



# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill decreases the amount of governmental involvement with the Florida Secured Transaction Registry.

### B. EFFECT OF PROPOSED CHANGES:<sup>1</sup>

#### Background

The National Conference of Commissioners on Uniform State Laws (NCCUSL), now 114 years old, "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law. NCCUSL's work supports the federal system and facilitates the movement of individuals and the business of organizations with rules that are consistent from state to state."<sup>2</sup> In 2001, the conference finalized the Revision of Uniform Commercial Code Article 1 - General Provisions. Currently, the act has been enacted in 14 states and the U.S. Virgin Islands, and is filed in the legislatures of 8 more.<sup>3</sup> The NCCUSL provided the following information regarding the proposed act.<sup>4</sup>

Article 1 of the UCC<sup>5</sup> provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the UCC. Article 2 of the UCC pertains to sales and transactions in goods.<sup>6</sup> Article 3 governs negotiable instruments.<sup>7</sup> Article 4 governs bank deposits and collections,<sup>8</sup> whereas Article 5 is concerned with letters of credit.<sup>9</sup> Article 7 pertains to documents of title,<sup>10</sup> and Article 8 governs investment securities.<sup>11</sup> Article 9 encompasses secured transactions.<sup>12</sup> The final section of the UCC concerns leases.<sup>13</sup>

Current Article 1 is sub-divided into three parts. Part I is entitled "Short Title, Construction, Application and Subject Matter of Act."<sup>14</sup> Part II is entitled "General Definitions and Principles of Interpretation."<sup>15</sup>

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<sup>1</sup> The bulk of this analysis is specifically derived from the Business Law Section of the Florida Bar's report that incorporates National Conference of Commissioners on Uniform State Laws' ("NCCUSL") report which was graciously supplied to the Civil Justice Committee. The Drafting Committee ("the Drafting Committee") to revise Article 1 of the UCC included the following: Boris Auerbach, Marion W. Benfield, Jr. Amelia H. Boss, James C. McKay, Jr., H. Kathleen Patchel, Curtis R. Reitz, Carlyle C. Ring, Jr., James J. White, Neil B. Cohen, John L. McLaugherty, Robert J. Tennesen, Harry C. Sigman,

Richard R. Goldberg, William J. Woodward, Jr., Fred H. Miller, and William J. Pierce.

<sup>2</sup> *Uniform Law Commissioners*, (Mar. 6, 2006) <<http://www.nccusl.org/Update/>>.

<sup>3</sup> *Revised Uniform Commercial Code Article 1, General Provisions (2001)*, (Mar. 22, 2006) <[http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ucc1.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc1.asp)>. Florida is not included in this list.

<sup>4</sup> *Summary, Uniform Real Property Electronic Recording Act*, (Mar. 22, 2006) <[http://www.nccusl.org/Update/uniformact\\_summaries/uniformacts-s-ucc1.asp](http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucc1.asp)>.

<sup>5</sup> Article 1 is located in ch. 671, F.S.

<sup>6</sup> Article 2 is located in ch. 672, F.S.

<sup>7</sup> Article 3 is located in ch. 673, F.S.

<sup>8</sup> Article 4 is located in ch. 674, F.S.

<sup>9</sup> Article 5 is located in ch. 675, F.S.

<sup>10</sup> Article 7 is located in ch. 677, F.S.

<sup>11</sup> Article 8 is located in ch. 678, F.S.

<sup>12</sup> Article 9 is located in ch. 679, F.S.

<sup>13</sup> The UCC provisions related to leases is located in ch. 680, F.S.

<sup>14</sup> Sections 671.101-671.109, F.S.

<sup>15</sup> Sections 671.201-671.208, F.S.

Part III is entitled "Effective Date and Repealer."<sup>16</sup> The following are significant substantive issues raised by changes from current Article 1.

## Substantive Issues

### Scope

Article 1 contains a relatively small number of substantive rules, but those rules are of fundamental importance. Occasionally courts and commentators have expressed uncertainty as to which transactions are governed by the substantive rules. Section 671.102, F.S. is amended to express a point that is implicit in current Article 1 – namely, that the substantive rules in Article 1 apply only to transactions within the scope of the other Articles.

### Applicability of Supplemental Principles of Law

This bill merges sections (1) and (2) of current s. 671.102, F.S. (concerning the underlying purposes and policies of the UCC) and current s. 671.103, F.S. (concerning the applicability of supplemental principles of law) into a revised s. 671.103, F.S. The provisions have been combined to reflect the interrelationship between the Code's purposes and policies and the extent to which other law is available to supplement it.

### Good Faith<sup>17</sup>

In the new definitions, the only significant substantive change lies in the definition of good faith. Section. 671.201(19), F.S. defined good faith simply as honesty in fact, a purely subjective definition containing no element of commercial reasonableness. In contrast, in Article 2<sup>18</sup>, the definition of good faith applicable to merchants means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Over time, amendments to other Articles incorporated the broader standard adopting it for all parties in Articles 3, 4, 8, and 9. Only Revised Article 5 defines "good faith" solely in terms of subjective honesty. Article 6 has been deleted from the Florida Uniform Commercial Code, and Article 7 contains no reference to "good faith." Thus, adoption of the broader definition in Article 1 merely states generally the standard already applicable throughout the Code. The narrower definition in Article 5 is explicitly applicable to that chapter and will not be disturbed by this bill.

Only one Florida case has been found in which the holding relied on the narrower former definition of good faith. In *Espirito Santo Bank of Florida v. Agronomics Finance Corporation*, 591 So. 2d 1078 (3d DCA 1991), the court held that even though the bank had been negligent, it did not act in subjective bad faith so as to justify consequential damages under s. 674.104, F.S. (1989). Of course the bank's negligence might have been seen as a bad faith failure to observe reasonable commercial standards had the amended definition been in place. However, the legislative decision to make this change is not presented at this time. The decision to broaden the definition applicable to Article 4 was made soon after this case was decided when the 1992 Amendments to Article 4 were adopted; s. 674.104(2), F.S. (1992). The amendment to the definition of good faith in Article 1 will affect no change in the law currently applicable to the above case.

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<sup>16</sup> Sections 671.301-671.311, F.S.

<sup>17</sup> On June 7, 2005, Governor M. Jodi Rell signed Connecticut HB 6985 into law, making Connecticut the ninth state (out of fourteen who have adopted some form of the proposed Uniform UCC Article One) to adopt the uniform "good faith" definition found in bill. Other states adopting the uniform good faith definition found in proposed 1-102(b)(20) include Arkansas, Delaware, Minnesota, Montana, Nevada, New Mexico, Oklahoma and Texas.

<sup>18</sup> Section 672.103(1)(b), F.S.

## **Course of Performance**

Section 671.205, F.S. adds the concept of “course of performance,” currently utilized only in Article 2, to course of dealing and usage of trade as the contextual clues that a court may use to interpret a contract.

## **Statute of Frauds<sup>19</sup>**

The Statute of Frauds “for kinds of personal property not otherwise covered” that appears in current s. 671.206, F.S. has been repealed in this bill. The Drafting Committee for the NCCUSL noted that the other Articles of the UCC make individual determinations as to writing requirements for transactions within their scope, so that the only effect of s. 671.206, F.S. was to impose a writing requirement on transactions not otherwise governed by the UCC. It was decided that it is inappropriate for Article 1 to impose that requirement.

## **Structural Issues**

### **Relocation of Substantive Rules Embedded in Definitions**

The Drafting Committee identified four cases in which definitions in s. 671.201 were made unnecessarily complicated by substantive rules embedded within them. Extracting those substantive rules and placing them in separate sections enables those rules to be presented more effectively and is more consistent with current drafting principles in many States.

### **Notice and Knowledge**

The rules concerning notice and knowledge have been moved from their current location in three subsections of s. 671.201 to a separate substantive section. The Drafting Committee believes that, with this reorganization, the concepts are more clearly articulated and more easily found.

### **Distinguishing Leases from Security Interests**

In Article 1, the definition of “security interest,” s. 671.201(37), F.S. consists of a short paragraph elucidating a basic principle that resolves almost every issue, followed by over 50 lines of clarification and qualification that serve only one function – distinguishing “true leases” from transactions that are leases in form but security interests in substance. This extended rule even contains a nested definition of the term “present value,” which it uses as part of drawing the distinction between true leases and security interests. The portion of the definition of “security interest” that distinguishes true leases from security interests has been moved to a separate substantive section. As a result, the remaining portion of the definition of “security interest” is shorter and clearer. The definition of “present value” is moved to its own definitional subsection.

### **Value**

Whether a person acquires rights “for value” is at present the subject of a definitional provision in current s. 671.201(44), F.S. The provision is more appropriately articulated as a free-standing rule.

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<sup>19</sup> The statute of frauds is defined as “a statute (based on the English Statute of Frauds) designed to prevent fraud and perjury by requiring certain contracts to be in writing and signed by the party to be charged.” Black’s Law Dictionary 1422 (7th ed. 1999).

### **Section 3. Short Title; Scope of Chapter**

New language is added in order to make the structure of Article 1 parallel with that of other Articles of the UCC. Moreover additional language is added to which is intended to resolve confusion that has occasionally arisen as to the applicability of the substantive rules in this article. This section makes clear that the rules in Article 1 apply to transactions to the extent that those transactions are governed by one of the other articles of the UCC. This article does not apply to transactions to the extent that they are governed by other law.

### **Section 5. Remedies to be Liberally Administered**

This section is nearly identical to the existing s. 671.106, F.S. The revised section is intended to effect three propositions. The first is to negate the possibility of unduly narrow or technical interpretation of remedial provisions by providing that the remedies in the UCC are to be liberally administered to the end stated in this section. The second is to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the UCC elsewhere makes it clear that damages must be minimized. The third purpose of subsection (1) is to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more.

Under the unchanged s. 671.106(2), F.S provides any right or obligation described in the UCC is enforceable by action, even though no remedy may be expressly provided, unless a particular provision specifies a different and limited effect. Whether specific performance or other equitable relief is available is determined not by this section but by specific provisions and by supplementary principles. Consequential or special damages and penal damages are not defined in the UCC; rather, these terms are used in the sense in which they are used outside the UCC.

### **Section 6. Waiver or Renunciation of Claim or Right after Breach**

Section 6 of the bill is drawn from s. 671.107, F.S. This section changes former law in two respects. First, s. 671.107, F.S, requiring the "delivery" of a "written waiver or renunciation" merges the separate concepts of the aggrieved party's agreement to forego rights and the manifestation of that agreement. This section separates those concepts, and explicitly requires agreement of the aggrieved party. Second, the revised section reflects developments in electronic commerce by providing for memorialization in an authenticated record.

This section makes consideration unnecessary to the effective renunciation or waiver of rights or claims arising out of an alleged breach of a commercial contract where the agreement effecting such renunciation is memorialized in a record authenticated by the aggrieved party. Its provisions, however, must be read in conjunction with the section imposing an obligation of good faith.

### **Section 7. General Definitions**

This section defines 43 terms and phrases appearing throughout the UCC. Most of the definitions are taken from s. 671.201, F.S. with very little change. For the most part the changes are intended to clarify the definition or bring it up to date with modern commercial practice. A number of the subsections of s. 671.201, F.S. have been relocated to reflect the determination that they are truly substantive rather than purely definitional.

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<sup>20</sup> This more extensive review of various sections of the bill does not address the sections covered elsewhere in the analysis or the sections containing the more routine modifications.

In order to make it clear that all definitions in the UCC – not just those in Article 1 – do not apply if the context otherwise requires, a new subsection (a) to that effect has been added. The reference to the “context” is intended to refer to the context in which the defined term is used in the UCC. In other words, the definition applies whenever the defined term is used unless the context in which the defined term is used in the statute indicates that the term was not used in its defined sense.

Other than minor stylistic changes, the definitions in this bill are as in Article 1 except as noted below.

- **Action.** Is unchanged from s. 671.201(1), F.S., and it was derived from similar definitions in the Uniform Negotiable Instruments Law, the Uniform Sales Act; the Uniform Warehouse Receipts Act; and the Uniform Bills of Lading Act.
- **Aggrieved party.** Essentially, this definition is unchanged from s. 671.201(2), F.S.
- **Agreement.** This definition is derived from s. 671.201(3), F.S. As used in the UCC the word is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of the UCC to displace a stated rule of law. Whether an agreement has legal consequences is determined by applicable provisions of the UCC and, to the extent provided in the UCC, by the law of contracts.
- **Bank.** This definition is derived from s. 674.105(1), F.S.
- **Bearer.** This definition is essentially unchanged from s. 671.201(5), F.S., which was derived from the Uniform Negotiable Instruments Law.
- **Bill of Lading.** This definition is derived from s. 671.201(6), F.S. The references to airbills has been deleted as they are no longer necessary.
- **Branch.** This definition is unchanged from s. 671.201(7), F.S.,.
- **Burden of establishing.** This definition is unchanged from s. 671.201(8), F.S.
- **Buyer in ordinary course of business.** This definition is essentially unchanged from s. 671.201(9), F.S. The first sentence of paragraph makes clear that a buyer from a pawnbroker cannot be a buyer in ordinary course of business. The second sentence tracks Section 6-102(1)(m). It explains what it means to buy “in the ordinary course.” The penultimate sentence prevents a buyer that does not have the right to possession as against the seller from being a buyer in ordinary course of business. Concerning when a buyer obtains possessory rights. However, the penultimate sentence is not intended to affect a buyer’s status as a buyer in ordinary course of business in cases (such as a “drop shipment”) involving delivery by the seller to a person buying from the buyer or a donee from the buyer. The requirement relates to whether as against the seller the buyer or one taking through the buyer has possessory rights.
- **Conspicuous.** This definition is derived from s. 671.201(10), F.S. It states the general standard that to be conspicuous a term ought to be noticed by a reasonable person. Whether a term is conspicuous is an issue for the court. The subparagraphs set out several methods for making a term conspicuous. Requiring that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning function (giving guidance to the party relying on the term regarding how that result can be achieved). Although these paragraphs indicate some of the methods for making a term attention-calling, the test is whether attention can reasonably be expected to be called to it. The statutory language should not be construed to permit a result that is inconsistent with that test.

- Consumer. This definition is derived from other portions of the UCC.
- Contract. This definition is essentially unchanged from s. 671.201(11), F.S.
- Creditor. This definition is unchanged from s. 671.201(12), F.S.
- Defendant. This definition is essentially unchanged from s. 671.201(13), F.S., which was derived from the Uniform Sales Act.
- Delivery. This definition is derived from s. 671.201(14), F.S.. The reference to certificated securities has been deleted in light of the more specific treatment of the matter elsewhere in the UCC.
- Document of title. This definition is unchanged from s. 671.201(15), F.S., which was derived from the Uniform Sales Act. By making it explicit that the obligation or designation of a third party as “bailee” is essential to a document of title, this definition clearly rejects any such result as obtained in *Hixson v. Ward*, 254 Ill.App. 505 (1929), which treated a conditional sales contract as a document of title. Also the definition is left open so that new types of documents may be included. It is unforeseeable what documents may one day serve the essential purpose now filled by warehouse receipts and bills of lading. Truck transport has already opened up problems which do not fit the patterns of practice resting upon the assumption that a bill can move through banking channels faster than the goods themselves can reach their destination. There lie ahead air transport and such probabilities as teletype transmission of what may some day be regarded commercially as “Documents of Title.” The definition is stated in terms of the function of the documents with the intention that any document which gains commercial recognition as accomplishing the desired result shall be included within its scope. Fungible goods are adequately identified within the language of the definition by identification of the mass of which they are a part.

Dock warrants were within the Sales Act definition of document of title apparently for the purpose of recognizing a valid tender by means of such paper. In current commercial practice a dock warrant or receipt is a kind of interim certificate issued by steamship companies upon delivery of the goods at the dock, entitling a designated person to have issued to him at the company’s office a bill of lading. The receipt itself is invariably nonnegotiable in form although it may indicate that a negotiable bill is to be forthcoming. Such a document is not within the general compass of the definition, although trade usage may in some cases entitle such paper to be treated as a document of title. If the dock receipt actually represents a storage obligation undertaken by the shipping company, then it is a warehouse receipt within this section regardless of the name given to the instrument.

The goods must be “described,” but the description may be by marks or labels and may be qualified in such a way as to disclaim personal knowledge of the issuer regarding contents or condition. However, baggage and parcel checks and similar “tokens” of storage which identify stored goods only as those received in exchange for the token are not covered by this Article.

The definition is broad enough to include an airway bill.

- Fault. This definition is derived from s. 671.201(16), F.S. “Default” has been added to the list events constituting fault.
- Fungible Goods. This definition is derived from s. 671.201(17), F.S. The definition has been reorganized and references to securities have been deleted since other portions of the UCC no longer use the term “fungible” to describe securities.
- Genuine. This definition is unchanged from s. 671.201(18), F.S.

- Good faith. This definition modifies s. 671.201(19), F.S. See above discussion.
- Holder. This definition is derived from s. 671.201(20), F.S. The definition has been reorganized for clarity.
- Insolvency proceedings. This definition is essentially unchanged from s. 671.201(22), F.S.
- Insolvent. This definition is derived from s. 671.201(23), F.S. The three tests of insolvency – “generally ceased to pay debts in the ordinary course of business other than as a result of a bona fide dispute as to them,” “unable to pay debts as they become due,” and “insolvent within the meaning of the federal bankruptcy law” – are expressly set up as alternative tests and must be approached from a commercial standpoint.
- Money. This definition is essentially unchanged from s. 671.201(24), F.S. The test is that of sanction of government, whether by authorization before issue or adoption afterward, which recognizes the circulating medium as a part of the official currency of that government. The narrow view that money is limited to legal tender is rejected.
- Organization. The definition of this word, found in s. 671.201(28), F.S., has been replaced with the standard definition used in acts prepared by the National Conference of Commissioners on Uniform State Laws.
- Party. This definition is substantively identical to s. 671.201(26), F.S. Mention of a party includes, of course, a person acting through an agent. However, where an agent comes into opposition or contrast to the principal, particular account is taken of that situation.
- Person. The definition of this word, found in s. 671.201(30), F.S., has been replaced with the standard definition used in acts prepared by the National Conference of Commissioners on Uniform State Laws.
- Present value. This definition was formerly contained within the definition of “security interest.”
- Purchase. This definition is derived from s. 671.201(29), F.S. The form of definition has been changed from “includes” to “means.”
- Purchaser. This definition is unchanged from s. 671.201(33), F.S.
- Record. This definition is derived from other portions of the UCC.
- Remedy. This definition is unchanged from s. 671.201(34), F.S. The purpose is to make it clear that both remedy and right (as defined) include those remedial rights of “self help” which are among the most important bodies of rights under the UCC, remedial rights being those to which an aggrieved party can resort on its own motion.
- Representative. This definition is derived from s. 671.201(35), F.S. Reorganized, and form changed from “includes” to “means.”
- Right. This definition is unchanged from s. 671.201(36), F.S.
- Security Interest. The definition is the first paragraph of the definition of “security interest” in s. 671.201(37), F.S.. The remaining portion has been moved to another section. Notice that the term includes the interest of certain outright buyers of certain kinds of property.



- Send. This definition contains slight changes to s. 671.201(38), F.S.
- Signed. This definition is derived from s. 671.201(39), F.S. The former definition referred to “authenticate”; because authenticate is now a defined term, the language has been changed to “intention to adopt or accept.” The latter formulation is derived from the definition of “authenticate.” The definition of “signed” is to make clear that, as the term is used in the UCC, a complete signature is not necessary. The symbol may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible situations can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing.
- State. This is the standard definition of the term used in acts prepared by the National Conference of Commissioners on Uniform State Laws.
- Surety. This definition makes it clear that “surety” includes all secondary obligors, not just those whose obligation refers to them person obligated as a surety
- Term. This definition is essentially unchanged from s. 671.201(42), F.S.
- Unauthorized signature. This definition is essentially unchanged from s. 671.201(43), F.S.
- Warehouse receipt. This definition contains minor changes to s. 671.201(45), F.S. This definition was derived from the Uniform Sales Act and the Uniform Warehouse Receipts Act. Receipts issued by a field warehouse are included, provided the warehouseman and the depositor of the goods are different persons.
- Writing. This definition is essentially unchanged from s. 671.201(46), F.S.

## **Section 8. Prima Facie Evidence by Third-Party Documents**

This section is nearly identical to s. 671.202, F.S. This section supplies judicial recognition for documents that are relied upon as trustworthy by commercial parties. This section is concerned only with documents that have been given a preferred status by the parties themselves who have required their procurement in the agreement, and for this reason the applicability of the section is limited to actions arising out of the contract that authorized or required the document. The list of documents is intended to be illustrative and not exclusive.

The provisions of this section go no further than establishing the documents in question as prima facie evidence and leave to the court the ultimate determination of the facts where the accuracy or authenticity of the documents is questioned. In this connection the section calls for a commercially reasonable interpretation. Documents governed by this section need not be writings if records in another medium are generally relied upon in the context.

## **Section 9. Obligation of Good Faith**

The source for this section is s. 671.203, F.S. This section sets forth a basic principle running throughout the UCC. The principle is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. While this duty is explicitly stated in some provisions of the UCC, the applicability of the duty is broader than merely these situations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this Act. It is further implemented by other provisions on course of dealing, course of performance, and usage of trade. This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a

specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

“Performance and enforcement” of contracts and duties within the UCC include the exercise of rights created by the UCC.

### **Section 10. Reasonable Time**

Section (1) makes it clear that requirements that actions be taken within a “reasonable” time are to be applied in the transactional context of the particular action.

Under section (2), the agreement that fixes the time need not be part of the main agreement, but may occur separately. Notice also that under the definition of “agreement” the circumstances of the transaction, including course of dealing or usages of trade or course of performance may be material. On the question what is a reasonable time these matters will often be important.

### **Section 11. Course of Performance; Course of Dealing; Usage of Trade**

This is derived from s. 671.205, F.S. and other sections. This section integrates the “course of performance” concept from other articles of the UCC into the principles of s. 671.205, F.S., which deals with course of dealing and usage of trade. In so doing, the section slightly modifies the articulation of the course of performance rules to fit more comfortably with the approach and structure of s. 671.205, F.S. There are also slight modifications to be more consistent with the definition of “agreement.” It should be noted that a course of performance that might otherwise establish a defense to the obligation of a party to a negotiable instrument is not available as a defense against a holder in due course who took the instrument without notice of that course of performance.

The UCC rejects both the “lay-dictionary” and the “conveyancer’s” reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

“Course of dealing,” as defined in section (2), is restricted, literally, to a sequence of conduct between the parties previous to the agreement. A sequence of conduct after or under the agreement, however, is a “course of performance.” “Course of dealing” may enter the agreement either by explicit provisions of the agreement or by tacit recognition.

The UCC deals with “usage of trade” as a factor in reaching the commercial meaning of the agreement that the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. By adopting in this context the term “usage of trade,” the UCC expresses its intent to reject those cases which see evidence of “custom” as representing an effort to displace or negate “established rules of law.” A distinction is to be drawn between mandatory rules of law such as the Statute of Frauds provisions of Article 2 on Sales whose very office is to control and restrict the actions of the parties, and which cannot be abrogated by agreement, or by a usage of trade, and those rules of law which fill in points which the parties have not considered and in fact agreed upon. The latter rules hold “unless otherwise agreed” but yield to the contrary agreement of the parties. Part of the agreement of the parties to which such rules yield is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.

A usage of trade under section (3) must have the “regularity of observance” specified. The ancient English tests for “custom” are abandoned in this connection. Therefore, it is not required that a usage of trade be “ancient or immemorial,” “universal,” or the like. Under the requirement of section (3) full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes.

The policies of the UCC controlling explicit unconscionable contracts and clauses apply to implicit clauses that rest on usage of trade and carry forward the policy underlying the ancient requirement that a custom or usage must be “reasonable.” However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

Section (4), giving the prescribed effect to usages of which the parties “are or should be aware,” reinforces the provision of section (3) requiring not universality but only the described “regularity of observance” of the practice or method. This subsection also reinforces the point of section (3) that such usages may be either general to trade or particular to a special branch of trade.

Although the definition of “agreement” includes the elements of course of performance, course of dealing, and usage of trade, the fact that express reference is made in some sections to those elements is not to be construed as carrying a contrary intent or implication elsewhere.

In cases of a well established line of usage varying from the general rules of the UCC where the precise amount of the variation has not been worked out into a single standard, the party relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established. In case a dominant pattern has been fairly evidenced, the party relying on the usage is entitled under this section to go to the trier of fact on the question of whether such dominant pattern has been incorporated into the agreement.

Section (7) is intended to insure that this Act’s liberal recognition of the needs of commerce in regard to usage of trade shall not be made into an instrument of abuse.

## **Section 12. Repeal of Statute of Frauds**

The Statute of Frauds “for kinds of personal property not otherwise covered” that appears in s. 671.206, F.S. has been repealed in this bill. The Drafting Committee noted that the other Articles of the UCC make individual determinations as to writing requirements for transactions within their scope, so that the only effect of s. 671.206, F.S. was to impose a writing requirement on transactions not otherwise governed by the UCC. It was decided that it is inappropriate for Article 1 to impose that requirement.

## **Section 13. Option to Accelerate at Will**

Except for minor stylistic changes, this section is nearly identical to s. 671.208, F.S. The common use of acceleration clauses in many transactions governed by the UCC, including sales of goods on credit, notes payable at a definite time, and secured transactions, raises an issue as to the effect to be given to a clause that seemingly grants the power to accelerate at the whim and caprice of one party. This section is intended to make clear that despite language that might be so construed and which further might be held to make the agreement void as against public policy or to make the contract illusory or too indefinite for enforcement, the option is to be exercised only in the good faith belief that the prospect of payment or performance is impaired.

Obviously this section has no application to demand instruments or obligations whose very nature permits call at any time with or without reason. This section applies only to an obligation of payment or performance which in the first instance is due at a future date.

#### **Section 14. Notice; Knowledge**

This section was derived from other sections of the UCC. These provisions are substantive rather than purely definitional. Accordingly, they have been relocated to this new section.

Under section (1), a person has notice when, inter alia, the person has received a notification of the fact in question. The subsection leaves open the time and circumstances under which notice or notification may cease to be effective.

As shown in section (4), the word “notifies” is used when the essential fact is the proper dispatch of the notice, not its receipt. Compare “Send.” When the essential fact is the other party’s receipt of the notice, that is stated. Section (5) states when a notification is received.

Section (6) makes clear that reason to know, knowledge, or a notification, although “received” for instance by a clerk in Department A of an organization, is effective for a transaction conducted in Department B only from the time when it was or should have been communicated to the individual conducting that transaction.

#### **Section 15. Presumptions**

This new section is created dealing with presumptions, however it is essentially unchanged from s. 671.201(31), F.S. This section provides that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

#### **Section 16. Value**

This section is unchanged from s. 671.201(44), F.S., which was derived from other uniform acts. These provisions are substantive rather than purely definitional. Accordingly, they have been relocated from the definition section.

All the Uniform Acts in the commercial law field (except the Uniform Conditional Sales Act) have carried definitions of “value.” All those definitions provided that value was any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a pre-existing claim. Sections (1), (2), and (4) in substance continue the definitions of “value” in the earlier acts. Section (3) makes explicit that “value” is also given in a third situation: where a buyer by taking delivery under a pre-existing contract converts a contingent into a fixed obligation.

This definition is not applicable to Articles 3 and 4 of the UCC, but the express inclusion of immediately available credit as value follows the separate definitions in those Articles. A bank or other financing agency which in good faith makes advances against property held as collateral becomes a bona fide purchaser of that property even though provision may be made for charge-back in case of trouble. Checking credit is “immediately available” within the meaning of this section if the bank would be subject to an action for slander of credit in case checks drawn against the credit were dishonored, and when a charge-back is not discretionary with the bank, but may only be made when difficulties in collection arise in connection with the specific transaction involved.

## Section 17. Electronic Signatures

As a result of the enactment of the Electronic Signatures in Global National Commerce Act ("E-sign") at the federal level, it is now possible to have sale contracts, mortgage instruments, and promissory notes memorialized in electronic form with the electronic signatures of the parties involved in the transaction.

Responding to the specific language of E-sign, this bill is designed to avoid preemption of state law under that federal legislation. This bill modifies, limits, and supersedes E-sign, 15 U.S.C. ss. 7001 et seq.,<sup>21</sup> but this section does not modify, limit, or supersede s. 101(c) of that act,<sup>22</sup> 15 U.S.C. s. 7001(c),<sup>23</sup> or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).<sup>24</sup>

## Section 18. Subordinated Obligations

Billions of dollars of subordinated debt are held by the public and by institutional investors. Commonly, the subordinated debt is subordinated on issue or acquisition and is evidenced by an investment security or by a negotiable or non-negotiable note. Debt is also sometimes subordinated after it arises, either by agreement between the subordinating creditor and the debtor, by agreement between two creditors of the same debtor, or by agreement of all three parties. The subordinated creditor may be a stockholder or other "insider" interested in the common debtor; the subordinated debt may consist of accounts or other rights to payment not evidenced by any instrument. All such cases are included in the terms "subordinated obligation," "subordination," and "subordinated creditor."

Subordination agreements are enforceable between the parties as contracts; and in the bankruptcy of the common debtor dividends otherwise payable to the subordinated creditor are turned over to the superior creditor. This "turn-over" practice has on occasion been explained in terms of "equitable lien," "equitable assignment," or "constructive trust," but whatever the label the practice is essentially an equitable remedy and does not mean that there is a transaction "that creates a security interest in personal property . . . by contract" or a "sale of accounts, chattel paper, payment intangibles, or promissory notes." On the other hand, nothing in this section prevents one creditor from assigning his rights to another creditor of the same debtor in such a way as to create a security interest within Article 9, where the parties so intend.

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<sup>21</sup> The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., was enacted on June 30, 2000. Congress enacted the Act, "to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. *Executive Summary*, (last visited Mar. 6, 2006) <<http://www.ftc.gov/os/2001/06/esign7.htm>>.

<sup>22</sup> In the Electronic Signatures in Global and National Commerce Act Congress:

imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1) of the Act provides that information required by law to be in writing can be made available electronically to a consumer only if he or she affirmatively consents to receive the information electronically and the business clearly and conspicuously discloses specified information to the consumer before obtaining his or her consent.

*Executive Summary*, (last visited Mar. 6, 2006) <<http://www.ftc.gov/os/2001/06/esign7.htm>>.

<sup>23</sup> 15 U.S.C. s.7001(c) states that a consumer's consent to receive electronic records is valid only if the consumer has affirmatively consented and prior to the consent, he or she was provided a clear and conspicuous statement outlining the consumer's rights.

<sup>24</sup> 15 U.S.C. s.7003(b) excludes from the Electronic Signatures in Global and National Commerce Act "court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings" and notices of: cancellation of utility services; defaults or foreclosures or other such proceedings on a primary residence; cancellation or termination of health or life insurance; or recall of a product because of health or safety issues, or documents required to transport toxic or dangerous materials.

The enforcement of subordination agreements is largely left to supplementary principles under s. 671.103, F.S.

### **Miscellaneous Provisions**

The bill has a number of miscellaneous provisions not directly contained within the UCC. One such provision removes documents under ch. 679, F.S. from the requirement that they be filed with the Department of State. A second such provision requires the governing body of the Seminole Tribe of Florida or the Miccosukee Tribe of Indians to file certain records relating to secured transactions with the central filing office.

#### Florida Secured Transaction Registry

The bill modifies s. 679.527, F.S. which established the Florida Secured Transaction Registry ("FSTR"). The FSTR is a centralized database in which financial statements are filed to register the secured party's interest in a loan secured by non-titled property. In 2001, the Department of State ("department") privatized the process of filing and maintaining the Florida Secured Transaction Registry, but the department retained sole and exclusive ownership of the materials and records of the registry. The department also has the right of reclaiming the registry if the private contractor does not perform the contract or becomes insolvent.<sup>25</sup>

The bill defines the term FSTR to mean the centralized database in which all initial financing statements, amendments, assignments, and other statements of change authorized to be filed under this chapter are filed, maintained, and retrieved. The department will appoint a central filing office for the FSTR. When appointing a filing office, the department must require that office to provide for the organization of the FSTR; and that the registry be public and accessible from the Internet. The central filing office will be a private nongovernmental entity and it will not be subject to the provisions of law that apply to governmental operations. The bill permits the registry to certify copies of financing statements, and permits the registry to retain the fees it collects to run its operation. This bill further removes the sole and exclusive ownership, right of reclamation, and other governmental oversight provisions of the department.

#### Fees

The bill also reduces the filing fees required for filing documents with the FSTR. Two fees for \$25 and \$30 dollars are reduced to \$15 dollars. These are fees to filing an initial financing statement and for obtaining certified copies of financing statements. See fiscal comments.

The bill also specifies fees under the Florida Uniform Federal Lien Registration Act, s. 713.901, F.S., that were previously provided through cross-references.

#### C. SECTION DIRECTORY:

Section 1 amends s. 15.16, F.S. to remove provision requiring certain records to be filed with the Department of State.

Section 2 amends s. 285.20, F.S. requiring the governing body of the Seminole Tribe of Florida or the Miccosukee Tribe of Indians to file certain records with the central filing office.

Section 3 amends s. 671.101, F.S. by providing a chapter and a short title

Section 4 amends s. 671.102, F.S. to authorize certain timeframes to be fixed by agreement and making editorial changes.

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<sup>25</sup> Section 679.527(4), F.S.

Section 5 amends s. 671.106, F.S. making minor grammatical changes.

Section 6 amends s. 671.107, F.S. providing for the discharge of a claim or right under certain circumstances.

Section 7 amends s. 671.201, F.S. providing, revising, and deleting definitions.

Section 8 amends s. 671.202, F.S. making an editorial change.

Section 9 amends s. 671.203, F.S. making an editorial change.

Section 10 amends s. 671.204, F.S.; revising criteria determining when an action is taken within a reasonable time and seasonably.

Section 11 amends s. 671.205, F.S.; defining "course of performance."

Section 12 repealing s. 671.206, F.S., relating to statute of frauds for kinds of personal property not otherwise covered.

Section 13 amends s. 671.208, F.S. making editorial changes.

Section 14 creates s. 671.209, F.S. to provide definitions; specifying when notice, knowledge, or notification becomes effective with the exercise of due diligence.

Section 15 creates s. 671.210, F.S. to provide that whenever the code creates certain presumptions, the trier of fact must find the existence of the fact presumed unless and until evidence is introduced that supports a finding of its nonexistence.

Section 16 creates s. 671.211, F.S. to provide in what instances a person gives value for rights.

Section 17 creates s. 671.212, F.S. to provide that the code modifies, limits, and supersedes certain provisions of the federal Electronic Signatures in Global and National Commerce Act.

Section 18 creates s. 671.213, F.S. authorizing the subordination of certain obligations.

Section 19 amends s. 671.301, F.S. by revising the effective date of the act.

Section 20 amends s. 679.5011, F.S. to require certain financial statements to be filed with the central filing office; authorizing the "Florida Secured Transaction Registry" to certify a copy of certain financing statements and providing for their admissibility.

Section 21 amends s. 679.525, F.S. reducing the amount of certain processing fees; authorizing the registry to use the fees collected to fund its operations.

Section 22 amends s. 679.527, F.S. relating to the Florida Secured Transaction Registry; revising the duties of the Department of State; providing requirements for a central filing office; providing that the central filing office will be a private nongovernmental entity and will not be subject to the provisions of law that apply to government operations.

Section 23 amends s. 679.705, F.S. by extending the time that a financing statement filed under previous law is effective.

Section 24 repeals ss. 15.091, 679.521, and 679.526, F.S.

Section 25 amends s. 319.27, F.S. conforming cross-references.

Section 26 amends s.559.9232, F.S. conforming cross-references.

Section 27 amends s.563.022, F.S. conforming cross-references.

Section 28 amends s. 668.50, F.S. conforming cross-references.

Section 29 amends s. 670.106, F.S. conforming cross-references.

Section 30 amends s. 670.204, F.S. conforming cross-references.

Section 31 amends s. 675.102, F.S. conforming cross-references.

Section 32 amends s. 679.1021, F.S. conforming cross-references.

Section 33 amends s. 680.1031, F.S. conforming cross-references.

Section 34 amends s. 680.518, F.S. conforming cross-references.

Section 35 amends s. 680.519, F.S. conforming cross-references.

Section 36 amends s. 680.527, F.S. conforming cross-references.

Section 37 amends s. 680.528, F.S.; conforming cross-references.

Section 38 amends s. 713.901, F.S.; specifying fees under the Florida Uniform Federal Lien Registration Act previously provided through cross-reference, reducing a fee and deleting a cross-reference to conform to changes made by the act.

Section 39 providing an effective date of January 1, 2007.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

This bill reduces UCC filing fees charged to the public. See chart below in Fiscal Comments.

### **D. FISCAL COMMENTS:**



It is unclear how this bill can reduce current filing fees in the Florida Secured Transaction Registry by nearly half in some situations, yet there is no fiscal impact. Section 679.525(1)(a), F.S. currently provides the following fee schedule for filings:

Description of Processing Fee	Fee
Initial financing statement	\$25 for the first page
An amendment	\$12 for the first page.
Indexing	\$3 per additional name indexed
Use of a nonapproved form	\$5
Additional page attached to a record	\$3
A financing statement communicated by an electronic filing process authorized by the filing office	\$15 with no additional fees.
Filing an amendment communicated by an electronic filing process authorized by the filing office	\$5 with no additional fees for multiple names or attached pages
For a certified copy of a financing statement and any and all associated amendments	\$30.

The bill amends fees to:

Description of Processing Fee	Fee
Initial financing statement	\$15 for the first page
An amendment	\$8 for the first page.
Indexing	\$2 per additional name indexed
Use of a nonapproved form	\$3
Additional page attached to a record	\$2
A financing statement communicated by an electronic filing process authorized by the filing office	\$8 with no additional fees.
Filing an amendment communicated by an electronic filing process authorized by the filing office	\$3 with no additional fees for multiple names or attached pages
For a certified copy of a financing statement and any and all associated amendments	\$15.

The current fees collected by the Department of State are used to pay the private contractor and cover the department's expenditures. It is unclear how the decrease in fees coupled with complete privatization will effect the state revenues and expenditures.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

The bill provides that the central filing office will be a private nongovernmental entity and it will not be subject to the provisions of law that apply to governmental operations. This appears to be a public records exception within a substantive bill; which would be prohibited by the Florida Constitution.

Article I, s. 24(a), of the Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature may,

however, provide by general law for the exemption of records from the requirements of Art. I, s. 24(a), of the Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose. Public policy regarding access to government records is also addressed s. 119.07(1), F.S.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The bill modifies s. 679.527, F.S. which established the Florida Secured Transaction Registry ("FSTR"). The FSTR is a centralized database in which financial statements are filed to register the secured party's interest in a loan secured by non-titled property. In 2001, the Department of State ("department") privatized the process of filing and maintaining the FSTR, but the department retained sole and exclusive ownership of the materials and records of the registry. This bill removes the sole and exclusive ownership, right of reclamation, and other governmental oversight provisions of the department.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

On March 28, 2006, the Civil Justice adopted four amendments to the bill. Three of the amendments addressed substantive issues by:

- Removing the provisions of the bill deleting the Florida Secured Transaction Registry.
- Providing that the Department of State has the authority to appoint a central filing office for the secured transaction registry.
- Providing that the central filing office is a nongovernmental agency.
- Slightly increasing UCC filing fees charged to the public.
- Providing for the organization of the Florida Secured Transaction Registry.

The bill was then reported favorably with a committee substitute.