

**2011 DRAFTING REQUEST**

**Senate Amendment (SA-SB416)**

Received: 02/02/2012

Received By: agary

Wanted: As time permits

Companion to LRB:

For: Glenn Grothman (608) 266-7513

By/Representing: Lance Burri

May Contact:

Drafter: agary

Subject: Fin. Inst. - UCC

Addl. Drafters:

Extra Copies:

Submit via email: YES

Requester's email: Sen.Grothman@legis.wisconsin.gov

Carbon copy (CC:) to: aaron.gary@legis.wisconsin.gov

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**Pre Topic:**

No specific pre topic given

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**Topic:**

UCC article 9 changes related to chattel paper, definition of good faith

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**Instructions:**

See attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	agary 02/02/2012	csicilia 02/06/2012	jfrantze 02/06/2012	_____	sbasford 02/06/2012	sbasford 02/06/2012	

FE Sent For:

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/1	agary	1 cjs 2/6 12	JG	2/6			

FE Sent For:

<END>

**Gary, Aaron**

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**From:** Burri, Lance  
**Sent:** Thursday, February 02, 2012 10:12 AM  
**To:** Gary, Aaron  
**Cc:** jrisch@wisbank.com; 'Cale Battles'  
**Subject:** Amendment to lrb 3505

Aaron, I need an amendment to SB 416 (lrb 3505) that reflects the two issues detailed below. You have our permission to discuss this with Cale Battles from the state bar.

We'd like to exec this on Wednesday, so is it possible to have it by Tuesday?

Thanks for all your help.

Lance Burri  
Office of Sen. Glenn Grothman  
608-266-7513

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**From:** Cale Battles [mailto:cbattles@wisbar.org]  
**Sent:** Tuesday, January 31, 2012 4:20 PM  
**To:** Burri, Lance  
**Cc:** jrisch@wisbank.com  
**Subject:** FW: Article 9 Amendments; Electronic Chattel Paper

Lance,

Below is the language we are looking for in a simple amendment.

**Good Faith Definition Language:**

Currently the definition of good faith in Article 9 of the UCC 409.102(km) reads:

"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing

We are requesting that this definition be changed to match the current "good faith" definition in Chapter 401 that was changed in 2009 Wisconsin Act 320

"Good faith" means honesty in fact in the conduct or transaction concerned.

Rationale for the change: The Business Section of the State Bar supported and requested an amendment to Senate Bill 492, which became 2009 Wisconsin Act 320. The Business Law section believes that the existing (or old) definition of "Good Faith" is superior because the proposed new definition will invite expensive and time consuming litigation. The proposed new definition adds to the old definition "... and the observance of reasonable commercial standards of fair dealing." What this could mean is vague and most likely is a question of fact for the jury or other fact finder. That will require a two year long discovery battle, experts and a trial.

Conversely, a lower likelihood of litigation encourages commerce, because there is less uncertainty and less expense in the enforcement of the commercial laws.

Ten of the 38 enacting jurisdictions have stayed with the existing (old) definition even though they have

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passed new UCC-1. That shows substantial support for the existing (old) definition. The argument for uniformity is not strong where so many states have not supported the new definition, as uniformity is not possible anyway.

#### Chattel Paper Suggested Language:

Add language to 409.105(2m): Specific Facts Giving Control. *Without limiting the generality of the foregoing*, a system satisfies sub. (1m) if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

Rationale for the change: Section 409.105 of the Wisconsin Statutes currently specifies the requirements for a secured party to obtain "control" of electronic chattel paper. Perfection by control, rather than by filing finance statements, is the preferred method of perfection for lenders obtaining security interests in chattel paper, because security interests perfected by control take priority over security interests perfected only by filing. Perfection by control is straightforward in connection with chattel paper in physical form; the secured party just has to take possession of the original chattel paper. Control is more difficult for electronic chattel paper because there is no physical document.

Section 409.105 currently includes a requirement that there be a single authoritative copy of the chattel paper, which has proven to be a significant problem because of the nature of electronic records. It has been suggested that there can be no single authoritative copy when a record can be accessed from multiple computers, particularly if they can be accessed at the same time. In addition, the technology for dealing with electronic chattel paper is in an early stage of development. It makes no sense for the statutory requirements to be too specific, and therefore too rigid to adapt to changes in the technology.

Proposed section 409.105(1m) of the amendments to Article 9 recognizes this problem and provides a general test that control will exist if "a system employed for evidencing the transfer of interests in the chattel paper reliability establishes the secured party as the person to which the chattel paper was assigned." This language is very helpful. Unfortunately, proposed section 409.105(2m) continues to include the existing requirements. Comment 2 to the amendments makes clear that subsection (2m) is intended only as a safe harbor, but the current language of subsection (2m) itself does not make clear that it is only a safe harbor, and the comments do not become part of the statute, and so do not have the force of law. Accordingly, I suggest that subsection (2m) be amended to add at the very beginning of the introductory language the phrase "*Without limiting the generality of the foregoing*, a system satisfies sub. (1m) if . . ." This language would not represent a substantive change; it would merely clarify the statutory language to make it consistent with the comment, and make clear that subsection (2m) merely provides a safe harbor, and not a set of mandatory requirements.

If you have any questions please let me know.

Cale



in 2/2



LRBa2241/1

ARG:.....

wanted 2/6

gjs

**SENATE AMENDMENT,  
TO 2011 SENATE BILL 416**

SAW bill history

1 At the locations indicated, amend the bill as follows:

2 **1.** Page 5, line 2: after that line insert:

3 **"SECTION 2m.** 409.102 (1) (km) of the statutes is amended to read:

4 409.102 (1) (km) "Good faith" means honesty in fact and the observance of  
5 reasonable commercial standards of fair dealing in the conduct or transaction  
6 concerned."

History: 2001 a. 10; 2003 a. 321; 2009 a. 322.

7 **2.** Page 6, line 11: delete "A" and substitute "Without limiting the generality  
8 of sub. (1m), a".

9 (END)