SENATE BILL 472 (LRB -4103)

An Act to amend 59.43 (1) (L), 59.43 (1) (n), 126.25 (11), 137.12 (2) (b), 137.24 (4), 340.01 (56o), 342.03, 402.202 (1), 402.208 (2), 403.103 (1) (j), 407.102 (1) (e), 407.103 (2), 410.106 (1), 410.204 (2), 411.501 (4), 706.08 (4) (c) and 893.36 (1g) (a); and to repeal and recreate chapter 401 of the statutes; relating to: adopting revised article 1 of the Uniform Commercial Code concerning general provisions.

2010

01-22.	S.	Introduced by Senators **Risser** and **Taylor**; cosponsored by Representatives **Cullen** and **Townsend**.	
01-22.	S.	Read first time and referred to committee on Veterans and Military Affairs, Biotechnology, and Financial Institutions	500
02-24.	S.	Public hearing held.	
03-01.	S.	Senate amendment 1 offered by Senator Risser **(LRB a1693)**	601
03-03.	S.	Executive action taken.	
03-15.	S.	Report adoption of Senate Amendment 1 recommended by committee on Veterans and Military Affairs, Biotechnology, and Financial Institutions, Ayes 5, Noes 0	634
03-15.	S.	Report passage as amended recommended by committee on Veterans and Military Affairs, Biotechnology, and Financial Institutions, Ayes 5, Noes 0	634
03-15.	S.	Available for scheduling.	
04-08.	S.	Placed on calendar 4-13-2010 pursuant to Senate Rule 18(1)	681
04-13.	S.	Read a second time	699
04-13.	S.	Senate amendment **1 adopted**	699
04-13.	S.	Ordered to a third reading	699
04-13.	S.	Rules suspended	699
04-13.	S.	Read a third time and **passed**	699
04-13.	S.	Ordered immediately messaged	701
04-14.	A.	Received from Senate	830
04-14.	A.	Read first time and referred to committee on Rules	831
04-20.	A.	Made a special order of business at 11:42 A.M. on 4-22-2010 pursuant to Assembly Resolution 26.	
04-22.	A.	Read a second time.	
04-22.	A.	Ordered to a third reading.	
04-22.	A.	Rules suspended.	
04-22.	A.	Read a third time and **concurred in**.	
04-22.	A.	Ordered immediately messaged.	
04-23.	S.	Received from Assembly concurred in.	

CMO

2009
ENROLLED BILL

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ADOPTED DOCUMENTS:

☒ **Orig** ☐ **Engr** ___ **SubAmdt** ___ **09** -4103/1

Amendments to above (if none, write "NONE"): SA 1 — a 1693/1

Corrections - show date (if none, write "NONE"): None

Topic Rel

4-29-10
Date

Enrolling Drafter

State of Wisconsin
2009 – 2010 LEGISLATURE

LRB–4103/1
MDK:wlj:ph

2009 SENATE BILL 472

January 22, 2010 – Introduced by Senators RISSER and TAYLOR, cosponsored by Representatives CULLEN and TOWNSEND. Referred to Committee on Veterans and Military Affairs, Biotechnology, and Financial Institutions.

1 AN ACT ***to amend*** 59.43 (1) (L), 59.43 (1) (n), 126.25 (11), 137.12 (2) (b), 137.24
2 (4), 340.01 (56o), 342.03, 402.202 (1), 402.208 (2), 403.103 (1) (j), 407.102 (1) (e),
3 407.103 (2), 410.106 (1), 410.204 (2), 411.501 (4), 706.08 (4) (c) and 893.36 (1g)
4 (a); and ***to repeal and recreate*** chapter 401 of the statutes; **relating to:**
5 adopting revised article 1 of the Uniform Commercial Code concerning general
6 provisions.

Analysis by the Legislative Reference Bureau

This bill repeals and recreates the general provisions chapter of the Uniform Commercial Code (UCC). The UCC governs certain transactions relating to sales, negotiable instruments, bank deposits and collections, letters of credit, bulk transfers, documents of title, investment securities, secured transactions, fund transfers, and leases. The bill revises and updates the general provisions chapter to better reflect and accommodate changing business practices. The bill also makes many changes of a technical or nonsubstantive nature, such as reordering and renumbering sections. In terms of substantive changes to the general provisions chapter of the UCC, the bill does all of the following:

1. Clarifies that the general provisions chapter applies only to transactions governed by the UCC and not by other law.

2. Clarifies when other principles of law may be used to supplement UCC provisions of law.

3. Specifically provides that evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 59.43 (1) (L) of the statutes is amended to read:

2 59.43 **(1)** (L) File all documents pertaining to security interests, as defined in
3 s. 401.201 ~~(37) (a)~~ (2) (t), that are required or authorized by law to be filed with the
4 register. Except as otherwise prescribed by the department of financial institutions
5 under subch. V of ch. 409, these documents shall be executed in a manner that
6 satisfies the requirements set forth in sub. (2m) (b) 1. to 5.

7 **SECTION 2.** 59.43 (1) (n) of the statutes is amended to read:

8 59.43 **(1)** (n) Upon the filing of a financing statement or other document
9 evidencing the creation of a security interest, as defined in s. 401.201 ~~(37) (a)~~ (2) (t),
10 required to be filed or recorded with the register under s. 409.501 (1) (a), index the
11 statement or document in the real estate records index under sub. (9).

12 **SECTION 3.** 126.25 (11) of the statutes is amended to read:

13 126.25 **(11)** "Warehouse receipt" means a receipt for grain, issued by a grain
14 warehouse keeper, that is also a document of title under s. 401.201 ~~(15)~~ (2) (i).

15 **SECTION 4.** 137.12 (2) (b) of the statutes is amended to read:

16 137.12 **(2)** (b) Chapters 401 and 403 to 410, other than ~~ss. 401.107 and 401.206~~
17 s. 401.306.

18 **SECTION 5.** 137.24 (4) of the statutes is amended to read:

19 137.24 **(4)** Except as otherwise agreed, a person having control of a transferable
20 record is the holder, as defined in s. 401.201 ~~(20)~~ (2) (km), of the transferable record
21 and has the same rights and defenses as a holder of an equivalent record or writing

under chs. 401 to 411, including, if the applicable statutory requirements under s. 403.302 (1), 407.501, or 409.330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable record of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

SECTION 6. 340.01 (56o) of the statutes is amended to read:

340.01 **(56o)** "Security interest" means a security interest as defined in s. 401.201 ~~(37)~~ (2) (t).

SECTION 7. 342.03 of the statutes is amended to read:

342.03 Motor vehicle, trailer or semitrailer leases. Notwithstanding s. 401.201 ~~(37)~~ (2) (t) or ch. 409, a transaction involving a motor vehicle, trailer or semitrailer does not create a conditional sale or a security interest merely because it includes a provision that permits or requires the rental price to be adjusted under the agreement by reference to the amount realized upon the sale or other disposition of the motor vehicle, trailer or semitrailer.

SECTION 8. Chapter 401 of the statutes is repealed and recreated to read:

CHAPTER 401

UNIFORM COMMERCIAL CODE

— GENERAL PROVISIONS

SUBCHAPTER I

GENERAL PROVISIONS

401.101 Short titles. (1) Chapters 401 to 411 may be cited as the uniform commercial code.

(2) This chapter may be cited as uniform commercial code — general provisions.

1 **401.102 Scope of chapter.** This chapter applies to a transaction to the extent
2 that it is governed by another chapter in chs. 402 to 411.

3 **401.103 Construction of uniform commercial code to promote its**
4 **purposes and policies; applicability of supplemental principles of law. (1)**
5 Chapters 401 to 411 must be liberally construed and applied to promote its
6 underlying purposes and policies, which are all of the following:

7 (a) To simplify, clarify, and modernize the law governing commercial
8 transactions.

9 (b) To permit the continued expansion of commercial practices through custom,
10 usage, and agreement of the parties.

11 (c) To make uniform the law among the various jurisdictions.

12 **(2)** Unless displaced by the particular provisions of chs. 401 to 411, the
13 principles of law and equity, including the law merchant and the law relative to
14 capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress,
15 coercion, mistake, bankruptcy, or other validating or invalidating cause shall
16 supplement its provisions.

17 **401.104 Construction against implied repeal.** Chapters 401 to 411 being
18 a general act intended as a unified coverage of its subject matter, no part of it shall
19 be deemed to be impliedly repealed by subsequent legislation if such construction can
20 reasonably be avoided.

21 **401.106 Use of singular and plural; gender.** In chs. 401 to 411, unless the
22 statutory context otherwise requires, all of the following apply:

23 **(1)** Words in the singular number include the plural, and those in the plural
24 include the singular.

25 **(2)** Words of any gender also refer to any other gender.

1 **401.107 Captions.** Section captions are part of chs. 401 to 411,
2 notwithstanding s. 990.001 (6).

3 SUBCHAPTER II
4 GENERAL DEFINITIONS AND
5 PRINCIPLES OF INTERPRETATION

6 **401.201 General definitions. (1)** Unless the context otherwise requires,
7 words or phrases defined in this section, or in the additional definitions contained
8 in chs. 402 to 411 that apply to particular chapters or subchapters thereof, have the
9 meanings stated.

10 **(2)** Subject to definitions contained in chs. 402 to 411 that apply to particular
11 chapters or subchapters thereof, in chs. 401 to 411:

12 (a) "Action," in the sense of a judicial proceeding, includes recoupment,
13 counterclaim, setoff, suit in equity, and any other proceeding in which rights are
14 determined.

15 (am) "Aggrieved party" means a party entitled to pursue a remedy.

16 (b) "Agreement" means the bargain of the parties in fact, as found in their
17 language or inferred from other circumstances, including course of performance,
18 course of dealing, or usage of trade as provided in s. 401.303. (Compare "Contract.")

19 (c) "Bank" means a person engaged in the business of banking and includes a
20 savings bank, savings and loan association, credit union, and trust company.

21 (cm) "Bearer" means a person in control of a negotiable electronic document of
22 title or person in possession of an instrument, negotiable tangible document of title,
23 or certificated security payable to bearer or endorsed in blank.

1 (d) "Bill of lading" means a document of title evidencing the receipt of goods for
2 shipment issued by a person engaged in the business of directly or indirectly
3 transporting or forwarding goods. The term does not include a warehouse receipt.
4 (dm) "Branch" includes a separately incorporated foreign branch of a bank.
5 (e) "Burden of establishing" a fact means the burden of persuading the trier of
6 fact that the existence of the fact is more probable than its nonexistence.
7 (em) "Buyer in ordinary course of business" means a person that buys goods in
8 good faith, without knowledge that the sale violates the rights of another person in
9 the goods, and in the ordinary course from a person, other than a pawnbroker, in the
10 business of selling goods of that kind. A person buys goods in the ordinary course if
11 the sale to the person comports with the usual or customary practices in the kind of
12 business in which the seller is engaged or with the seller's own usual or customary
13 practices. A person that sells oil, gas, or other minerals at the wellhead or minehead
14 is a person in the business of selling goods of that kind. A buyer in ordinary course
15 of business may buy for cash, by exchange of other property, or on secured or
16 unsecured credit, and may acquire goods or documents of title under a preexisting
17 contract for sale. Only a buyer that takes possession of the goods or has a right to
18 recover the goods from the seller under ch. 402 may be a buyer in ordinary course of
19 business. A person that acquires goods in a transfer in bulk or as security for or in
20 total or partial satisfaction of a money debt is not a buyer in ordinary course of
21 business.
22 (f) "Conspicuous," with reference to a term, means so written, displayed, or
23 presented that a reasonable person against which it is to operate ought to have
24 noticed it. Whether a term is "conspicuous" or not is a decision for the court.
25 Conspicuous terms include any of the following:

1. A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size.

2. Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(fm) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(g) "Contract" means the total legal obligation that results from the parties' agreement as determined by chs. 401 to 411 as supplemented by any other applicable laws. (Compare "Agreement.")

(gm) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(h) "Defendant" includes a person in the position of defendant in a counterclaim or 3rd party claim.

(hm) "Delivery" with respect to electronic documents of title means voluntary transfer of control and with respect to instruments, tangible documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

(i) "Document of title" means a record that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers; and that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible

portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title is evidenced by a record consisting of information stored in an electronic medium. A tangible document of title is evidenced by a record consisting of information that is inscribed on a tangible medium.

(im) "Fault" means a wrongful act, omission, breach, or default.

(j) "Fungible goods" means any of the following:

1. Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit.

2. Goods which by agreement are treated as equivalent.

(jm) "Genuine" means free of forgery or counterfeiting.

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(k) "Good faith," except as otherwise provided in ch. 405, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(km) "Holder" means any of the following:

1. The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.

2. A person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.

3. A person in control of a negotiable electronic document of title.

(L) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(Lm) "Insolvent" means any of the following:

1. Having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute.

2. Unable to pay debts as they become due.

3. Insolvent within the meaning of federal bankruptcy law.

(m) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between 2 or more countries.

(mm) "Organization" means a person other than an individual.

(n) "Party," as distinct from a "3rd party," means a person that has engaged in a transaction or made an agreement subject to chs. 401 to 411.

(nm) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(p) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(pm) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

1 (q) "Purchase" means taking by sale, lease, discount, negotiation, mortgage,
2 pledge, lien, security interest, issue or reissue, gift, or any other voluntary
3 transaction creating an interest in property.

4 (qm) "Purchaser" means a person that takes by purchase.

5 (r) "Record" means information that is inscribed on a tangible medium or that
6 is stored in an electronic or other medium and is retrievable in perceivable form.

7 (rm) "Remedy" means any remedial right to which an aggrieved party is
8 entitled with or without resort to a tribunal.

9 (s) "Representative" means any person empowered to act for another, including
10 an agent, an officer of a corporation or association, and a trustee, executor, or
11 administrator of an estate.

12 (sm) "Right" includes remedy.

13 (t) "Security interest" means an interest in personal property or fixtures which
14 secures payment or performance of an obligation. The term also includes any
15 interest of a consignor and a buyer of accounts, chattel paper, a payment intangible,
16 or a promissory note in a transaction that is subject to ch. 409. The special property
17 interest of a buyer of goods on identification of those goods to a contract for sale under
18 s. 402.401 is not a "security interest," but a buyer may also acquire a "security
19 interest" by complying with ch. 409. Except as otherwise provided in s. 402.505, the
20 right of a seller or lessor of goods under ch. 402 or 411 to retain or acquire possession
21 of the goods is not a "security interest," but a seller or lessor may also acquire a
22 "security interest" by complying with ch. 409. The retention or reservation of title
23 by a seller of goods notwithstanding shipment or delivery to the buyer (s. 402.401)
24 is limited in effect to a reservation of a "security interest." Whether a transaction in
25 the form of a lease creates a "security interest" is determined pursuant to s. 401.203.

(tm) "Send" in connection with a writing, record, or notice means any of the following:

1. To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances.

2. In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.

(u) "Signed" includes any symbol executed or adopted with present intention to adopt or accept a writing.

(um) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(v) "Surety" includes a guarantor or other secondary obligor.

(vm) "Term" means a portion of an agreement that relates to a particular matter.

(w) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(wm) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(x) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

401.202 Notice; knowledge. (1) Subject to sub. (6), a person has "notice" of a fact if the person satisfies any of the following:

1 (a) Has actual knowledge of it.

2 (b) Has received a notice or notification of it.

3 (c) From all the facts and circumstances known to the person at the time in
4 question, has reason to know that it exists.

5 **(2)** "Knowledge" means actual knowledge.

6 **(3)** "Discover," "learn," or words of similar import refer to knowledge rather
7 than to notice.

8 **(4)** A person "notifies" or "gives" a notice or notification to another by taking
9 such steps as may be reasonably required to inform the other in ordinary course,
10 whether or not the other person actually comes to know of it.

11 **(5)** Subject to sub. (6), a person "receives" a notice or notification when any of
12 the following apply:

13 (a) It comes to that person's attention.

14 (b) It is duly delivered in a form reasonable under the circumstances at the
15 place of business through which the contract was made or at another location held
16 out by that person as the place for receipt of such communications.

17 **(6)** Notice, knowledge, or a notice or notification received by an organization
18 is effective for a particular transaction from the time it is brought to the attention
19 of the individual conducting that transaction and, in any event, from the time it
20 would have been brought to the individual's attention if the organization had
21 exercised due diligence. An organization exercises due diligence if it maintains
22 reasonable routines for communicating significant information to the person
23 conducting the transaction and there is reasonable compliance with the routines.
24 Due diligence does not require an individual acting for the organization to
25 communicate information unless the communication is part of the individual's

regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

401.203 Lease distinguished from security interest. (1) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.

(2) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and if any of the following apply:

(a) The original term of the lease is equal to or greater than the remaining economic life of the goods.

(b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods.

(c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

(d) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

(3) A transaction in the form of a lease does not create a security interest merely because of any of the following:

(a) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into.

(b) The lessee assumes risk of loss of the goods.

1 (c) The lessee agrees to pay taxes, insurance, filing, recording, or registration
2 fees, or service or maintenance costs with respect to the goods.
3 (d) The lessee has an option to renew the lease or to become the owner of the
4 goods.
5 (e) The lessee has an option to renew the lease for a fixed rent that is equal to
6 or greater than the reasonably predictable fair market rent for the use of the goods
7 for the term of the renewal at the time the option is to be performed.
8 (f) The lessee has an option to become the owner of the goods for a fixed price
9 that is equal to or greater than the reasonably predictable fair market value of the
10 goods at the time the option is to be performed.
11 **(4)** Additional consideration is nominal if it is less than the lessee's reasonably
12 predictable cost of performing under the lease agreement if the option is not
13 exercised. Additional consideration is not nominal if any of the following apply:
14 (a) When the option to renew the lease is granted to the lessee, the rent is stated
15 to be the fair market rent for the use of the goods for the term of the renewal
16 determined at the time the option is to be performed.
17 (b) When the option to become the owner of the goods is granted to the lessee,
18 the price is stated to be the fair market value of the goods determined at the time the
19 option is to be performed.
20 **(5)** The "remaining economic life of the goods" and "reasonably predictable" fair
21 market rent, fair market value, or cost of performing under the lease agreement must
22 be determined with reference to the facts and circumstances at the time the
23 transaction is entered into.

1 **401.204 Value.** Except as otherwise provided in chs. 403, 404, 405, and 406,
2 a person gives value for rights if the person acquires them under any of the following
3 circumstances:

4 **(1)** In return for a binding commitment to extend credit or for the extension of
5 immediately available credit, whether or not drawn upon and whether or not a
6 charge–back is provided for in the event of difficulties in collection.

7 **(2)** As security for, or in total or partial satisfaction of, a preexisting claim.

8 **(3)** By accepting delivery under a preexisting contract for purchase.

9 **(4)** In return for any consideration sufficient to support a simple contract.

10 **401.205 Reasonable time; seasonableness. (1)** Whether a time for taking
11 an action required by chs. 401 to 411 is reasonable depends on the nature, purpose,
12 and circumstances of the action.

13 **(2)** An action is taken seasonably if it is taken at or within the time agreed or,
14 if no time is agreed, at or within a reasonable time.

15 SUBCHAPTER III
16 TERRITORIAL APPLICABILITY AND
17 GENERAL RULES

18 **401.301 Territorial applicability; parties' power to choose applicable**
19 **law.**

20 **(1)** Except as otherwise provided in this section, when a transaction bears a
21 reasonable relation to this state and to another state or nation the parties may agree
22 that the law either of this state or of such other state or nation shall govern their
23 rights and duties.

1 **(2)** In the absence of an agreement under sub. (1), and except as provided in
2 sub. (3), chs. 401 to 411 apply to transactions bearing an appropriate relation to this
3 state.

4 **(3)** If one of the following provisions of chs. 401 to 411 specifies the applicable
5 law, that provision governs and a contrary agreement is effective only to the extent
6 permitted by the law so specified:

7 (a) Section 402.402.

8 (b) Sections 411.105 and 411.106.

9 (c) Section 404.102.

10 (d) Section 410.507.

11 (e) Section 405.116.

12 (f) Section 406.103.

13 (g) Section 408.110.

14 (h) Sections 409.301 through 409.307.

15 **401.302 Variation by agreement. (1)** Except as otherwise provided in sub.
16 (2) or elsewhere in chs. 401 to 411, the effect of provisions of chs. 401 to 411 may be
17 varied by agreement.

18 **(2)** The obligations of good faith, diligence, reasonableness, and care prescribed
19 by chs. 401 to 411 may not be disclaimed by agreement. The parties, by agreement,
20 may determine the standards by which the performance of those obligations is to be
21 measured if those standards are not manifestly unreasonable. Whenever chs. 401
22 to 411 require any action to be taken within a reasonable time, any time which is not
23 manifestly unreasonable may be fixed by agreement.

1 **(3)** The presence in certain provisions of chs. 401 to 411 of the phrase "unless
2 otherwise agreed," or words of similar import, does not imply that the effect of other
3 provisions may not be varied by agreement under this section.

4 **401.303 Course of performance, course of dealing, and usage of trade.**
5 **(1)** A "course of performance" is a sequence of conduct between the parties to a
6 particular transaction that exists if any of the following apply:

7 (a) The agreement of the parties with respect to the transaction involves
8 repeated occasions for performance by a party.

9 (b) The other party, with knowledge of the nature of the performance and
10 opportunity for objection to it, accepts the performance or acquiesces in it without
11 objection.

12 **(2)** A "course of dealing" is a sequence of conduct concerning previous
13 transactions between the parties to a particular transaction that is fairly to be
14 regarded as establishing a common basis of understanding for interpreting their
15 expressions and other conduct.

16 **(3)** A "usage of trade" is any practice or method of dealing having such
17 regularity of observance in a place, vocation, or trade as to justify an expectation that
18 it will be observed with respect to the transaction in question. The existence and
19 scope of such a usage are to be proved as facts. If it is established that such a usage
20 is embodied in a trade code or similar record, the interpretation of the record is a
21 question of law.

22 **(4)** A course of performance or course of dealing between the parties or usage
23 of trade in the vocation or trade in which they are engaged or of which they are or
24 should be aware is relevant in ascertaining the meaning of the parties' agreement,
25 may give particular meaning to specific terms of the agreement, and may

1 supplement or qualify the terms of the agreement. A usage of trade applicable in the
2 place in which part of the performance under the agreement is to occur may be so
3 utilized as to that part of the performance.

4 **(5)** Except as otherwise provided in sub. (6), the express terms of an agreement
5 and any applicable course of performance, course of dealing, or usage of trade must
6 be construed whenever reasonable as consistent with each other. If such a
7 construction is unreasonable, all of the following apply:

8 (a) Express terms prevail over course of performance, course of dealing, and
9 usage of trade.

10 (b) Course of performance prevails over course of dealing and usage of trade.

11 (c) Course of dealing prevails over usage of trade.

12 **(6)** Subject to s. 402.209, a course of performance is relevant to show a waiver
13 or modification of any term inconsistent with the course of performance.

14 **(7)** Evidence of a relevant usage of trade offered by one party is not admissible
15 unless that party has given the other party notice that the court finds sufficient to
16 prevent unfair surprise to the other party.

17 **401.304 Obligation of good faith.** Every contract or duty within chs. 401 to
18 411 imposes an obligation of good faith in its performance and enforcement.

19 **401.305 Remedies to be liberally administered. (1)** The remedies
20 provided by chs. 401 to 411 must be liberally administered to the end that the
21 aggrieved party may be put in as good a position as if the other party had fully
22 performed but neither consequential or special damages nor penal damages may be
23 had except as specifically provided in chs. 401 to 411 or by other rule of law.

24 **(2)** Any right or obligation declared by chs. 401 to 411 is enforceable by action
25 unless the provision declaring it specifies a different and limited effect.

1 **401.306 Waiver or renunciation of claim or right after breach.** A claim
2 or right arising out of an alleged breach may be discharged in whole or in part without
3 consideration by agreement of the aggrieved party in an authenticated record.

4 **401.307 Prima facie evidence by 3rd–party documents.** A document in
5 due form purporting to be a bill of lading, policy or certificate of insurance, official
6 weigher's or inspector's certificate, consular invoice, or any other document
7 authorized or required by the contract to be issued by a 3rd party shall be prima facie
8 evidence of its own authenticity and genuineness and of the facts stated in the
9 document by the 3rd party.

10 **401.308 Performance or acceptance under reservation of rights. (1)**
11 A party that with explicit reservation of rights performs or promises performance or
12 assents to performance in a manner demanded or offered by the other party does not
13 thereby prejudice the rights reserved. Such words as "without prejudice," "under
14 protest," or the like are sufficient.

15 **(2)** Subsection (1) does not apply to an accord and satisfaction.

16 **401.309 Option to accelerate at will.** A term providing that one party or
17 that party's successor in interest may accelerate payment or performance or require
18 collateral or additional collateral "at will" or when the party "deems itself insecure,"
19 or words of similar import, means that the party has power to do so only if that party
20 in good faith believes that the prospect of payment or performance is impaired. The
21 burden of establishing lack of good faith is on the party against which the power has
22 been exercised.

23 **401.310 Subordinated obligations.** An obligation may be issued as
24 subordinated to performance of another obligation of the person obligated, or a
25 creditor may subordinate its right to performance of an obligation by agreement with

either the person obligated or another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor.

SECTION 9. 402.202 (1) of the statutes is amended to read:

402.202 **(1)** By course of dealing or usage of trade (s. ~~401.205~~ 401.303) or by course of performance (s. 402.208);

SECTION 10. 402.208 (2) of the statutes is amended to read:

402.208 **(2)** The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (s. ~~401.205~~ 401.303).

SECTION 11. 403.103 (1) (j) of the statutes is amended to read:

403.103 **(1)** (j) "Prove" with respect to a fact means to meet the burden of establishing a fact, as defined in s. 401.201 ~~(8)~~ (2) (e).

SECTION 12. 407.102 (1) (e) of the statutes is amended to read:

407.102 **(1)** (e) "Document" means document of title as defined in s. 401.201 (2) (i).

SECTION 13. 407.103 (2) of the statutes is amended to read:

407.103 **(2)** This chapter does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees' businesses in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a

document of title which otherwise complies with the definition of a document of title in s. 401.201 (2) (i).

SECTION 14. 410.106 (1) of the statutes is amended to read:

410.106 **(1)** The time of receipt of a payment order or communication canceling or amending a payment order is determined by the rules applicable to receipt of a notice stated in s. ~~401.201 (26) (b)~~ 401.202 (6). A receiving bank may fix a cutoff time or times on a funds–transfer business day for the receipt and processing of payment orders and communications canceling or amending payment orders. Different cutoff times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cutoff time may apply to senders generally or different cutoff times may apply to different senders or categories of payment orders. If a payment order or communication canceling or amending a payment order is received after the close of a funds–transfer business day or after the appropriate cutoff time on a funds–transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds–transfer business day.

SECTION 15. 410.204 (2) of the statutes is amended to read:

410.204 **(2)** Reasonable time under sub. (1) may be fixed by agreement as stated in s. ~~401.204~~ 401.302 (1), but the obligation of a receiving bank to refund payment as stated in sub. (1) may not otherwise be varied by agreement.

SECTION 16. 411.501 (4) of the statutes is amended to read:

411.501 **(4)** Except as otherwise provided in s. ~~401.106~~ 401.305 (1), this chapter or the lease agreement, the rights and remedies in subs. (2) and (3) are cumulative.

SECTION 17. 706.08 (4) (c) of the statutes is amended to read:

706.08 **(4)** (c) The person conveys an interest in land as trustee to a good faith purchaser, as defined in s. 401.201 ~~(33)~~ (2) (qm).

SECTION 18. 893.36 (1g) (a) of the statutes is amended to read:

893.36 **(1g)** (a) "Buyer in ordinary course of business" has the meaning provided by s. 401.201 ~~(9)~~ (2) (em).

SECTION 19. Initial applicability.

(1) This act first applies to transactions entered into on the effective date of this subsection.

SECTION 20. Effective date.

(1) This act takes effect on the first day of the 3rd month beginning after publication.

(END)

State of Wisconsin
2009 – 2010 LEGISLATURE

LRBa1693/1
MDK:nwn:md

SENATE AMENDMENT 1,

TO 2009 SENATE BILL 472

March 1, 2010 – Offered by Senator RISSER.

SA 1

At the locations indicated, amend the bill as follows:

1. Page 8, line 13: delete lines 13 and 14 and substitute:

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

(END)