP. THOMAS LEE		✓
REP. BRUCE MEASURE	✓	
REP. CHARLOTTE MESSMORE	✓	
REP. LINDA NELSON		✓
REP. JIM RICE		✓
REP. ANGELA RUSSELL		✓
REP. JESSICA STICKNEY		
REP. HOWARD TOOLE	✓	
REP. TIM WHALEN	✓	
REP. DIANA WYATT		✓
REP. BILL STRIZICH, CHAIRMAN	✓	
TOTAL	8	11

EXHIBIT 7
DATE 3-12-91
~~HB~~ SB 327

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL VOTE

DATE 3 12 91 BILL NO. SB 327 NUMBER

MOTION: Whalen: Table

Fails

NAME	AYE	NO
REP. VIVIAN BROOKE, VICE-CHAIR	✓	
REP. ARLENE BECKER	✓	
REP. WILLIAM BOHARSKI		✓
REP. DAVE BROWN		✓
REP. ROBERT CLARK		✓
REP. PAULA DARKO	✓	
REP. BUDD GOULD		✓
REP. ROYAL JOHNSON		✓
REP. VERNON KELLER		✓
REP. THOMAS LEE		✓
REP. BRUCE MEASURE	✓	
REP. CHARLOTTE MESSMORE		✓
REP. LINDA NELSON	✓	
REP. JIM RICE		✓
REP. ANGELA RUSSELL	✓	
REP. JESSICA STICKNEY		✓
REP. HOWARD TOOLE		✓
REP. TIM WHALEN	✓	
REP. DIANA WYATT	✓	
REP. BILL STRIZICH, CHAIRMAN		✓
TOTAL	8	12

EXHIBIT 8
DATE 3-12-91
SB 327

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL VOTE

DATE 3-12-91 BILL NO. SB 327 NUMBER

MOTION: Brown: Strike sec 8

NAME	AYE	NO
REP. VIVIAN BROOKE, VICE-CHAIR	✓	
REP. ARLENE BECKER	✓	
REP. WILLIAM BOHARSKI		✓
REP. DAVE BROWN	✓	
REP. ROBERT CLARK		✓
REP. PAULA DARKO	✓	
REP. BUDD GOULD		✓
REP. ROYAL JOHNSON		✓
REP. VERNON KELLER		✓
REP. THOMAS LEE		✓
REP. BRUCE MEASURE	✓	
REP. CHARLOTTE MESSMORE		✓
REP. LINDA NELSON		✓
REP. JIM RICE		✓
REP. ANGELA RUSSELL	✓	
REP. JESSICA STICKNEY	✓	
REP. HOWARD TOOLE	✓	
REP. TIM WHALEN	✓	
REP. DIANA WYATT	✓	
REP. BILL STRIZICH, CHAIRMAN	✓	
TOTAL	11	9

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

House Judiciary COMMITTEE BILL NO. SB#214

DATE 3-12-91 SPONSOR(S) Sen. Towe

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
Tom Hopgood	Mont. Assoc. Realtors	SB 214		✓
Riley Johnson	NFIB	SB 214		✓
Bob Pyfer	MT Credit Unions League	214		✓
John Cameron	MT Collectors Assoc	214		✓
Brendan Beatty	MT Assoc Realtors	214		✓
Pat Bradley	Mt Magistrates Assn	214		✓
Charles R. Brooks	MT. Retail Assn	214		✓
Dan Walker	US WEST	214		✓

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

House Judiciary COMMITTEE BILL NO. SB# 398

DATE 3-12-91 SPONSOR(S) Sen. Towe

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
Pat Bradley	Mt Mag. Assn	398		✓

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

House Judiciary COMMITTEE BILL NO. SB # 441

DATE 3-12-91 SPONSOR(S) Sen. Mazurek

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
Allen Chronister	State Bar			✓

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

House Judiciary COMMITTEE BILL NO. SB#1

DATE 3-12-91 SPONSOR(S) Sen. Mazurek

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
Bob Pyfer	MT Credit Unions League	1		✓

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

House Judiciary COMMITTEE BILL NO. SB#7

DATE 3-12-91 SPONSOR(S) Sen. Mazurek

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.