

The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1[†]

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... Article 1 provides rules that govern all transactions covered by the UCC without regard to their nature. It contains general rules of construction for interpreting the provisions of the entire Code, definitions applicable throughout the Code, a choice of law rule that applies to the other articles to the extent they do not contain their own provisions on choice of law, and a few substantive provisions applicable throughout the entire Code. Its provisions are the coordinating mechanism that holds the Code together, providing a level of commonality across the various substantive Articles of the Code.

Because the provisions of Article 1 apply to the entire Code, the impact of decisions regarding what provisions it includes is greater than that for decisions regarding provisions in individual articles...¹

The ubiquitous nature of Article 1 justifies attention to its revision. Part One of this paper discusses some noteworthy differences between Revised Article 1 and the version of Article 1 in force in a majority of states as recently as June 30, 2007, and still in effect (as of August 15, 2011) in ten states and the District of Columbia. Part Two gauges how Revised Article 1 has fared thus far in the states. Part Three considers the pros and cons of each noteworthy change, suggests one or more legislative response(s) to each, and briefly analyzes some implications of each response.

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¹ Kathleen Patchel & Boris Auerbach, *The Article 1 Revision Process*, 54 SMU L. REV. 603, 603-04 (2001) (footnotes omitted).

I. Noteworthy Changes in Revised Article 1

There are three noteworthy differences between the current official version of Revised Article 1 and the pre-revised version still in effect in sixteen states and the District of Columbia. First, Revised Article 1 expressly narrows its own scope, so that it applies only to transactions governed by another article of the Code. Second, Revised Article 1 – together with its conforming amendments to Articles 2 and 2A – applies the same good faith standard to merchants and non-merchants. Third, Revised Article 1 extends the relevance of course of performance evidence to all agreements governed by the Code. Until mid-2008,² a fourth – and the most controversial – difference was that Revised Article 1 purported to allow the parties in any non-consumer transaction to choose the law of any state to govern their transaction, without regard to any relationship between that state and either the parties or the transaction.

A. The Scope of Revised Article 1

Unlike pre-revised Article 1, which contains no explicit scope provision, Section R1-102³ states that Revised Article 1 only “applies to a transaction to the extent that it is governed by another article of [the Code].”⁴ In other words, if a transaction does not fall within the scope of Article 2, 2A, 3, 4, 4A, 5, 6 (where still in force), 7, 8, or 9, it is not subject to Revised Article 1.

² See *infra* note 28 and accompanying text.

³ For ease of reference, from this point forward, all citations in the text and notes to Revised Article 1 are in the form of “U.C.C. § R1-...” or “Section R1-....” All citations in the text and notes to pre-Revised Article 1 are in the form of “U.C.C. § 1-...” or “Section 1-....” The uniform version of Revised Article 1 can be found in its entirety, with official comments and annotations, in *Uniform Laws Annotated*, 1 U.L.A. 5-52 & S4-S41 (2004 & Supp. 2011), as can the uniform version of pre-Revised Article 1, with its official comments and annotations, 1 U.L.A. 69-352 & S44-59 (2004 & Supp. 2011).

⁴ U.C.C. § R1-102.

This is a departure from pre-revised Article 1, notwithstanding its drafters' claim that Section R1-102 merely "makes clear what has always been the case – the rules in Article 1 apply [only] to transactions ... governed by one of the other articles of the Uniform Commercial Code."⁵ Pre-revised Section 1-206 requires a signed writing evidencing a contract (other than a security agreement) for the sale of personal property (other than goods and investment securities) if a party wishes to enforce that contract "beyond \$5,000 in amount or value of remedy."⁶ The Official Comment to pre-revised Section 1-206 and numerous court decisions recognize that pre-revised Section 1-206 – and, by extension, the rest of Article 1 – applies to, *inter alia*, sales of intellectual property rights,⁷ goodwill and other intangibles included in the sale of a going business concern,⁸ franchise rights,⁹ "choses in action,"¹⁰ and other forms of intangible personal property not otherwise covered by the Code.¹¹

⁵ *Id.* § R1-102 cmt. 1; *see also* Patchel & Auerbach, *supra* note 1, at 605 (recognizing that, while current Article 1's scope "implicitly ... has always been that it only governs transactions within the scope of other articles of the UCC ... the lack of an express scope provision occasionally caused courts and commentators to express uncertainty about which transactions are governed by its substantive rules").

⁶ U.C.C. § 1-206(1)-(2).

⁷ *See, e.g.*, Grappo v. Alitalia Linee Aeree Italiane, S.p.A., 56 F.3d 427, 431 (2d Cir. 1995); Mellencamp v. Riva Music Ltd., 698 F. Supp. 1154, 1163 (S.D.N.Y. 1988).

⁸ *See, e.g.*, Olympic Junior, Inc. v. David Crystal, Inc., 463 F.2d 1141, 1143 (3d Cir. 1972); Beldengreen v. Ashinsky, 528 N.Y.S.2d 744, 746-47 (N.Y. Civ. Ct. 1987).

⁹ *See, e.g.*, American Buick, Inc. v. General Motors Corp., 66 S.W.3d 51, 60-61 (Mo. Ct. App. 2001).

¹⁰ *See, e.g.*, Sel-Lab Mktg., Inc. v. Dial Corp., 48 UCC Rep. Serv. 2d 482, 485-86 (S.D.N.Y. 2002) (right of first refusal); *see also In re Furst*, 914 F. Supp. 734, 737 (D. Mass. 1996) (royalty rights).

¹¹ *See, e.g.*, FDIC v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944, 951-52 (N.Y. App. Div. 1981) (sale of chattel paper not given as collateral). *See generally* U.C.C. § 1-206 cmt. (stating that Section 1-206's purpose is to "fill the gap" left by statute of frauds provisions elsewhere in the Code – principally "relat[ing] to the sale of general intangibles").

If this were not the case, there would be scant need for Section 1-206. And, given the choice between construing pre-revised Section 1-206 to apply to transactions not otherwise governed by the Code and construing it to be surplusage, the Uniform Commercial Code's chief architect advocated the former. *See* Karl N. Llewellyn,

B. Good Faith Under Revised Article 1

Both pre-revised and Revised Article 1 impose a duty of good faith performance and enforcement on all parties to any agreement governed by the Code.¹² However, pre-revised Article 1 and Revised Article 1 define “good faith” differently. Pre-revised Section 1-201 defines good faith as “honesty in fact in the conduct or transaction concerned.”¹³ The question under pre-revised Article 1 is whether the person was subjectively truthful and behaved honestly.¹⁴ In addition to this requirement of subjective honesty, Revised Article 1 also requires that every party “observ[e] reasonable commercial standards of fair dealing.”¹⁵ Thus, Revised Article 1 applies the same standard of good faith to non-merchants that current Articles 2 and 2A apply only to merchants.¹⁶

Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395, 400 (1950) (“If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.”).

¹² Compare U.C.C. § 1-203 with U.C.C. § R1-304.

¹³ U.C.C. § 1-201(19).

¹⁴ See Margaret L. Moses, *The New Definition of Good Faith in Revised Article 1*, 35 U.C.C.L.J. 47, 48-49 (2002); see, e.g., *Rogers v. Ricane Enters., Inc.*, 930 S.W.2d 157, 175 (Tex. App. 1996) (“[T]he test for good faith, i.e., honesty in fact in the conduct or transaction, is the actual belief of the party in question, not the reasonableness of the belief.” (citing *La Sara Grain Co. v. First Nat’l Bank of Mercedes*, 673 S.W.2d 558, 563 (Tex. 1984)); *Town & Country State Bank of Newport v. First State Bank of St. Paul*, 358 N.W.2d 387, 392 (Minn. 1984) (holding that U.C.C. § 1-201(19) imposes “a subjective test, requiring honesty of intent rather than absence of circumstances which would put an ordinarily prudent holder on inquiry.” (quotation omitted)).

¹⁵ U.C.C. § R1-201(b)(20) (“‘Good faith’ ... means honesty in fact and the observance of reasonable commercial standards of fair dealing.”).

¹⁶ Compare U.C.C. § 2-103(1)(b) (“‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”) and *id.* § 2A-103(3) (incorporating § 2-103’s good faith standard by reference) with *id.* § 1-201(19) (“‘Good faith’ means honesty in fact in the conduct or transaction concerned.”); see, e.g., *Ledbetter v. Darwin Dobbs Co.*, 473 So. 2d 197, 201 (Ala. Civ. App. 1985); *Hammer v. Thompson*, 129 P.3d 609, 617 (Kan. Ct. App. 2006) (both recognizing that Article 2 holds merchants to a higher standard of good faith than Article 1 holds nonmerchants). See generally Moses, *supra* note 14, at 51-52.

Suppose I sign a contract to purchase a home spa from my local Sears store and that I further agree to make monthly payments for a fixed term, to maintain the spa for the duration of the payment period, and to promptly notify Sears of any non-routine maintenance needs that arise for the duration of the express warranty that is part of the sales agreement. Under Revised Article 1, not only must Sears (the merchant seller) observe reasonable commercial standards of fair dealing, so must I (the non-merchant buyer) – even though I may have no reason to know reasonable commercial standards of fair dealing in the sale and servicing of home spas. If the relevant standards require that I inspect the home spa every few days and I fail to inspect the spa for two weeks because I am on vacation, when I return home and find the spa not working as warranted, am I breaching my duty of good faith by insisting that Sears make good on its warranty? Revised Article 1’s reasonable-person-with-knowledge-of-the-trade standard suggests I am in breach.¹⁷

C. Course of Performance Under Revised Article 1

The text of pre-revised Article 1 refers to course of performance only as one possible element of an “agreement.”¹⁸ Otherwise, Articles 2 and 2A define and operationalize course of performance.¹⁹ As a result, there has been some uncertainty about what role course of

¹⁷ See generally Moses, *supra* note 14, at 50-51 (reaching a similar conclusion juxtaposing the “honesty in fact” test of former U.C.C. Article 3 with the “honesty in fact and ... observance of reasonable commercial standards of fair dealing” test of current U.C.C. § 3-103(1)(d)). If I am in breach, my breach will not give Sears independent grounds to recover from me, but it may well give Sears a defense to excuse it from liability for its breach of warranty. See U.C.C. § R1-304 cmt. 1; see also Moses, *supra* note 14, at 48 n.6.

¹⁸ U.C.C. § 1-201(3). The official comments to a few sections of current Article 1 mention course of performance; but, they generally do so in the context of discussing the meaning of “agreement,” see U.C.C. §§ 1-102 cmt. 2 & 1-204 cmt. 2; and, like the definition of “agreement,” they refer the reader seeking the meaning of “course of performance” to U.C.C. § 2-208, see U.C.C. §§ 1-102 cmt. 2 & 1-205 cmt. 2.

¹⁹ See *id.* §§ 2-208 & 2A-207.

performance plays in transactions governed by Article 3, 4, 4A, 5, 6, 8, or 9²⁰ and how course of performance fits into the hierarchy set forth in pre-revised Section 1-205.²¹ Revised Article 1 resolves any uncertainty by defining course of performance and fixing its position in the hierarchy of express and implied terms of any agreement governed by the Code.²²

D. Choice of Law Under Revised Article 1

Both pre-revised and Revised Article 1 empower the parties to agree on governing law, subject to certain limitations. Where pre-revised and Revised Article 1 parted ways until mid-2008 was that pre-revised Article 1 requires the parties to choose the law of a jurisdiction that is reasonably related to the transaction;²³ whereas Revised Article 1, as the ALI and NCCUSL

²⁰ Compare, e.g., *National Livestock Credit Corp. v. Schultz*, 653 P.2d 1243 (Okla. Ct. App. 1982) (affirming the trial court's resort to course of performance evidence in resolving a dispute governed by Article 9) with, e.g., *Universal C.I.T. Credit Corp. v. Middlesboro Motor Sales, Inc.*, 424 S.W.2d 409, 411 (Ky. 1968) (“[U.C.C. § 2-208] deals with sales only. As to secured transactions the code apparently does not contain a rule for varying the contract by performance.”).

²¹ See U.C.C. § 1-205(4); see, e.g., *Farmers State Bank v. Farmland Foods*, 402 N.W.2d 277, 281 (Neb. 1987) (“[P]ostagreement course of performance is not governed by § 1-205(4).”). See generally David Frisch & Henry D. Gabriel, *Much Ado About Nothing: Achieving Essential Negotiability in an Electronic Environment*, 31 IDAHO L. REV. 747, 765 n.76 (1995) (“Although the definition of ‘agreement’ in section 1-201(3) includes usage of trade, course of dealing and course of performance, the definition of course of performance appears in section 2-208 and the concept is conspicuously absent from the interpretational priority set out in section 1-205(4). It is therefore open to question whether course of performance was intended to be part of the definition of agreement when that term appears outside of Article 2.” (citations omitted)); Nicholas M. Insua, Note, *Dogma, Paradigm, and the Uniform Commercial Code: Sons of Thunder v. Borden Considered*, 31 RUTGERS L.J. 249, 282-83 (1999) (“In contracts for the sale of goods, section 2-208 adds ‘course of performance’ to the agreement confluence, falling between express terms and course of dealing in the ‘lexical ordering’ created by section 1-205(4).” (emphasis added and footnotes omitted)).

²² U.C.C. § R1-303(a), (d) & (e). See generally Patchel & Auerbach, *supra* note 1, at 610 (“Although the comments to pre-revision Section 1-205 refer to course of performance, the section itself deals with only course of dealing and usage of trade. The Revision remedies this omission by adding course of performance to course of dealing and usage of trade as relevant in ascertaining the meaning of the parties’ agreement and supplementing its express terms.” (footnote omitted)).

²³ See U.C.C. § 1-105(1) (“Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law of this state or of such other state or nation governs their rights and duties.”).

originally promulgated it, required no such relationship between the transaction and the chosen jurisdiction,²⁴ unless at least one party to the agreement was a consumer.²⁵

Under the original version of Revised 1-301, if Sears is headquartered and incorporated in Illinois, I reside in Nevada, and I purchase a home spa from a Sears store in Las Vegas, then a provision in the sales agreement subjecting all disputes to Maine law would not bind me because I am a consumer; but, if Sears purchased the spa for resale from The Wizard of Spas, located in Kansas, and The Wizard of Spas shipped directly to the Las Vegas Sears store, then a similar provision in the Sears-The Wizard of Spas agreement would bind both parties because neither is a consumer.

In so doing, the original version of Revised Article 1 ignored the general tendency of states to allow parties to choose only the law of a jurisdiction bearing some relationship to the parties, the transaction, or both, and then only if the chosen law does not conflict with some fundamental public policy of a state bearing a greater relationship to the dispute than the chosen state.²⁶ As one leading commentator put it, the original version of R1-301 was “far broader, cover[ed] far more contracts, and (by sheer force of numbers of contracts implicated) [was] less

²⁴ See U.C.C. § R1-301(c)(1) (2001) (“Except as otherwise provided in this section an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated.”).

²⁵ See *id.* § R1-301(e)(1) (“If one of the parties to a transaction is a consumer,... [a]n agreement referred to in subsection (c) is not effective unless the transaction bears a reasonable relation to the State ... designated.”).

²⁶ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1969); see, e.g., *Sievers v. Diversified Mortgage Investors*, 603 P.2d 270, 273 (Nev. 1979) (“Under choice-of-law principles, parties are permitted within broad limits to choose the law that will determine the validity and effect of their contract. The situs fixed by the agreement, however, must have a substantial relation with the transaction, and the agreement must not be contrary to the public policy of the forum.” (citations omitted)). See generally Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159 (2000).

deferential to the ordinarily-governing law of other jurisdictions than any widely-known conflict of laws rule[] anywhere.”²⁷

In 2008, the ALI and NCCUSL promulgated a substitute Section R1-301, effectively reinstating pre-revised Section 1-105.²⁸ Once again, Article 1 protects both me and The Wizard of Spas from a contractual provision purporting to subject any dispute to the law of Maine, a jurisdiction wholly unrelated to either of our transactions with Sears.

²⁷ William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 740 (2001). Professor Woodward cautioned that the original version of R1-301

states a rule for any case subject to the Uniform Commercial Code, unless displaced by a specified provision elsewhere in the UCC. This means that all sales and leases of goods contracts will be covered, as will contracts in all the other areas covered by the Uniform Commercial Code. Thus the provision will be available for a large percentage of the staggeringly large number of commercial contracts formed in our economy every day. There are no size or value limitations. Parties to every commercial contract from the sale to a carpenter of a screwdriver to the large-scale business liquidation sale will be able to choose unrelated law to cover their transaction.

Id. at 740-41 (footnotes omitted). Another commentator has argued that state choice-of-law rules should generally defer to the parties’ contractual choice of law. See Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59 (2005).

²⁸ See Lance Liebman et al., Proposal to Amend Official Text of § 1-301 (Territorial Applicability; Parties’ Power to Choose Applicable Law) of Revised Article 1 of the UCC (2008), available at <http://www.ali.org/doc/uccamendment.pdf> (last visited Aug. 15, 2011).

II. News from the Front: Revised Article 1 in the States

Since August 1, 2010, Revised Article 1 has been in effect in Alabama,²⁹ Alaska,³⁰ Arizona,³¹ Arkansas,³² California,³³ Colorado,³⁴ Connecticut,³⁵ Delaware,³⁶ Florida,³⁷ Hawaii,³⁸ Idaho,³⁹ Illinois,⁴⁰ Indiana,⁴¹ Iowa,⁴² Kansas,⁴³ Kentucky,⁴⁴ Louisiana,⁴⁵ Maine,⁴⁶ Minnesota,⁴⁷

²⁹ ALA. CODE §§ 7-1-101 to 7-1-310 (2006).

³⁰ ALASKA STAT. ANN. §§ 45.01.111 to 45.01.310 (West Supp. 2011).

³¹ ARIZ. REV. STAT. ANN. §§ 47-1101 to 47-1310 (Supp. 2010).

The Arizona Senate considered a Revised Article 1 bill in 2005. *See* <http://www.azleg.gov/legtext/47leg/1r/bills/sb1234p.pdf> (last visited Aug. 15, 2011). However, that bill never emerged from committee. *See* <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/legtext/47leg/1r/bills/sb1234o%2Easp> (last visited Aug. 15, 2011). In March 2005, Morton Scult, a partner with Phoenix's Stinson Morrison Hecker LLP and Chair of the State Bar of Arizona Business Law Section's UCC Committee, reported that SB 1234 had been "held" because of opposition to the new good faith definition in R1-201(b)(20) and "w[ould] not get out of committee this session." E-mail from Morton Scult to Keith A. Rowley, Mar. 7, 2005 (on file with the author). The Revised Article 1 bill enacted the following year replaced the uniform R1-201(b)(20) good faith definition with the pre-revised 1-201(19) version. *See* ARIZ. REV. STAT. ANN. § 47-1201(B)(20).

³² ARK. CODE ANN. §§ 4-1-101 to 4-1-310 (West Supp. 2011).

³³ CAL. COM. CODE §§ 1101 to 1310 (West Supp. 2011).

³⁴ COLO. REV. STAT. ANN. §§ 4-1-101 to 4-1-310 (West Supp. 2010).

³⁵ CONN. GEN. STAT. ANN. § 42a-1-101 to 42a-1-310 (West 2009).

³⁶ DEL. CODE ANN. tit. 6, §§ 1-101 to 1-310 (2006).

³⁷ FLA. STAT. ANN. §§ 671.101 to 671.213 (West Supp. 2011).

The Florida House and Senate each considered Article 1 bills during the 2006 legislative session. *See* HB 1437, *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1437c1.doc&DocumentType=Bill&BillNumber=1437&Session=2006 (last visited Aug. 15, 2011); SB 2716, *available at* <http://www.flsenate.gov/data/session/2006/Senate/bills/billtext/pdf/s2716.pdf> (last visited Aug. 15, 2011). Each bill died in committee in its respective chamber.

³⁸ HAW. REV. STAT. ANN. §§ 490:1-101 to 490:1-310 (West 2008).

³⁹ IDAHO CODE ANN. §§ 28-1-101 to 28-1-310 (West 2006).

⁴⁰ 810 ILL. COMP. STAT. ANN. 5/1-101 to 5/1-310 (West 2009).

The Illinois Senate passed a Revised Article 1 bill in 2005, after its author agreed to replace uniform R1-301 and R1-201(b)(20) with language consistent with pre-Revised 1-105 and 1-201(19), respectively. *See* <http://www.ilga.gov/legislation/94/SB/PDF/09400SB1647lv.pdf> (last visited Aug. 15, 2011). However, the Illinois House took no meaningful action on SB1647 before adjourning sine die in January 2007. *See* <http://www.ilga.gov/>

Mississippi,⁴⁸ Montana,⁴⁹ Nebraska,⁵⁰ Nevada,⁵¹ New Hampshire,⁵² New Mexico,⁵³ North Carolina,⁵⁴ North Dakota,⁵⁵ Oklahoma,⁵⁶ Oregon,⁵⁷ Pennsylvania,⁵⁸ Rhode Island,⁵⁹ South Dakota,⁶⁰

legislation/billstatus.asp?DocNum=1647&GAID=8&GA=94&DocTypeID=SB&LegID=19742&SessionID=50 (last visited Aug. 15, 2011).

⁴¹ IND. CODE ANN. §§ 26-1-1-101 to 26-1-1-302 (West Supp. 2010).

As introduced, 2007 Indiana P.L. 143 (née SB 419) included uniform R1-301. *See* SB 419, § 5, *available at* <http://www.in.gov/legislative/bills/2007/PDF/IN/IN0419.1.pdf> (last visited Aug. 15, 2011). SB 419 was subsequently amended to, *inter alia*, replace uniform R1-301 with language consistent with pre-Revised 1-105. *See* <http://www.in.gov/legislative/bills/2007/PDF/SCR/AM041902.001.pdf> (last visited Aug. 15, 2011). The amendments also struck Section 7 of the introduced bill, which would have deleted IND. CODE ANN. § 26-1-2-103(1)(b) and had the effect of holding Article 2 merchants to an “honesty in fact” good faith standard.

⁴² IOWA CODE ANN. §§ 554.1101 to 554.1310 (West Supp. 2011).

As introduced, 2007 Iowa P.L. 30 (née SF 535) included uniform R1-301. *See* SF 535, § 5, *available at* <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&hbill=SF535&GA=82&menu=false&version=White> (last visited Aug. 15, 2011). SF 535 was subsequently amended to, *inter alia*, replace uniform R1-301 with language consistent with pre-Revised 1-105. *See* <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&ga=82&hbill=S3139> (last visited Aug. 15, 2011).

⁴³ KAN. STAT. ANN. §§ 84-1-101 to 84-1-310 (West 2008).

As introduced, 2007 Kansas P.L. 89 (née SB 183) included uniform R1-301. *See* SB 183, § 15 (copy on file with author). SB 183 was subsequently amended to replace uniform R1-301 with language consistent with pre-Revised 1-105. *See* 2007 S.J. 169-70, *available at* <http://www.kslegislature.org/journals/2007/sj0219.pdf> (last visited Aug. 15, 2011); *see also* <http://www.kslegislature.org/supplemental/2008/SN0183.pdf> (last visited Aug. 15, 2011). During its 2005-06 session, the Kansas legislature considered a Revised Article 1 bill including uniform R1-301. *See* HB 2453, *available at* <http://www.kslegislature.org/bills/2006/2453.pdf> (last visited Aug. 15, 2011). HB 2453 was introduced on February 11, 2005, *see* <http://www.kslegislature.org/journals/2005/hj0211.pdf> (last visited Aug. 15, 2011), and referred to committee on February 14, *see* <http://www.kslegislature.org/journals/2005/hj0214.pdf> (last visited Aug. 15, 2011). No further action was reported before the legislature adjourned sine die.

⁴⁴ KY. REV. STAT. ANN. §§ 355.1-101 to 355.1-310 (West Supp. 2010).

⁴⁵ LA. REV. STAT. ANN. §§ 10:1-101 to 10:1-310 (Supp. 2011).

⁴⁶ ME. REV. STAT. ANN. tit. 11, §§ 1-1101 to 1-1310 (Supp. 2010).

⁴⁷ MINN. STAT. ANN. §§ 336.1-101 to 336.1-310 (West Supp. 2011).

⁴⁸ MISS. CODE §§ 75-1-101 to 75-1-310 (Supp. 2010).

As introduced, Mississippi SB 2419 included a choice-of-law provision resembling original R1-301. *See* SB 2419, § 3, *available at* <http://billstatus.ls.state.ms.us/documents/2010/pdf/SB/2400-2499/SB2419IN.pdf> (last visited Aug. 15, 2011). SB 2419 was subsequently amended to include the current version of R1-301. *See* http://billstatus.ls.state.ms.us/documents/2010/pdf/sam/SB2419_S_Amend_02.pdf (last visited Aug. 15, 2011).

⁴⁹ MONT. CODE ANN. §§ 30-1-101 to 30-1-302 (2009).

Tennessee,⁶¹ Texas,⁶² Utah,⁶³ Vermont,⁶⁴ Virginia,⁶⁵ West Virginia,⁶⁶ and Wisconsin.⁶⁷ Revised Article 1 took effect in Ohio on June 29, 2011;⁶⁸ and, as of August 15, 2011, Revised Article 1 bills were languishing in the District of Columbia⁶⁹ and Massachusetts.⁷⁰

⁵⁰ NEB. REV. STAT. ANN. U.C.C. §§ 1-101 to 1-310 (LexisNexis 2009).

⁵¹ NEV. REV. STAT. ANN. §§ 104.1101 to 104.1310 (LexisNexis 2007).

⁵² N.H. REV. STAT. ANN. §§ 382-A:1-101 to 382-A:1-310 (2011).

⁵³ N.M. STAT. ANN. §§ 55-1-101 to 55-1-310 (West Supp. 2010).

⁵⁴ N.C. GEN. STAT. ANN. §§ 25-1-101 to 25-1-310 (West Supp. 2010).

⁵⁵ N.D. CENT. CODE ANN. §§ 41-01-01 to 41-01-24 (West 2008).

The North Dakota legislature considered a Revised Article 1 bill in 2005, *see* SB 2143, *available at* <http://www.legis.nd.gov/assembly/59-2005/bill-text/FANA0100.pdf> (last visited Aug. 15, 2011); but the North Dakota Senate rejected it by a margin of 45-1, *see* <http://www.legis.nd.gov/assembly/59-2005/bill-actions/ba2143.html> (last visited Aug. 15, 2011).

⁵⁶ OKLA. STAT. ANN., tit. 12A, §§ 1-101 to 1-310 (West Supp. 2011).

⁵⁷ OR. REV. STAT. §§ 71.1010 to 71.3100 (West Supp. 2011).

⁵⁸ 13 PA. CONS. STAT. ANN. §§ 1101 to 1310 (West Supp. 2011).

⁵⁹ R.I. GEN. LAWS ANN. §§ 6A-1-101 to 6A-1-310 (West Supp. 2011).

⁶⁰ S.D. CODIFIED LAWS §§ 57A-1-101 to 57A-1-310 (Supp. 2011).

The South Dakota Senate briefly considered a Revised Article 1 bill in 2007. *See* <http://legis.state.sd.us/sessions/2007/bills/SB85p.pdf> (last visited Aug. 15, 2011). Introduced on January 18, the Senate Judiciary Committee unanimously voted on February 2 to defer consideration until 2008, so that the South Dakota Bar Association's Business Law Committee could review and comment on it. *See* <http://legis.state.sd.us/sessions/2007/cminute/minSJU02021000.htm#13531> (last visited Aug. 15, 2011).

⁶¹ TENN. CODE ANN. §§ 47-1-101 to 47-1-310 (West Supp. 2011).

⁶² TEX. BUS. & COM. CODE ANN. §§ 1.101 to 1.310 (Vernon 2009).

⁶³ UTAH CODE ANN. §§ 70A-1a-101 to 70A-1a-310 (West Supp. 2011).

As introduced, 2007 Utah P.L. 272 (née SB 91) included uniform R1-301 and uniform R1-201(b)(20). *See* SB 91, § 8, *available at* <http://www.le.state.ut.us/~2007/bills/sbillint/sb0091.pdf> (last visited Aug. 15, 2011). SB 91 was enacted only after the Senate Business and Labor Committee amended it to strike uniform R1-301 and R1-201(b)(20) and replace them with language consistent with pre-Revised 1-105 and 1-201(19), respectively, *see* <http://www.le.state.ut.us/~2007/bills/sbillint/sb0091.pdf> (last visited Aug. 15, 2011), and a floor amendment expanded the list of subject-specific choice-of-law provisions to which amended R1-301 would yield, *see* <http://le.utah.gov/~2007/bills/sbillint/sb0091s01.pdf> (last visited Aug. 15, 2011).

⁶⁴ VT. STAT. ANN. tit. 9A, §§ 1-101 to 1-310 (West Supp. 2010).

⁶⁵ VA. CODE ANN. §§ 8.1A-101 to 8.1A-310 (West Supp. 2011).

⁶⁶ W. VA. CODE ANN. §§ 46-1-101 to 46-1-310 (West Supp. 2010).

⁶⁷ WIS. STAT. §§ 401.101 to 401.310 (Supp. 2010).

As introduced, Wisconsin SB 472 contained the uniform Revised Article 1 good faith definition. *See* <http://www.legis.state.wi.us/2009/data/SB-472.pdf> (last visited Aug. 15, 2011). It was subsequently amended to change its good faith definition from the uniform version of R1-201(b)(20) to the pre-revised 1-201(19) “honesty in fact” definition in existing Wisconsin law. *See* <http://www.legis.state.wi.us/2009/data/SB472-SA1.pdf> (last visited Aug. 15, 2011).

⁶⁸ HB 9 (to be codified at OHIO REV. CODE §§ 1301.101 to 1301.311), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_9_EN_N.pdf (last visited Aug. 15, 2011). HB 9 took effect on June 29, 2011. *See* <http://lsc.state.oh.us/coderev/hou129.nsf/House+Bill+Number/0009?OpenDocument> (last visited Aug. 15, 2011).

Representative William P. Coley, II introduced Ohio HB 9 on January 11, 2011. The House Judiciary & Ethics Committee approved it as amended on February 2, as did a unanimous House on February 8. The Senate Judiciary Civil Justice Committee reported the bill favorably on March 17; and the Senate unanimously approved it on March 22. Governor John R. Kasich signed HB 9 on March 30. *See generally* <http://lsc.state.oh.us/coderev/hou129.nsf/House+Bill+Number/0009?OpenDocument> (last visited Aug. 15, 2011).

Representatives Coley and Stephen Dyer offered a Revised Article 1 bill in 2010. *See* <http://lsc.state.oh.us/coderev/hou128.nsf/House+Bill+Number/0490?OpenDocument> (last visited Aug. 15, 2011). Despite accepting the relevant committee’s favorable report on a substitute version of HB 490, *see* 2010 H.J. 2715-16, *available at* <http://www.legislature.state.oh.us/JournalText128/HJ-05-27-10.pdf> (last visited Aug. 15, 2011), the House took no further action before the legislature adjourned.

⁶⁹ B19-0136 (to be codified at D.C. CODE §§ 28:1-101 to 28:1-310 if enacted), *available at* <http://www.dccouncil.washington.dc.us/images/00001/20110302163516.pdf> (last visited Aug. 15, 2011).

⁷⁰ HB 25 (to be codified at MASS. GEN. LAWS ch. 106, §§ 1-101 to 1-310 if enacted), *available at* <http://www.malegislature.gov/Bills/187/House/H00025> (last visited Aug. 15, 2011).

The Washington legislature considered a Revised Article 1 bill in 2009 and 2010. *See* <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/5155.pdf> (last visited Aug. 15, 2011). As introduced, SB 5155 included the original uniform version of R1-301. Following a public hearing at which every witness testifying for or against the bill unanimously testified against original uniform R1-301, *see* <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/Senate/5155%20SBA%20JUD%2009.pdf> (last visited Aug. 15, 2011), SB 5155 died in committee in 2009, was reintroduced (with original R1-301 intact) in 2010, and never came to a vote during either the 2010 Regular Session or 1st Special Session. *See* <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5155&year=2009> (last visited Aug. 15, 2011). As of August 15, 2011, the Washington Legislature has not revived SB 5155 or considered a successor bill proposing to revise UCC Article 1.

A. Adoptions to Date

The versions of Revised Article 1 enacted in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin each embrace the narrowed scope of uniform R1-102,⁷¹ extend course of performance to all transactions the Code governs,⁷² and reject the original version of uniform R1-

⁷¹ See ALA. CODE § 7-1-102 (2006); ALASKA STAT. ANN. § 45.01.112 (West Supp. 2011); ARIZ. REV. STAT. ANN. § 47-1102 (Supp. 2010); ARK. CODE ANN. § 4-1-102 (West Supp. 2011); CAL. COM. CODE § 1102 (West Supp. 2011); COLO. REV. STAT. ANN. § 4-1-102 (West Supp. 2010); CONN. GEN. STAT. ANN. § 42a-1-102 (West 2009); DEL. CODE ANN. tit. 6, § 1-102 (2006); FLA. STAT. ANN. § 671.101(2) (West Supp. 2011); HAW. REV. STAT. ANN. § 490:1-102 (West 2008); IDAHO CODE ANN. § 28-1-102 (West 2006); 810 ILL. COMP. STAT. ANN. 5/1-102 (West 2009); IND. CODE ANN. § 26-1-1-101(2) (West Supp. 2010); IOWA CODE ANN. § 554.1102A (West Supp. 2011); KAN. STAT. ANN. § 84-1-102 (West 2008); KY. REV. STAT. ANN. § 355.1-102 (West Supp. 2010); LA. REV. STAT. ANN. § 10:1-102 (Supp. 2011); ME. REV. STAT. ANN. tit. 11, § 1-1102 (Supp. 2010); MINN. STAT. ANN. § 336.1-102 (West Supp. 2011); MISS. CODE § 75-1-102 (Supp. 2010); MONT. CODE ANN. § 30-1-101(4) (2009); NEB. REV. STAT. ANN. U.C.C. § 1-102 (LexisNexis 2009); NEV. REV. STAT. ANN. § 104.1102 (LexisNexis 2007); N.H. REV. STAT. ANN. § 382-A:1-102 (2011); N.M. STAT. ANN. § 55-1-102 (West Supp. 2010); N.C. GEN. STAT. ANN. § 25-1-102 (West Supp. 2010); N.D. CENT. CODE ANN. § 41-01-02 (West 2008); HB 9, *supra* note 68 (to be codified at OHIO REV. CODE § 1301.102); OKLA. STAT. ANN., tit. 12A, § 1-102 (West Supp. 2011); OR. REV. STAT. § 71.1020 (West Supp. 2011); 13 PA. CONS. STAT. ANN. § 1102 (West Supp. 2011); R.I. GEN. LAWS ANN. § 6A-1-102 (West Supp. 2011); S.D. CODIFIED LAWS § 57A-1-102 (Supp. 2011); TENN. CODE ANN. § 47-1-102 (West Supp. 2011); TEX. BUS. & COM. CODE ANN. § 1.102 (Vernon 2009); UTAH CODE ANN. § 70A-1a-102 (West Supp. 2011); VT. STAT. ANN. tit. 9A, § 1-102 (West Supp. 2010); VA. CODE ANN. § 8.1A-102 (West Supp. 2011); W. VA. CODE ANN. § 46-1-102 (West Supp. 2010); WIS. STAT. § 401.102 (Supp. 2010).

⁷² See ALA. CODE § 7-1-303; ALASKA STAT. ANN. § 45.01.303; ARIZ. REV. STAT. ANN. § 47-1303; ARK. CODE ANN. § 4-1-303; CAL. COM. CODE § 1303; COLO. REV. STAT. ANN. § 4-1-303; CONN. GEN. STAT. ANN. § 42a-1-303; DEL. CODE ANN. tit. 6, § 1-303; FLA. STAT. ANN. § 671.205; HAW. REV. STAT. ANN. § 490:1-303; IDAHO CODE ANN. § 28-1-303; 810 ILL. COMP. STAT. ANN. 5/1-303; IND. CODE ANN. § 26-1-1-205; IOWA CODE ANN. § 554.1205; KAN. STAT. ANN. § 84-1-303; KY. REV. STAT. ANN. § 355.1-303; LA. REV. STAT. ANN. § 10:1-303; ME. REV. STAT. ANN. tit. 11, § 1-1303; MINN. STAT. ANN. § 336.1-303; MISS. CODE § 75-1-303; MONT. CODE ANN. § 30-1-205; NEB. REV. STAT. U.C.C. § 1-303; NEV. REV. STAT. ANN. § 104.1303; N.H. REV. STAT. ANN. § 382-A:1-303; N.M. STAT. ANN. § 55-1-303; N.C. GEN. STAT. ANN. § 25-1-303; N.D. CENT. CODE ANN. § 41-01-17; HB 9, *supra* note 68 (to be codified at OHIO REV. CODE § 1301.303); OKLA. STAT. ANN., tit. 12A, § 1-303; OR. REV. STAT. § 71.3030; 13 PA. CONS. STAT. ANN. § 1303; R.I. GEN. LAWS ANN. § 6A-1-303; S.D. CODIFIED LAWS § 57A-1-303; TENN. CODE ANN. § 47-1-303; TEX. BUS. & COM. CODE ANN. § 1.303; UTAH CODE ANN. § 70A-1a-303; VT. STAT. ANN. tit. 9A, § 1-303; VA. CODE ANN. § 8.1A-303; W. VA. CODE ANN. § 46-1-303; WIS. STAT. § 401.303.

301 in favor of language retaining the essence of pre-revised Section 1-105 or tracking the substitute R1-301 the ALI and NCCUSL promulgated in 2008 – both of which require some reasonable relation between the state whose law the parties choose by agreement and the transaction the parties wish to subject to that law.⁷³

⁷³ Compare ALA. CODE § 7-1-301; ALASKA STAT. ANN. § 45.01.301; ARIZ. REV. STAT. ANN. § 47-1301; ARK. CODE ANN. § 4-1-301; CAL. COM. CODE § 1301; COLO. REV. STAT. ANN. § 4-1-301; CONN. GEN. STAT. ANN. § 42a-1-301; DEL. CODE ANN. tit. 6, § 1-301; HAW. REV. STAT. ANN. § 490:1-301; IDAHO CODE ANN. § 28-1-301; 810 ILL. COMP. STAT. ANN. 5/1-301; IND. CODE ANN. § 26-1-1-301; IOWA CODE ANN. § 554.1105; KAN. STAT. ANN. § 84-1-301; KY. REV. STAT. ANN. § 355.1-301; ME. REV. STAT. ANN. tit. 11, § 1-1301; MINN. STAT. ANN. § 336.1-301; MISS. CODE § 75-1-301; MONT. CODE ANN. § 30-1-301; NEB. REV. STAT. U.C.C. § 1-301; NEV. REV. STAT. ANN. § 104.1301; N.H. REV. STAT. ANN. § 382-A:1-301; N.M. STAT. ANN. § 55-1-301; N.C. GEN. STAT. ANN. § 25-1-301; N.D. CENT. CODE ANN. § 41-01-15; HB 9, *supra* note 68 (to be codified at OHIO REV. CODE § 1301.301); OKLA. STAT. ANN., tit. 12A, § 1-301; OR. REV. STAT. § 71.3010; 13 PA. CONS. STAT. ANN. § 1301; R.I. GEN. LAWS ANN. § 6A-1-301; S.D. CODIFIED LAWS § 57A-1-301; TENN. CODE ANN. § 47-1-301; TEX. BUS. & COM. CODE ANN. § 1.301; UTAH CODE ANN. § 70A-1a-301; VT. STAT. ANN. tit. 9A, § 1-301; VA. CODE ANN. § 8.1A-301; W. VA. CODE ANN. § 46-1-301; WIS. STAT. § 401.301 *with* ALA. CODE § 7-1-105 (2002); ALASKA STAT. ANN. § 45.01.105 (West 2007); ARIZ. REV. STAT. ANN. § 47-1105 (2005); ARK. CODE ANN. § 4-1-105 (West 2004); CAL. COM. CODE § 1105 (West 2002); COLO. REV. STAT. ANN. § 4-1-105 (West 2002); CONN. GEN. STAT. ANN. § 42a-1-105 (West 2002); DEL. CODE ANN. tit. 6, § 1-105 (1999 & Supp. 2004); HAW. REV. STAT. ANN. § 490:1-105 (LexisNexis 2002); IDAHO CODE ANN. § 28-1-105 (2001); 810 ILL. COMP. STAT. ANN. 5/1-105 (West 2004); IND. CODE ANN. § 26-1-1-105 (West 2003); IOWA CODE ANN. § 554.1105 (West 2001); KAN. STAT. ANN. § 84-1-105 (Supp. 2004); KY. REV. STAT. ANN. § 355.1-105 (West 2006); LA. REV. STAT. ANN. § 10:1-105 (2003); ME. REV. STAT. ANN. tit. 11, § 1-1105 (1995); MINN. STAT. ANN. § 336.1-105 (West 2002); MISS. CODE ANN. § 75-1-105 (West 1999); MONT. CODE ANN. § 30-1-105 (2003); NEB. REV. STAT. ANN. U.C.C. § 1-105 (LexisNexis 2000); NEV. REV. STAT. ANN. § 104.1105 (LexisNexis 2001); N.H. REV. STAT. ANN. § 382-A:1-105 (West 1994); N.M. STAT. ANN. § 55-1-105 (West 2003); N.C. GEN. STAT. ANN. § 25-1-105 (West 2006); N.D. CENT. CODE § 41-01-15 (2005); OHIO REV. CODE § 1301.105 (2004); OKLA. STAT. ANN., tit. 12A, § 1-105 (West 2004); OR. REV. STAT. ANN. § 71.105 (West 2003); 13 PA. CONS. STAT. ANN. § 1105 (West 1999 & Supp. 2008); R.I. GEN. LAWS ANN. § 6A-1-105 (West 2006); S.D. CODIFIED LAWS § 57A-1-301 (2004); TENN. CODE ANN. § 47-1-105 (West 2002); TEX. BUS. & COM. CODE ANN. § 1.105 (Vernon 1994); UTAH CODE ANN. § 70A-1-105 (West 2004); VT. STAT. ANN. tit. 9A, § 1-105 (West 2007); VA. CODE ANN. § 8.1-105 (West 2001); W. VA. CODE ANN. § 46-1-105 (West 2002); WIS. STAT. ANN. § 401.105 (West 2003 & Supp. 2009); *see also* FLA. STAT. ANN. § 671.105 (West 2003) (unchanged by the 2007 amendments).

Louisiana rejected the original version of R1-301 in favor of a provision that defers to its general statutory choice-of-law scheme except where a choice-of-law provision elsewhere in Louisiana's version of the UCC applies. *See* LA. REV. STAT. ANN. § 10:1-301 (Supp. 2011).

California's rejection of the original version of R1-301 is tempered by Section 1646.5 of the California Civil Code, allowing parties to certain types of contracts with an aggregate value of at least \$250,000 – including contracts subject to revised CAL. COM. CODE § 1301(a), but excluding contracts subject to revised CAL. COM. CODE § 1301(c) – to agree to have California law govern their transaction even if California otherwise bears no relation to the transaction. *See* CAL. CIV. CODE § 1646.5 (West Supp. 2011). Illinois non-UCC law has a similar provision, which has not been amended to reflect Illinois's enactment of Revised Article 1. *See* 735 ILL. COMP. STAT. ANN. 105/5-5 (West 2003). Because of the permissive language of substitute R1-301(a), it would not be surprising if an Illinois court construed 735 ILL. COMP. STAT. ANN. 105/5-5 to allow parties to non-consumer contracts within the

The only division in the ranks of enacting states to date is over the definition of “good faith.” Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, and West Virginia have adopted uniform R1-201(b)(20) and conforming amendments to Articles 2 and 2A that, collectively, eliminate the bifurcated good faith standard in Articles 2 and 2A and hold merchants and non-merchants alike to “honesty in fact and the observance of reasonable commercial standards of fair dealing.”⁷⁴

scope of 810 ILL. COMP. STAT. ANN. 5/1-301(a) (West 2009) and with an aggregate value of at least \$250,000 to choose Illinois law even if Illinois otherwise bears no relation to the transaction. By contrast, Florida’s similar non-UCC statute, FLA. STAT. ANN. § 685.101 (West 2003), expressly excludes from its scope contracts in which the parties choose Florida law even though the transaction bears no reasonable relation to Florida and none of the parties reside, are incorporated, or maintain a place of business in Florida, *see id.* § 685.101(2)(a).

As introduced, New Hampshire HB 719 included the original version of R1-301, HB 719, § 1 (copy on file with the author), as did 2005’s ill-fated Arizona SB 1234, *see supra* note 31, and Kansas HB 2453, *see supra* note 43, and 2004’s Massachusetts HB 91, *see infra* note 82. New Hampshire HB 719 only passed after the original version of R1-301 was replaced by the current language, which tracks pre-Revised 1-105. Arizona enacted a version of Revised Article 1 in 2006 that replaced the original version of R1-301 with language tracking pre-Revised 1-105. *See* ARIZ. REV. STAT. ANN. § 47-1301 (Supp. 2010). The versions of Revised Article 1 that Indiana, Iowa, Kansas, and Utah enacted in 2007 were each introduced as bills including the original version of R1-301. Each bill was amended to replace the original version of R1-301 with language tracking pre-Revised 1-105 before it progressed to a floor vote. All four bills were enacted as amended. *See supra* notes 41, 42, 43 & 63, respectively. 2007’s ill-fated South Dakota SB 85 also included original version of R1-301. *See* SB 85, *supra* note 60, § 15.

Mississippi SB 2149, introduced in 2010, likewise included a choice-of-law provision resembling original R1-301. *See supra* note 48. After its principal sponsor amended it to strike the introduced version of 1-301 and replace it with language similar to the substitute 1-301 the ALI and NCCUSL promulgated in 2008, the amended bill unanimously passed both chambers of the Mississippi Legislature, received the governor’s signature, and took effect on July 1, 2010. *See id.*

As of August 15, 2011, only the U.S. Virgin Islands has adopted uniform R1-301. *See* V.I. CODE ANN. tit. 11A, § 1-301 (2003). In response to this nearly-unanimous rejection of uniform R1-301, NCCUSL and the ALI promulgated a substitute version that, as so many states have already done while enacting most of Revised Article 1, retains the essence of former Section 1-105. *See* U.C.C. § 1-301 (2008), *reprinted at* 1 U.L.A. 27 (Supp. 2011).

⁷⁴ *See* ALASKA STAT. ANN. § 45.01.211(b)(22) (West Supp. 2011); ARK. CODE ANN. § 4-1-201(b)(20) (West Supp. 2011); CAL. COM. CODE § 1201(b)(20) (West Supp. 2011); COLO. REV. STAT. ANN. § 4-1-201(b)(19) (West Supp. 2010); CONN. GEN. STAT. ANN. § 42a-1-201(b)(20) (West 2009); DEL. CODE ANN. tit. 6, § 1-201(b)(20) (2006); FLA. STAT. ANN. § 671.201(20) (West Supp. 2011); IND. CODE ANN. § 26-1-1-201(19) (West Supp. 2010); IOWA CODE ANN. § 554.1201(2)(t) (West Supp. 2011); KAN. STAT. ANN. § 84-1-201(b)(20) (West

Alabama, Arizona, Hawaii, Idaho, Illinois, Nebraska, Rhode Island, Tennessee, Utah, Virginia, and Wisconsin have opted to retain the pre-R1 “honesty in fact in the conduct or transaction concerned” definition and leaving 2-103(1)(b) & 2A-103(3) unchanged.⁷⁵

B. Pending Legislation

The bills pending in the District of Columbia and Massachusetts embrace the narrowed scope of uniform R1-102,⁷⁶ extend course of performance to all transactions the Code governs,⁷⁷

2008); KY. REV. STAT. ANN. § 355.1-201(2)(t) (West Supp. 2010); LA. REV. STAT. ANN. § 10:1-201(b)(20) (Supp. 2011); ME. REV. STAT. ANN. tit. 11, § 1-1201(20) (Supp. 2010); MINN. STAT. ANN. § 336.1-201(b)(20) (West Supp. 2011); MISS. CODE § 75-1-201(b)(20) (Supp. 2010); MONT. CODE ANN. § 30-1-201(2)(u) (2009); NEV. REV. STAT. ANN. § 104.1201(2)(t) (LexisNexis 2007); N.H. REV. STAT. ANN. § 382-A:1-201(b)(20) (2011); N.M. STAT. ANN. § 55-1-201(b)(20) (West Supp. 2010); N.C. GEN. STAT. ANN. § 25-1-201(b)(20) (West Supp. 2010); N.D. CENT. CODE ANN. § 41-01-09(2)(t) (West 2008); HB 9, *supra* note 68 (to be codified at OHIO REV. CODE § 1301.201(B)(20)); OKLA. STAT. ANN., tit. 12A, § 1-201(b)(20) (West Supp. 2011); OR. REV. STAT. § 71.2010(t) (West Supp. 2011); 13 PA. CONS. STAT. ANN. § 1201(b)(20) (West Supp. 2011); S.D. CODIFIED LAWS § 57A-1-201(b)(20) (Supp. 2011); TEX. BUS. & COM. CODE ANN. § 1.201(b)(20) (Vernon 2009); VT. STAT. ANN. tit. 9A, § 1-201(b)(20) (West Supp. 2010); W. VA. CODE ANN. § 46-1-201(b)(20) (West Supp. 2010).

Indiana’s original enactment of Revised Article 1 retained the bifurcated “good faith” standard. *See* IND. CODE ANN. § 26-1-1-201(19) (West Supp. 2008). However, P.L. 135-2009, adopting the 2002 amendments to Articles 3 and 4, also amended Indiana’s Article 1 definition of “good faith” to require “honesty in fact and the observance of reasonable commercial standards of fair dealing,” *see* IND. CODE ANN. § 26-1-1-201(19) (West Supp. 2010) (codifying 2009 Ind. Acts 1329, 1332 (effective July 1, 2010)), further tilting the balance in favor of the uniform R1-201(b)(20) “good faith” definition.

Louisiana, of course, has not adopted UCC Articles 2 and 2A. Nonetheless, its enactment of the R1-201(b)(20) “good faith” definition requires all parties to all contracts subject to R1-304 to act honestly and to observe reasonable commercial standards of fair dealing.

⁷⁵ *See* ALA. CODE § 7-1-201(b)(20) (2006); ARIZ. REV. STAT. ANN. § 47-1201(B)(20) (Supp. 2010); HAW. REV. STAT. ANN. § 490:1-201(b) (West 2008); IDAHO CODE ANN. § 28-1-201(b)(20) (West 2006); 810 ILL. COMP. STAT. ANN. 5/1-201(b)(20) (West 2009); NEB. REV. STAT. ANN. U.C.C. § 1-201(b)(20) (LexisNexis 2009); R.I. GEN. LAWS ANN. § 6A-1-201(b)(20) (West Supp. 2011); TENN. CODE ANN. § 47-1-201(b)(20) (West Supp. 2011); UTAH CODE ANN. § 70A-1a-201(2)(t) (West Supp. 2011); VA. CODE ANN. § 8.1A-201(b)(20) (West Supp. 2011); WIS. STAT. § 401.201(2)(k) (Supp. 2010).

⁷⁶ *See* B19-0136, *supra* note 69 (to be codified at D.C. CODE § 28:1-102 if enacted); HB 25, *supra* note 70, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-102 if enacted).

⁷⁷ *See* B19-0136, *supra* note 69 (to be codified at D.C. CODE § 28:1-303 if enacted); HB 25, *supra* note 70, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-303 if enacted).

include a choice-of-law provision along the lines of substitute R1-301,⁷⁸ and incorporate uniform R1-201(b)(20)'s unitary good faith standard.⁷⁹

C. Prospects for Additional Adoptions

District of Columbia Council Member Yvette Alexander introduced B19-0136 on March 1, 2011. It was promptly referred to the Public Services and Consumer Affairs Committee, which scheduled a public hearing for June 6, 2011.⁸⁰ No further action had been reported as of August 15, 2011.

In January 2011, Representative Michael A. Costello introduced Massachusetts HB 25,⁸¹ a sixth attempt to enact Revised Article 1 in the Commonwealth.⁸² The bill was referred to the

⁷⁸ See B19-0136, *supra* note 69 (to be codified at D.C. CODE § 28:1-301 if enacted); HB 25, *supra* note 70, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-301 if enacted).

⁷⁹ See B19-0136, *supra* note 69 (to be codified at D.C. CODE § 28:1-201(b)(20) if enacted); HB 25, *supra* note 70, § 2 (to be codified at MASS. GEN. LAWS ch. 106, § 1-201(b)(20) if enacted).

⁸⁰ See http://www.dccouncil.washington.dc.us/media/2011hearingnotices/june6_alexander_uniform.PDF (last visited Aug. 15, 2011). See generally <http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx> (last visited Aug. 15, 2011).

⁸¹ See HB 25, *supra* note 70 (to be codified at MASS. GEN. LAWS ch. 106, §§ 1-101 to 1-310 if enacted), available at <http://www.malegislature.gov/Bills/187/House/H00025> (last visited Aug. 15, 2011).

⁸² A 2003 effort to enact a version of Revised Article 1 including the original uniform version of R1-301 was unsuccessful. See HB 91 (copy on file with the author). In early 2005, Representative Paul Loscocco introduced what would become Massachusetts HB 3731. <http://www.mass.gov/legis/bills/house/184/ht03pdf/ht03731.pdf> (last visited Aug. 15, 2011). The bill was referred to the Joint Committee on Economic Development and Emerging Technologies, which held a public hearing on October 26, 2005. On March 23, 2006, the Massachusetts House extended the committee's deadline to report on the bill to June 23. On July 6, the Senate and House extended the reporting date to July 31. On August 17, the House extended the reporting date to January 2, 2007. See <http://www.mass.gov/legis/184history/h03731.htm> (last visited Aug. 15, 2011). On January 11, 2007, Representative Paul Loscocco introduced Massachusetts HB 3924, which succeeded the previously unsuccessful HB 3731. On October 15, HB 4302 superseded HB 3924. See <http://www.mass.gov/legis/185history/h03924.htm> (last visited Aug. 15, 2011). HB 4302 stalled in the House as did its predecessors. Massachusetts HB 89, <http://www.mass.gov/legis/bills/house/186/ht00pdf/ht00089.pdf> (last visited Aug. 15, 2011), was assigned to the Joint Committee on Economic Development and Emerging Technologies on January 20, 2009. Nearly sixteen months later, on May 13, 2010, the committee reported favorably on HB 89. On June 14, the House Committee on Steering, Policy, and Scheduling ordered a second reading. Despite having a second reading – the furthest any of the first five efforts to enact Revised Article 1 in Massachusetts had gotten – on June 15, HB 89 died awaiting a third reading. See <http://www.mass.gov/legis/186history/h00089.htm> (last visited Aug. 15, 2011).

Joint Committee on Financial Services, which discharged the bill six months later to the Joint Committee on Economic Development and Emerging Technologies⁸³ (on whose docket the five prior bills all perished). No further action had been reported as of August 15, 2011.

III. What's a State to Do?

Everything else being constant, uniformity is good for commercial law and, in turn, for commerce, because the predictability fostered by uniformity reduces transaction costs and “levels the playing field” across jurisdictions. However, everything else rarely is constant, and uniformity – assuming it is even achievable – may bear costs, as well as benefits. So, what should the fourteen states that have yet to enact a version of Revised Article 1 do?

A. Course of Performance

The decision to explicitly import course of performance into Revised Article 1 appears sound and carries with it no apparent cost. A widely-recognized principle of contract law counsels courts to look to the parties' course of performance of a contract – sometimes referred to as the parties' “practical construction” of the contract – when interpreting or construing that contract.⁸⁴ It is not surprising, therefore, that every state that has enacted Revised Article 1 to date has enacted Revised Section 1-303.⁸⁵ A legislature enacting Revised Article 1 should enact Section R1-303 as drafted. Doing so will foster uniformity.

⁸³ See <http://www.malegislature.gov/Bills/187/House/H00025> (last visited Aug. 15, 2011).

⁸⁴ See, e.g., *Moore v. Prindle*, 394 P.2d 352, 354 (Nev. 1964) (“In determining which contract is in effect the practical construction and interpretation of the parties as evidenced by their conduct is always persuasive, if not conclusive.” (citing *Reno Club v. Young Inv. Co.*, 182 P.2d 1011 (Nev. 1947), and *Flyge v. Flynn*, 166 P.2d 539 (Nev. 1946)); accord *Wiley v. Cook*, 583 P.2d 1076, 1078 n.2 (Nev. 1978). See generally *RESTATEMENT (SECOND) OF CONTRACTS* § 202(4) (1979); Keith A. Rowley, *Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and Everything in Between)*, 69 *MISS. L.J.* 73, 147-49 (1999).

⁸⁵ See *supra* note 72 and accompanying text.

B. Choice of Law

Allowing parties to choose the law of some jurisdiction wholly unrelated to them or their transaction is contrary to the prevailing rules regarding contractual choice of law⁸⁶ and was sufficiently problematic that none of the thirty states that had enacted Revised Article 1 by March 1, 2008 had enacted the original version of uniform R1-301, prompting NCCUSL and ALI to promulgate a substitute R1-301.⁸⁷ Enacting the substitute R1-301, which retains the essence of pre-revised 1-105 and is consistent with the choice of law provisions enacted by 38 of the 39 enacting states,⁸⁸ will foster uniformity across jurisdictions and consistent treatment with a jurisdiction of choice-of-law clauses in contracts the UCC governs and those it does not govern.

C. Scope

The decision to narrow Article 1's scope – notwithstanding the protestations of its drafters that they did not do so⁸⁹ – is not costless, although the benefits of uniformity may outweigh those costs. Revised Article 1 excludes from its scope sales of intangible or immovable personal property not governed by another article of the Code, which are within the scope of pre-Revised Article 1; therefore, parties to these sales will, *inter alia*, lose the protection of the Code's duty of good faith and fair dealing and of the default statute of frauds in pre-Revised Section 1-206.

⁸⁶ See *supra* notes 26-27 and accompanying text.

⁸⁷ See *supra* note 28.

⁸⁸ Louisiana's R1-301 is idiosyncratic, see *supra* note 73 – though no more so than its pre-revised 1-105.

⁸⁹ See *supra* note 5 and accompanying text.

Most states' courts recognize an implied duty of good faith and fair dealing in all contracts.⁹⁰ Thus, in most states, parties to contracts excluded by Revised Article 1 appear to be protected from bad faith and unfair dealing without Section 1-203. On the other hand, most states lack another statute of frauds that will fill the gap left by the loss of Section 1-206. Some may see that as a good thing. If a legislature does not, it appears to have four options: (1) do not enact Revised Article 1; (2) enact Revised Article 1, but without the new scope provision, Section R1-102; (3) enact Revised Article 1, but with an expanded scope provision that would encompass all sales of personal property not governed by another Article of the Code; or (4) enact Revised Article 1 and either rely upon or amend an existing non-Code statute of frauds⁹¹ or enact a stand-alone statute of frauds⁹² covering sales of personal property not

⁹⁰ Compare, e.g., *Pemberton v. Farmers Ins. Exch.*, 858 P.2d 380, 382 (Nev. 1993); *R.J. Gaydos Ins. Agency, Inc. v. National Consumer Ins. Co.*, 773 A.2d 1132, 1148 (N.J. 2001); *Uptown Heights Assocs. v. Seafirst Corp.*, 891 P.2d 639, 643 (Or. 1995); *Wallace v. National Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996); *Rawson v. Conover*, 20 P.3d 876, 885 (Utah 2001) (all recognizing a common law duty) with, e.g., *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225 (Tex. 2002) (refusing to recognize a common law duty in the absence of a "special relationship" between the parties or an express agreement imposing the duty). See generally RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 84, § 205.

⁹¹ See, e.g., ARIZ. REV. STAT. ANN. § 44-101(4) (2003) (barring any action "[u]pon a contract to sell or a sale of ... choses in action of the value of five hundred dollars or more" unless "the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized").

⁹² For example, the legislation that resulted in California's enactment of Revised Article 1 added a new section 1624.5 to the California Civil Code, which reads, in part:

(a) Except in the cases described in subdivision (b), a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars (\$5,000) in amount or value of remedy unless there is some record ... that indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed, including by way of electronic signature, ... by the party against whom enforcement is sought or by his or her authorized agent.

(b) Subdivision (a) does not apply to contracts governed by the Commercial Code, including contracts for the sale of goods (Section 2201 of the Commercial Code), contracts for the sale of securities (Section 8113 of the Commercial Code), and security agreements (Sections 9201 and 9203 of the Commercial Code).

governed by the Code in the wake of Revised Article 1. Enacting Section R1-102 as written and retaining a renumbered Section 1-206 is not an option because, in light of Section R1-102, a statute of frauds in Revised Article 1 would not apply to any transactions.⁹³

Thus far, the states that have enacted Revised Article 1 have not addressed the effects of its narrowed scope provision, and nothing I have read or heard suggests that any state has declined to enact Revised Article 1 because of Section R1-102's effects. Enacting Section R1-102 as written will foster uniformity. That said, a legislature enacting Revised Article 1 without Section R1-102, or with an amended Section R1-102 that broadens the scope of Revised Article 1 to include transactions that are within the implied scope of current Article 1, should have a negligible impact on commerce, as the net effect would be to keep the scope of Revised Article 1 the same as that of current Article 1. Enacting or amending a non-UCC statute of frauds to require a signed writing evidencing a contract for the sale of personal property not governed by Article 2 or 8 should, likewise, have a negligible impact on commerce, as the net effect would be to require a signed writing only in cases in which current law already does so.

CAL. CIV. CODE § 1624.5 (West Supp. 2011); *see also, e.g.*, R.I. GEN. LAWS ANN. § 9-1-4(7) (West Supp. 2011) (providing that “No action shall be brought ... [e]xcept in cases to which the Uniform Commercial Code (Title 6A) applies, ... to charge any person upon any contract for the sale of personal property beyond five thousand dollars (\$5,000) in an amount or value or remedy, unless the promise or agreement upon which the action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him or her thereunto lawfully authorized.”).

⁹³ Nonetheless, this appears to be what Indiana's 2007 enactment of Revised Article 1 did. As enacted and codified, P.L. 143-2007 did not replace existing Article 1 in its entirety; rather, it deleted certain specified provisions, amended others, and added yet others. P.L. 143-2007 narrowed the scope of Article 1, *see* IND. CODE ANN. § 26-1-1-101(2) (West Supp. 2010), but neither deleted nor amended Section 26-1-1-206, *see* IND. CODE ANN. § 26-1-1-206 (West 2003). Indiana P.L. 135-2009, *see supra* note 75, amended Indiana's Revised Article 1 definition of “good faith” effective July 1, 2010, *see* IND. CODE ANN. § 26-1-1-201(19) (West Supp. 2010); but, it did not address the apparent inconsistency between IND. CODE ANN. § 26-1-1-101(2) and IND. CODE ANN. § 26-1-1-206. Florida's Revised Article 1 enactment also took the form of selective amendments; however, it expressly repealed former Section 1-206 effective January 1, 2008. *See* FLA. STAT. ANN. § 671.206 (West Supp. 2011).

D. Good Faith

The only real disagreement among the states that have enacted Revised Article 1 thus far is whether to enact Revised Article 1's unitary good faith standard or retain a bifurcated standard that holds merchants and others assumed to have knowledge of commercially reasonable practices to a higher good faith standard than it does non-merchants and others assumed not to have knowledge of commercially reasonable practices.⁹⁴ While the balance among enacting states has tipped markedly toward Revised Section 1-201(b)(20) in the last few years, enough states have declined to adopt the uniform definition that it is difficult to claim that either adopting Revised Section 1-201(b)(20) or retaining pre-Revised Section 1-201(19) will promote interstate uniformity.⁹⁵

Assuming that pre-Revised Section 1-201(19) affords non-merchants at least as much protection in U.C.C. transactions as a state's common law duty of good faith and fair dealing would afford them in a non-U.C.C. transaction, the key question seems to be whether enacting uniform Section R1-201(b)(20) would afford non-merchants less protection than a state's common law duty of good faith and fair dealing. If so, and assuming further that a legislature does not wish to erode the good faith protection afforded non-merchants in transactions governed by its current U.C.C., then it could reject the unitary good faith standard of uniform Section R1-201(b)(20), and leave pre-Revised Section 1-201(19) and Sections 2-103(1)(b) and 2A-103(3) in place to retain the current merchant/non-merchant distinction. Alternatively, a legislature could alter the language of Section R1-201(b)(20), so that the unitary standard would apply "except as

⁹⁴ See *supra* note 16.

⁹⁵ See *supra* text accompanying notes 74 and 75.

otherwise provided in Articles 2, 2A, and 5,” and leave Sections 2-103(1)(b) and 2A-103(3) in place to retain the current merchant/non-merchant distinction. To date, eleven states have done the former; none have done the latter.