MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-third Session
March 31, 2005

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 8:08 a.m. on Thursday, March 31, 2005, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven A. Horsford

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Kelly Lee, Committee Counsel
Gale Maynard, Committee Secretary

OTHERS PRESENT:

Frank W. Daykin, Attorney
William R. Uffelman, Nevada Bankers Association
Ted Kitada, Senior Counsel, Law Department, Wells Fargo and Company
Raymond Bacon, Nevada Manufacturers Association
Tara Plimpton, General Counsel, Optimization Service, General Electric Energy Services
Charles Keeton, Attorney, Frost Brown Todd, Limited Liability Company
Jean Braucher, Professor, James E. Rogers College of Law, University of Arizona; Americans for Fair Electronic Commerce Transactions
David Munsey, Senior Attorney, Intel Corporation
Mary Lau, Retail Association of Nevada
George A. Ross, Las Vegas Chamber of Commerce

Fred L. Hillerby, American Council of Life Insurers

CHAIR AMODEI:
Senator Care, we have been waiting for these bills to come before us and proceed in any manner you see fit.

SENATOR TERRY CARE (Clark County Senatorial District No. 7):
There are four bills pertaining to uniform state laws; three of the bills combine to contain six of the revised articles of the Uniform Commercial Code (UCC). I will like to give an overview of the UCC and talk about the revised articles and the Uniform Partnership Acts. Mr. Daykin will discuss Articles 3 and 4 of the UCC.

CHAIR AMODEI:
For the record, Senator McGinness is the only member of the Committee in attendance who is neither a lawyer nor attended any law school.

SENATOR CARE:
I am here in my capacity as a uniform law commissioner and I think the people in this room largely understand how this works. Each state has commissioners who come from state or federal trial and appellate court judges, sometimes law professors, practitioners, legislators, or legislative counsels and sometimes from the offices of the various attorneys general. They meet once a year, usually in a major city, for eight days and vote to approve or not approve certain drafting of uniform acts. If an act is adopted, it is then the mission of each commissioner to return to his or her state and attempt to get the bill enacted.

Most of the bills go through a two-year drafting period; sometimes, it is longer and thoroughly reviewed. Under this capacity, I bring these bills to you this morning. The UCC is extremely important if you represent a multi-billion dollar corporation. Due to the various deadlines in this Legislative Session, and having to have all bills out of Committee by April 15, it was necessary to get these bills heard. Everyone who wanted to testify could not be here. Representatives from the National Conference of Commissioners on Uniform State Laws (NCCUSL) will be here on April 11 and 12. I went to several people who I knew had clients interested in these Acts and told these representatives that I would like to give an overview of these bills, but have their clients get their objections on the record. Sometime before the April 15 deadline, a negotiating session may be

possible to see if any of the objections to these revised Acts can be worked out in order to process these bills.

I would like to go through each of these bills, and then anyone who wants to testify may do so.

SENATOR WIENER:
As you are a commissioner from Nevada, are you required to be an attorney due to the complexities of these bills?

SENATOR CARE:
You cannot be a commissioner unless you are an attorney.

SENATOR WIENER:
With the changes from both proponents and opponents, what happens to the uniformity of the laws in these Acts?

SENATOR CARE:
With Senate Bill (S.B.) 201, changes are made frequently. Eight states have adopted revised Article 1; in one case, all eight states have ignored specific language in revised Article 1; and in another part of that same Article, those same eight states have split. This is not an attempt to say this is the exact way of doing things. The National Conference knows that each state may have its own needs. If not uniformity, then similarity would be a better way to describe it.

SENATE BILL 201: Revises provisions of Articles 1 and 7 of Uniform Commercial Code. (BDR 8-357)

SENATOR CARE:
The UCC is about 113 years old. In that time, Nevada has adopted 105 of the Uniform Acts. The UCC is codified as *Nevada Revised Statute* (NRS) 104 and NRS 104A.

The UCC is a way the states uniformly govern various business transactions. There are Articles governing sale of goods, leases, negotiable instruments, letters of credit, bank collections, security investments and transactions, bills of lading and documents of titles. These different types of transactions all fall under a particular Article and are all under commerce.

Times change, and therefore, the Conference deems it necessary to explore the possibility of revising certain parts of the Articles that has led to the six revised Articles before the Committee.

Article 1 (Exhibit C) is like an operator's manual for the remaining Articles of the UCC. It governs the transactions covered in the other Articles. Article 1 is used to help interpret the intent of the remaining Articles, unless there is a similar provision in one of the other Articles.

Eight states including the Virgin Islands have adopted the revisions in Article 1, and a number of other states are looking to do the same. There are also debates on these issues which center on choice-of-law provisions. I believe the eight states that adopted the revisions have ignored the revised version of UCC Article 1. You may be familiar with "choice of law" where two parties enter into a transaction, and in the event of a dispute, some question may arise as to what law governs the transaction that crosses state lines. Generally, the code looks for a relationship between the transaction and a particular jurisdiction. Not all states agree with the choice of language. "Good faith" seems to be another point of contention. The states seem to be split on the distinction of good faith of a merchant and good faith of a buyer or consumer of goods. There is also discussion on the scope of revised Article 1.

I have been working and corresponding with Keith A. Rowley, Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas, who has written an article on this (Exhibit D, original is on file at the Research Library). Generally, this commentary is what Article 1 and revised Article 1 is supposed to do.

Sometimes, the languages in these Articles are old, and when you get into the new technologies, it is necessary to update the Articles. Generally speaking, Article 1 is the operator's manual and the reason for the changes. There may be people who want to testify in opposition to Article 1 about the issues that I have risen.

Revised Article 7 is contained in the same bill as Article 1, S.B. 201, and is a little more than 50 years old and relates to bills of lading, warehouse receipts and documents of title. Another way to look at it is this: goods are manufactured, shipped and handled several times along the route. Article 7 is intended to make clear who controls those goods as they are handled toward

their final destination. The purpose of revising Article 7 (Exhibit E) is because documents such as bills of lading can be done electronically. I am unaware of any opposition to the revisions.

I would like to move onto Senate Bill 198 which contains Articles 3 and 4. I am presenting a fact sheet pertaining to these Articles (Exhibit F).

SENATE BILL 198: Revises provisions of Articles 3 and 4 of Uniform Commercial Code. (BDR 8-542)

SENATOR CARE:
I knew the bankers would be interested in these Articles. I will turn over this part of the discussion to Mr. Daykin.

FRANK W. DAYKIN (Attorney):
I am one of the commissioners on Uniform State Laws. Articles 3 and 4 respectively deal with negotiable instruments, bank deposits and collections. They have been revised more than Articles 2 and 2A. The principle reason behind the revisions has been to bring terminology up to date and to introduce new instruments being used.

I will not take you through S.B. 198 line by line, but I will mention a point in the bill. The bankers would like to introduce a new type of instrument. Without involving the Committee with the mechanics of the language, I fear this new type of instrument introduction would impede the other definitions in the code since 1957. It would confuse not only the reader, but eventually this would confuse the courts. If we can draft statutes in a way to avoid litigation, then that is the best approach.

I was not a part of any of the drafting committees, but the NCCUSL has it right. If the Legislature decides the Conference does not have the language correct, I would be glad to work with any committee or subcommittee in drafting language that will work.

CHAIR AMODEI:
In order to provide some continuity to this, we might need to get the objections heard in order to connect them with the bill.

SENATOR CARE:
That would be fine, and if this would work better for the Committee, I have no objections.

WILLIAM R. UFFELMAN (Nevada Bankers Association):
I thank Senator Care for giving us the opportunity to review the revised language, and we have discussed it at some length. If you look at S.B. 198 on page 3, line 15, you will notice how they have defined a "remotely-created consumer item." In a nutshell, the focus on the consumer is the significant objection of the American Bankers Association and the Nevada Bankers Association to Articles 3 and 4. The fact is the transactions as revised have focused on the consumer portion. I have a gentleman from Wells Fargo who is more knowledgeable about these issues than myself.

TED KITADA (Senior Counsel, Law Department, Wells Fargo and Company):
My specialty is deposit accounts and negotiable instruments, and I have dealt with the UCC for about 30 years. One of the concerns about the proposed changes to Articles 3 and 4 relates to remotely-created consumer items; it becomes a challenge for the banking industry to differentiate between a remotely-created consumer item and a remotely-created item that may not have been used by consumers. Please see the supplemental information pertaining to remotely generated checks (Exhibit G).

Articles 3 and 4, as proposed by the NCCUSL to my knowledge, have been adopted in one state. It was adopted by Minnesota in their session laws of 2003, chapter 81. Minnesota adopted "remotely-created items," not "remotely-created consumer items," and made no differentiation affording rights under "remotely-created items" as to both consumers and businesses.

In 1762, under a case in England, *Price v. Neal*, a paying bank is responsible for knowing its customer's signature. This responsibility is codified in the law. If a check bears an unauthorized signature, that paying bank would normally bear the loss unless it can timely return that item. However, in the 1980s and 1990s, we saw telemarketers develop what we, at the state level, call demand drafts. Demand drafts are drafts prepared by telemarketers against consumer accounts at the instruction of the consumer in connection with telephone solicitation.

These items bear no signature of the consumer, and with automated processing, they have been paid against consumers. These consumers did not strictly speak and authorize them, because they bear no signature of the customer. If the transaction was disputed by the customer, the transaction had to be borne as a loss by the paying bank despite the fact that the depository bank is in a better position than the paying bank to know its customer and to know if it has deposited these demand drafts. As a result, starting in 1996, California adopted laws that say when demand drafts are involved, the depository bank must bear responsibility. It must warn that these items have been authorized.

Fourteen states have followed California's lead and have introduced and adopted legislation, and other states have entertained California's proposal. In response to this problem, the NCCUSL also amended Articles 3 and 4 to propose what it calls remotely-created consumer items. Because of the challenge in differentiating between consumers and business transactions, there is no sound policy why businesses cannot have the same benefits as consumers with regard to these unauthorized transactions. Minnesota adopted Articles 3 and 4, but adopted them with the change of remotely-created items, affording this protection to consumers and businesses.

On March 4, the Board of Governors of the Federal Reserve System proposed a change to Regulation CC which was adopted by the Board under the Expedited Funds Availability Act. This same principle started with California's demand drafts, followed by NCCUSL with remotely-created consumer items and Minnesota with remotely-created items. This concept is sound, and the Board is proposing a change to Regulation CC to provide for remotely-created checks. Even if states incrementally do not kindly adopt legislation about remotely-created consumer items, we will shortly see this principle being adopted as remotely-created checks at the national level. This proposal is outstanding and comments are due by May 3. We will have a national rule on this subject affording protection to consumers and businesses because the federal proposal gives protection to everyone.

CHAIR AMODEI:
Is this your information the Committee has before us?

MR. KITADA:
Yes, it is. Exhibit G is a March 1 press release by the Federal Reserve with regard to remotely-created checks. This proposal was published in the Federal

Register on March 4. This is the idea of nationalizing the law with regard to remotely-created items.

CHAIR AMODEI:
Looking at the information starting on page 3 of Exhibit G referring to the UCC and the matters you have summarized, is it your testimony that the federal government, through these proposed changes, will be the law for purposes of these documents nationally?

MR. KITADA:
Yes. It will be a national rule applicable to bankers throughout the nation.

CHAIR AMODEI:
Do you have anything else on Articles 3 and 4 in S.B. 198?

MR. KITADA:
No. Not at this time.

SENATOR WIENER:
Traditionally, a check requires a signature. Could you tell me how this works with remotely-created checks?

MR. KITADA:
A check normally requires the signature of the paying bank's customer. This is the way an order is given by the customer. A customer may, through a telephone solicitation, order a product over the telephone and the telemarketer, in order to get paid, will create a draft that will not bear the signature of the customer, but it will have micro lines, or magnetic-ink character recognition at the bottom of the draft. As a practical matter, because checks are posted by automated means and bear that micro line, they will be paid by the paying bank, and the bank will not know unless the customer later complains about the transaction. This is how these transactions occur. Because the paying bank is not in a position to look at each signature, as it was done many years ago, these items are automatically posted.

Interestingly, there are protections for a credit card and the losses will be addressed. Checks, however, are different; in referring to 1762 in England, the paying bank is responsible for knowing the signature of its customer. If that item bears no signature or is unauthorized, it becomes a loss of the paying bank

unless it can return the item promptly within the midnight deadline. These transactions are processed quickly or it becomes impossible.

For example, during every banking day, Wells Fargo processes anywhere between 12- to 16-million checks, and it becomes a challenge for us to handle.

SENATOR WIENER:
Mr. Uffelman and I are working on one of my bills in regard to opt-out provisions in credit cards and we have more work due to this dilemma.

MR. DAYKIN:
You have heard an explanation on Articles 3 and 4 of S.B. 198, and the best approach proposed is by placing it into a subcommittee. We can get people out from the Chicago office of the UCC who are better prepared, technically, to discuss this. If the subcommittee reaches a conclusion to either adopt or change, we will work with you.

CHAIR AMODEI:
Committee Members, if there are no objections I will put S.B. 198 in a subcommittee consisting of Senator Care, who will be the Chairman, and I will also serve on this committee. I appreciate the involvement of the people from Chicago. We are working against an April 15 deadline to hear all bills; therefore, I will make the resources of the Committee available for telephone conferencing prior to this with Mr. Uffelman and Mr. Kitada or for anyone who has an interest to get this process started before April 11.

SENATOR CARE:
I will get this message to Chicago today.

CHAIR AMODEI:
We will close the hearing on S.B. 198 and open the hearing on S.B. 200.

SENATE BILL 200: Revises provisions of Articles 2 and 2A of Uniform Commercial Code. (BDR 8-541)

CHAIR AMODEI:
For the record, these bills have generated a lot of interest around the nation and this includes letters from the following: Kathleen Harrington, Law Librarian, Nevada Supreme Court, representing the Nevada Law Librarians Association

(Exhibit H); Barry Murphy, Senior Manager, State Government Affairs, Microsoft Corporation (Exhibit I); Holly K. Towle, Washington Legal Foundation, Advocate for freedom and justice, Volume 18, No. 16 (Exhibit J) and Volume 20, No. 6 (Exhibit K); and a paper titled, "Opposing Adoption of Revised UCC Article 2" (Exhibit L).

SENATOR CARE:
The correspondence is not surprising. Article 2 governs goods while Article 2A governs leases. Article 2 has been around for almost a century and was adopted by the National Conference in the early 1950s. Article 2A came later, possibly in the 1970s or early 1980s. When we talk about Article 2A for leases, we are not talking about apartment buildings or office buildings, we are referring to lease of goods. In Article 2, we are talking about sale of goods.

Article 2 has been adopted by virtually everyone, but Louisiana may be an exception. Here, again, is an attempt by the NCCUSL to say it is time for updates. A lot of this change has to do with the way business is conducted electronically.

It is true that NCCUSL adopted revised Article 2, in 2003, and Kansas is the other state that introduced it. Mr. Bacon informed me that not only is this now in a subcommittee, but there is feeling Nevada is not the place to start with this; there would be more comfort in states that do more commerce such as California, New York or Michigan. If these states had adopted the revised Article 2, it would be more acceptable in Nevada. The argument is because it is new, Nevada is not the place. I do not agree with this. It has to start somewhere, and as a commissioner, I volunteered to introduce the revised Article 2.

I do not think there is much opposition to the revised Article 2A, although it is difficult to imagine the adoption of one without the other. Again, there has been an increase of businesses with leases, and we present an article that governs those. As businesses become more modern and transactions are done electronically, there are reasons for updates. I present written fact sheets pertaining to amendments to UCC Articles 2 and 2A (Exhibit M).

Regarding Article 2, although the Conference sat down and came up with its revisions after a lengthy process, some may already be obsolete and there may be testimony to this issue. I will let the opponents to this bill speak and once again, I am not surprised by the correspondence.

MR. DAYKIN:
Louisiana did adopt Articles 2 and 2A in their entirety.

RAYMOND BACON (Nevada Manufacturers Association):
The Nevada Manufacturers Association became aware of this issue in 2001. I have written a letter pertaining to Articles 2 and 2A (Exhibit N) regarding our concerns. We realize the biggest danger of these revisions is not so much the major corporations that have the assets and the resources to deal with these issues, but what happens if you change the rules and terms. Free on board and some of the other standard terms we have used for a long time are eliminated with the changes in Article 2 and not replaced with the international terms because the international terms are not adopted as a reference: therefore, the terminology used in commerce now changes. Major companies will understand this and make the appropriate changes, but the small companies will find themselves in situations where the laws thought to be in place are now gone and replaced by something else.

We could follow the lead of our counterparts in Mississippi, Alabama and Florida to become a haven for the trial bar to bring lawsuits because of the language.

TARA PLIMPTON (General Counsel, Optimization Service, General Electric Energy Services):
I am here to remind the Committee about General Electric's (GE) long presence in Nevada with the medical, National Broadcasting Company and the GE Capital Corporation businesses. In January 2002, as Mr. Bacon stated, GE purchased Bently Nevada, and since that time, Bently Nevada has grown over 30 percent. We have almost 1,000 employees currently in Northern Nevada and continue to be the headquarters for a much larger GE business that is global in over 100 countries throughout the world.

Opposition to the revisions of Article 2 of the UCC is important to GE in order to continue our present growth.

I would like to introduce Charles Keeton who is one of the leading experts on the UCC. He is a 30-year commercial lawyer, a partner at Frost Brown Todd and a professor of commercial law who has attended every NCCUSL meeting on this subject matter since 1994. It is disappointing that a NCCUSL representative could not be here today so the Committee could hear dialog between

Mr. Keeton and them. We would be glad to have Mr. Keeton return on April 11 or 12, if you have another Committee meeting with NCCUSL at that time.

CHARLES KEETON (Attorney, Frost Brown Todd, Limited Liability Company):
I am speaking today on behalf of the General Electric Company which is one of the world's largest and most innovative industrial, financial and business concerns. The General Electric Company is concerned about S.B. 200, has made significant investments and commitments in Nevada and is an important economic stimulus to the State. If Nevada were to adopt the amendments to the bill, the economic stimulus would be more negative than positive.

Article 2 is the most widely applicable statute that each of us encounters. It applies to business transactions on a daily basis and also to the lives of consumers. It affects everything, from buying goods at Wal-Mart to the sophisticated long-term purchasing arrangement which is the lifeblood of modern businesses.

Any amendment of Article 2 can have a profound impact on how businesses operate and can come with significant costs. Article 2 is not only pervasive, but it is the most successful statute ever enacted. As mentioned by Mr. Daykin, it was adopted in Louisiana. One of the primary goals has been to facilitate commerce by making commercial law uniform among the 50 states, and it has been successful. In addition, the 40 to 50 years of case law developed to help interpret the statutory language must be considered. Any amendment will come at great cost, and those costs must be offset by significant benefits in order to be justified.

General Electric and I have been involved in the Article 2 amendment process for over ten years. We recognize the hard work done by the drafting committees, reporters and both advisers and observers. The General Electric Company has studied the proposed amendments as they have evolved over 15 years and has concluded the proposed amendments are flawed. Rather than improve on current law, they would reduce the ability of contracting parties to rely upon their contracts, interfere with the flexibility and balance between buyers and sellers found in Article 2 and impose unwarranted obligations on sellers. This would lead to greater transactional uncertainty, reduce innovation and product improvement, and increase costs to buyers and sellers alike. No amount of tweaking will fix the proposed amendments.

Those arguments that Article 2 needs updating for the modern era, especially for e-commerce transactions, are a reason for the initial look at a need for the amendments. The e-commerce provisions in the proposed amendments are themselves largely not helpful. They point to law outside of Article 2 for resolution of important issues and provide no additional guidance and help in forming or executing e-commerce transactions.

What little there is in the Article 2 amendments addressing e-commerce can be accomplished through other means. As an example, the Uniform Electronic Transactions Act already addresses a number of issues in the e-commerce provisions of S.B. 200. Most importantly, the great success that Article 2 has had in creating uniformity among the states would be in jeopardy due to the proposed amendments. Significant opposition to the proposed amendments exists. Senator Care and Chair Amodei, both of you have received information in opposition.

No business, commercial or consumer group has supported adoption of the proposed amendments. Scores of businesses have studied the proposed amendments, found that they would harm rather than improve commercial law and have gone on the record in opposition.

CHAIR AMODEI:
We have talked about putting these measures into a subcommittee to allow the interaction you have described. It is clear with your testimony that you do not see much redeeming value with S.B. 200, but you did indicate some areas where it can be tuned up through different legislation. We also heard testimony about the Federal Reserve System getting involved in some of the electronic funds transfers. What do you see, if anything, as a benefit from subcommittee work on the proposed amendments to S.B. 200?

MR. KEETON:
In my view, it would not be productive to work on this in a subcommittee, especially given the time constraints. As indicated, I have attended three dozen or more draft committee meetings in a ten-year period. Each of those committees start and go all day Friday and then all day Saturday until noon on Sunday. This happens three to five times per year. You get the picture. Obtaining a remedy for this problem in the next two weeks is difficult at best.

CHAIR AMODEI:
You mentioned certain areas where you thought something could be done, but not in the context of adopting a new Article 2 or Article 2A. Do you have any thoughts in this area?

MR. KEETON:
The Uniform Electronics Transactions Act (UETA) adopted by Nevada remedies most of the updating necessary for e-commerce in the Article 2 area.

CHAIR AMODEI:
You have given us your thoughts on Article 2 and subcommittees. I would ask you to give us your bottom line.

MR. KEETON:
In summary, I am reminded of the Hippocratic Oath. It says, "Do no harm," and is the principle we hope this Committee takes in its consideration of S.B. 200. Existing Article 2 is not perfect, but its imperfections have been long with us, and we have had four to five decades to understand and develop solutions for them. There is no evidence Article 2 is broken and needs to be fixed.

JEAN BRAUCHER (Professor, James E. Rogers College of Law, University of Arizona; Americans for Fair Electronic Commerce Transactions):
I have taught commercial law for 24 years, including Article 2, and was on the drafting committee for Article 2A. I am speaking today for Americans for Fair Electronic Commerce Transactions (AFFECT), a nationwide coalition of customers of digital products including software and content. The members of AFFECT include consumers, libraries and businesses as customers of software. The business contingent of AFFECT includes insurance companies and large manufacturers.

We oppose the amendments to Article 2 as only creating more uncertainty, and we agree with Mr. Keeton. Current Article 2 is not perfect, but it is better than the amendments. We have three main objections to the amendments. The first in section 8 of S.B. 200 referring to the definition of goods on page 7, line 12, is a new exclusion of undefined information from the definition of goods covered by Article 2. This exclusion of information without any alternative provided leaves the courts to work out whether software or hard goods including software are covered by Article 2.

The next objection to S.B. 200 is in section 16, on page 12, where it fails to clearly require advance disclosure of important terms in contracts and leaves it to the courts to decide if there is agreement to delayed terms such as terms in the box, shrink wrap or click wrap in the digital context—terms not provided before order and delivery.

The last objection to S.B. 200 is in section 14 on page 11, and this would only confuse the law of electronic transactions. This bill is not necessary to facilitate electronic commerce; Nevada already has the UETA along with the federal e-sign bill and plenty of enabling legislation for electronic commerce. You do not need more provisions in Article 2 that are confusing. Nevada Revised Statute 104.2204 seems to validate delayed clicking as the way to make a contract; it is related to NRS 104.2207 and we object to this also.

No state has enacted this part of revised Article 2. At present in the United States, there is a high degree of uniformity on the law of sales, and all 50 states have enacted Article 2 with only small, nonuniform amendments. If you enact this, you will actually reduce uniformity and could be alone. The main result in the short-term would have many contracts stating "in no event will Nevada law apply," because no affected interest wants this. It only brings new uncertainty, solves no problems and brings no efficiency to the law. As a comparison, revised Article 9 which was adopted a few years ago had consensus support because it reduced the cost of filing security-interest financing statements. It had efficiency gains for lenders and borrowers. In contrast, amended Article 2 has no gains and you cannot point to anything that it will solve or improve. The UETA has already done the enabling job on electronic commerce. This statute will set things back. In regard to fixing this, our position is no. We should leave this alone; maybe some larger state will take on this Article, but it would be a major project to solve all the problems.

In S.B. 201, we oppose section 15 which is the unlimited choice-of-law provision in Article 1. The Americans for Fair Electronic Commerce Transactions prefer to keep the reasonable-relationship test in current law wherein the law chosen has to bear some reasonable relationship to transaction.

We have submitted a letter from Professor William J. Woodward, Jr., Temple University, Beasley School of Law that involves substitute language (Exhibit O). Basically, this leaves the law as is with the reasonable-relationship test. We are concerned about the unlimited choice-of-law provision because it might facilitate

choice of a jurisdiction that has adopted the Uniform Computer Information Transactions Act (UCITA) which has been adopted in only two states, Maryland and Virginia. Through choice-of-law clauses, it might end up applying to Nevada companies and residents although you may not have chosen to adopt UCITA. This is one reason for opposing unlimited choice of law.

DAVID MUNSEY (Senior Attorney, Intel Corporation):
I have a prepared statement (Exhibit P), but I will be brief in my summary. My primary concern with revised Article 2 is the impact it will have on purchasing and buying of goods. I attended some of the Article 2 drafting committee sessions and witnessed the Article 2 drafting process. I have a short comment as to why there is little support for these amendments. The process has been in the works since 1991 and has, from the beginning, resulted in a polarized approach resulting in a stalemate. In 1999 it reached a stage where the drafting committee was reconstituted due to little progress after working on this for eight years. The new committee could not come up with a reasonable work product that would satisfy either the consumer interests or industry interests. Despite the opposition by almost everyone to the current draft, it processed through the NCCUSL committees, was approved by the American Bar Association committees, again over much opposition, and now is being presented in Kansas and Nevada.

We view this as an unfortunate failure of the process. Many NCCUSL activities are productive. The UCC has been with us for many years and was a worthwhile process, but these amendments are a failure.

I could give examples as to how this would adversely impact commercial law. One of the ways is through “remedial promise” which is a promise to repair, replace or refund upon the happening of an agreed upon event. This is something in addition to a warranty. If a warranty was expired and the manufacturer agreed to offer some remedial support for a product, this creates a new class of unknown and undefined remedies, and the impacts are unclear. The drafting committee attempted to deal with a statute-of-limitation problem in some consumer claims, and as a result, there is this massive, new potential liability to manufacturers and sellers. We view this law with unintended consequences where they tried to fix a problem that would result in a cause for class-action lawsuits.

Other examples included are embodied in statute as provisions which allow any affirmation of fact, promise, description or remedial promise made in advertising or similar communication to the public to create a warranty-like obligation. A few states have done this, but the rule is that general information to the public does not create an expressed warranty. The changes to Article 2 will create this. Essentially, any information provided to the general public may be deemed as an expressed warranty to a remote buyer.

From an Intel context, if we put several hundred pages of basic, detailed application notes for a product on a Web site, never intending the information as a warranty, under revised Article 2, we believe this could be deemed a warranty-like obligation and a cause of action could result in a class-action lawsuit. We perceive this to be a major expansion liability. These problems permeate the entire draft. In reference to class-action lawsuits, Article 2 would remove a notice requirement. Under current law, potential plaintiffs have to give notice of a perceived problem to the defendant before they certify the class. With this change, Article 2 removes the need for notice. As a manufacturer or seller, we could have consumers who believe there is a problem with a product and would not have to give us notice of the defect and a chance to remedy the problem, but instead proceed with their claim. With no notice and no chance to remedy or correct the problem, we view this as the law going in the wrong direction.

There is the issue of rejecting nonconforming goods. If a buyer rejects these goods as defective, they cannot use those goods. Under revised Article 2, they can use them after paying reasonable compensation. Essentially, you end up with a forced lease. You have a case where a buyer rejects defected goods, but can still use them. This seems bizarre.

CHAIR AMODEI:
If someone disagrees with Mr. Keeton and Professor Braucher's conclusions about a need for a subcommittee, please put this on the record or we will presume that you agree with their findings.

MR. MUNSEY:
This has been a long and painful process and a massive effort. Unfortunately, it has been a failure. We are not aware of any organization at this time that supports Article 2, with the exception of the NCCUSL. We think the NCCUSL has suffered institutional inertia. The UCC has attempted to simplify, clarify and

modernize commercial law for the continued expansion of commercial practices. The purpose has failed, and I request this Committee not approve S.B. 200.

MARY LAU (Retail Association of Nevada):
I thank Senator Care for his hard work with these bills; however, Articles 2 and 2A of S.B. 200 have been of great concern to the retailers throughout the United States. It is one of the topics discussed at our State meetings where all 50 retail executives work with National Retail Federation. We have over 80 members, and I have no further testimony except to express our opposition to this bill.

GEORGE A. ROSS (Las Vegas Chamber of Commerce):
Our main purpose is to promote the business environment in this State. I can add nothing further to the testimony already spoken. We have heard today that these proposals are not just a situation where we have small things to fix or do differently, and it could negatively impact business in the State of Nevada. We urge you to consider the testimony.

FRED L. HILLERBY (American Council of Life Insurers):
Although the proposed change to Article 2, page 7, lines 14 and 15 identifies in effect what goods are, what is excluded is information. In today's technological world, to exclude information from things bought and sold is not realistic. Historically, the existing laws we have used have dealt with software and information issues, and now, it looks as though this law does not apply. This is a step in the wrong direction. I understood the intent was to try to be more modern and address the e-commerce issues.

CHAIR AMODEI:
We will close the hearing on S.B. 200 and open the testimony on S.B. 199.

SENATE BILL 199: Adopts Uniform Partnership Act of 1997 and Uniform Limited Partnership Act of 2001. (BDR 7-358)

SENATOR CARE:
Professor Braucher made some comments on Article 1 on the choice-of-law provision. I spoke about this in my earlier comments on Article 1, and this seems to be the direction the states have adopted. Our goal is to retain the old language. The final bill I will speak on this morning is S.B. 199 and these are the partnership acts: the Uniform Limited Partnership Act of 2001 and the revised Uniform Partnership Act of 1977. I am presenting fact sheets pertaining to both acts, respectively (Exhibit Q and Exhibit R, originals are on file at the Research Library).

In talking with John Fowler of Woodburn and Wedge and Robert Kim, an attorney in Las Vegas, businesses outside of Nevada, including in Canada, like the way some existing partnership law exists in Nevada. The general consensus is to make an amendment (Exhibit S) and delete sections 85 through 205 from S.B. 199 which deletes all provisions in the measure relating to the adoption of the 2001 Uniform Limited Partnership Act.

As to the remainder of the bill, there is a proposed amendment. If the bill is enacted, it would not affect existing partnerships and those partnerships that come online in Nevada would have the opportunity to opt in or follow existing law. I would like to get some literature, and have been promised letters from the Business Law Section of the State Bar of Nevada as to why they are comfortable with these amendments. The purpose of the revised Uniform Partnership Act is to bring it up to date. Some language in the revised act goes to partnership duties and clarification not there before. There is some language on mergers, but regarding mergers with other companies, I think the Committee will recall we had a bill from the Business Law Section that dealt with mergers and conversions of different entities.

CHAIR AMODEI:
Is there anyone else to testify on S.B. 199?

SENATOR CARE:
I would point out that I was paid a visit by the Office of the Secretary of State prior to making a decision on deleting the language in the Limited Liability Partnership Act. A concern was expressed that they would need time beyond October 1 for an effective date. Apparently, they have to make certain adjustments to their equipment and there were possible concerns from resident agents. However, the deletion of the Uniform Limited Liability Partnership Act might have alleviated those concerns.

Mr. Chair, in conclusion, it is not the intent of the NCCUSL to disrupt American commerce. The idea is to lend uniformity and make the revisions when necessary. We do not want to create an indigenous environment. I ask those who testified today to drop off an e-mail or business card. I will contact Chicago today and get the dialog started.

CHAIR AMODEI:
Unless there is an objection among the Committee members, we will create a subcommittee for S.B. 198 and S.B. 201 to be chaired by Senator Care, and I will be the other subcommittee member. This is so Senator Care can meet informally on these matters and not be in a quorum. Based upon the subcommittee work, we will have a report, not an action item, from Senator Care at the April 12 meeting.

We will work with S.B. 200 on April 14, which will give Senator Care time to talk with the business-law community on the proposed changes. With respect to S.B. 199, it will be on work session for April 14, and the Committee will have a report from the subcommittee on S.B. 198 and S.B. 201 on April 12, which should give you the day after the meeting with leaders from Chicago.

CHAIR AMODEI:
Are there any questions from the Committee in reference to the four bills we have just heard or any other matters or concerns? Seeing no further comments or questions we are adjourned at 9:37 a.m.

RESPECTFULLY SUBMITTED:

Gale Maynard,
Committee Secretary

APPROVED BY:

Senator Mark E. Amodei, Chair

DATE: