

# UNIFORM COMMERCIAL CODE

## CHAPTER 448

SENATE BILL NO. 2100

(Committee on Industry, Business and Labor)

(At the request of the Commission on Uniform State Laws)

### UNIFORM COMMERCIAL CODE REVISIONS

AN ACT to create and enact a new section to chapter 39-05 and new chapters 41-02.1, 41-03, 41-04, and 41-04.1 of the North Dakota Century Code, relating to the Uniform Commercial Code, article 2A - leases, article 3 - negotiable instruments, article 4 - bank deposits and collections, and article 4A - funds transfers; to amend and reenact subsection 3 of section 6-07-52, subsection 2 of section 41-01-05, subsections 20, 24, 37, 43, and 44 of section 41-01-11, section 41-01-17, subsection 3 of section 41-02-03, subsection 4 of section 41-02-48, subsection 3 of section 41-02-59, subsection 3 of section 41-05-03, subdivision a of subsection 2 of section 41-05-14, subsection 3 of section 41-09-05, section 41-09-13, subsection 1 of section 41-09-16, subdivision f of subsection 1 of section 41-09-23, section 41-09-30, subsection 1 of section 41-09-33, and section 47-15-01 of the North Dakota Century Code, relating to the Uniform Commercial Code; to repeal the present chapters 41-03 and 41-04 and section 41-09-11 of the North Dakota Century Code, relating to negotiable instruments and bank deposits and collections; to provide for transition; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 3 of section 6-07-52 of the North Dakota Century Code is amended and reenacted as follows:

3. Claims of depositors, except that notwithstanding sections 6-03-67 and ~~41-04-27~~ 41-04-31, if a depositor is indebted to an insolvent bank, the insolvent bank has a right to setoff against the depositor's account;

SECTION 2. A new section to chapter 39-05 is created and enacted as follows:

Vehicle leases that are not sales or security interests. Notwithstanding any other provision of law, a transaction regarding motor vehicles or trailers does not create a sale or security interest merely because an agreement provides that the rental price may be adjusted by reference to the amount realized upon sale or other disposition of the motor vehicle or trailer.

SECTION 3. AMENDMENT. Subsection 2 of section 41-01-05 of the North Dakota Century Code is amended and reenacted as follows:

2. Where one of the following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is

effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

- a. Rights of creditors against sold goods. Section 41-02-47.
- b. Applicability of the chapter on leases. Sections 41-02.1-05 and 41-02.1-06.
- c. Applicability of the chapter on bank deposits and collections. Section 41-04-02.
- ~~Bulk transfers subject to the chapter on bulk transfers. Section 41-06-02.~~
- d. Governing law in the chapter on funds transfers. Section 41-04.1-38.
- e. Applicability of the chapter on investment securities. Section 41-08-06.
- f. Perfection provisions of the chapter on secured transactions. Section 41-09-03.

SECTION 4. AMENDMENT. Subsections 20, 24, 37, 43, and 44 of section 41-01-11 of the 1989 Supplement to the North Dakota Century Code are amended and reenacted as follows:

- 20. "Holder" means a person who is in possession of a document of title, an instrument, or a certificated investment security drawn, issued, or endorsed to him, to his order, to bearer, or in blank with respect to an instrument, certificated security, or document of title means the person in possession if, in the case of an instrument, it is payable to bearer or to the order of the person in possession; in the case of a security, the person in possession is the registered owner, the security has been endorsed to the person in possession by the registered owner, or the security is in bearer form; or, in the case of a document of title, the goods are deliverable to bearer or to the order of the person in possession.
- 24. "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency or by an intergovernmental organization.
- 37. a. "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 41-02-46) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts or chattel paper which is subject to chapter 41-09. The special property interest of a buyer of goods on identification of such those goods to a contract for sale under section 41-02-46 is not a "security interest", but a buyer may also acquire a "security interest" by complying with chapter 41-09. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest", but a consignment is in any event subject to the provisions on

consignment sales (section 41-02-43). Whether a transaction creates a lease is intended as or security interest is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security; and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security a transaction creates a security interest if the consideration 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 not subject to termination by the lessee, and (1) the original term of the lease is equal to or greater than the remaining economic life of the goods; (2) 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; (3) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or (4) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

- b. A transaction does not create a security interest merely because it provides that (1) 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; (2) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, reporting, or registration fees, or service or maintenance costs with respect to the goods; (3) the lessee has an option to renew the lease or to become the owner of the goods; (4) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or (5) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.
- c. For purposes of this subsection: Additional consideration is not nominal if when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into. "Present value"

means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

43. "Unauthorized" signature **or endorsement** means one made without actual, implied or apparent authority and includes a forgery.
44. "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (sections ~~41-03-33~~ 41-03-29, ~~41-04-18~~ 41-04-22, and ~~41-04-19~~ 41-04-23) a person gives "value" for rights if he acquires them:
- In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge back is provided for in the event of difficulties in collection;
  - As security for or in total or partial satisfaction of a preexisting claim;
  - By accepting delivery pursuant to a preexisting contract for purchase; or
  - Generally, in return for any consideration sufficient to support a simple contract.

SECTION 5. AMENDMENT. Section 41-01-17 of the North Dakota Century Code is amended and reenacted as follows:

41-01-17. (1-207) Performance or acceptance under reservation of rights.

1. A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest", or the like are sufficient.
2. Subsection 1 does not apply to an accord and satisfaction governed by section 41-03-37.

SECTION 6. AMENDMENT. Subsection 3 of section 41-02-03 of the North Dakota Century Code is amended and reenacted as follows:

- The following definitions in other chapters apply to this chapter:
  - a. "Check". Section 41-03-04.
  - b. "Consignee". Section 41-07-02.
  - c. "Consignor". Section 41-07-02.

d. "Consumer goods". Section 41-09-09.

e. "Dishonor". Section ~~41-03-63~~ 41-03-59.

f. "Draft". Section 41-03-04.

SECTION 7. AMENDMENT. Subsection 4 of section 41-02-48 of the North Dakota Century Code is amended and reenacted as follows:

4. The rights of other purchasers of goods and of lien creditors are governed by the chapters on secured transactions (chapter 41-09), ~~bulk transfers (chapter 41-06)~~, and documents of title (chapter 41-07).

SECTION 8. AMENDMENT. Subsection 3 of section 41-02-59 of the North Dakota Century Code is amended and reenacted as follows:

3. Subject to the provisions of this title on the effect of an instrument on an obligation (section ~~41-03-76~~ 41-03-36), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

SECTION 9. Chapter 41-02.1 of the North Dakota Century Code is created and enacted as follows:

41-02.1-01. (2A-101) Short title. This chapter may be cited as the Uniform Commercial Code - leases.

41-02.1-02. (2A-102) Scope. This chapter applies to any transaction, regardless of form, that creates a lease.

41-02.1-03. (2A-103) Definitions and index of definitions.

1. In this chapter unless the context otherwise requires:

a. "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

b. "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.

c. "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any

- other unit treated in use or in the relevant market as a single whole.
- d. "Conforming" goods or performance under a lease contract means goods or performance that is in accordance with the obligations under the lease contract.
- e. "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed twenty-five thousand dollars.
- f. "Fault" means wrongful act, omission, breach, or default.
- g. "Finance lease" means a lease in which (1) the lessor does not select, manufacture, or supply the goods; (2) the lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and (3)(a) the lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract; (b) the lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract; (c) the lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations, or modifications of remedies, or liquidated damages, including those of any third party such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or (d) only if the lease is not a consumer lease, before the lessee signs the lease contract the lessor informs the lessee in writing of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, that the lessee is entitled under this chapter to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and that the lessee may contact the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.
- h. "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (section 41-02.1-39), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

- i. "Installment lease contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each delivery is a separate lease" or its equivalent.
- j. "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.
- k. "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance (as provided in this chapter). Unless the context clearly indicates otherwise, the term includes a sublease agreement.
- l. "Lease contract" means the total legal obligation that results from the lease agreement as affected by this chapter and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.
- m. "Leasehold interest" means the interest of the lessor or the lessee under a lease contract.
- n. "Lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.
- o. "Lessee in ordinary course of business" means a person who, in good faith and without knowledge that the lease is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, leases in ordinary course from a person in the business of selling or leasing goods of that kind, but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
- p. "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.
- q. "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination, or cancellation of the lease contract.
- r. "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

- s. "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, regardless of whether it is sufficient to perform the lease contract.
  - t. "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.
  - u. "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.
  - v. "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.
  - w. "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.
  - x. "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.
  - y. "Supply contract" means a contract under which a lessor buys or leases goods to be leased.
  - z. "Termination" occurs when either party under a power created by agreement or law puts an end to the lease contract otherwise than for default.
2. Other definitions applying to this chapter and the sections in which they appear are:
- a. "Accessions". Subsection 1 of section 41-02.1-40.
  - b. "Construction mortgage". Subdivision d of subsection 1 of section 41-02.1-39.
  - c. "Encumbrance". Subdivision e of subsection 1 of section 41-02.1-39.
  - d. "Fixtures". Subdivision a of subsection 1 of section 41-02.1-39.
  - e. "Fixture filing". Subdivision b of subsection 1 of section 41-02.1-39.
  - f. "Purchase money lease". Subdivision c of subsection 1 of section 41-02.1-39.
3. The following definitions also apply to this chapter:

- a. "Account". Section 41-09-06.
  - b. "Between merchants". Subsection 1 of section 41-02-04.
  - c. "Buyer". Subdivision a of subsection 1 of section 41-02-03.
  - d. "Chattel paper". Subdivision b of subsection 1 of section 41-09-05.
  - e. "Consumer goods". Subsection 1 of section 41-09-09.
  - f. "Document". Subdivision f of subsection 1 of section 41-09-05.
  - g. "Entrusting". Subsection 3 of section 41-02-48.
  - h. "General intangibles". Section 41-09-06.
  - i. "Good faith". Subdivision b of subsection 1 of section 41-02-03.
  - j. "Instrument". Subdivision i of subsection 1 of section 41-09-05.
  - k. "Merchant". Subsection 3 of section 41-02-04.
  - l. "Mortgage". Subdivision j of subsection 1 of section 41-09-05.
  - m. "Pursuant to commitment". Subdivision k of subsection 1 of section 41-09-05.
  - n. "Receipt". Subdivision c of subsection 1 of section 41-02-03.
  - o. "Sale". Subdivision d of subsection 1 of section 41-02-06.
  - p. "Sale on approval". Subdivision a of subsection 1 of section 41-02-43.
  - q. "Sale or return". Subdivision b of subsection 1 of section 41-02-43.
  - r. "Seller". Subdivision d of subsection 1 of section 41-02-03.
4. In addition, chapter 41-01 contains general definitions and principles of construction and interpretation applicable throughout this chapter.
- 41-02.1-04. (2A-104) Leases subject to other laws.
- 1. A lease, although subject to this chapter, is also subject to any applicable:
    - a. Certificate of title statute of this state;
    - b. Certificate of title statute of another jurisdiction (section 41-02.1-05); or

- c. Consumer protection law of this state, both decisional and statutory.
2. In case of conflict between the provisions of this chapter, other than section 41-02.1-05 or subsection 3 of section 41-02.1-34 or subsection 3 of section 41-02.1-35, and any statute or decision referred to in subsection 1, the provisions of that statute control.
  3. Failure to comply with any applicable law has only the effect specified therein.

41-02.1-05. (2A-105) Territorial application of article to goods covered by certificate of title. Subject to subsection 3 of section 41-02.1-34 and subsection 3 of section 41-02.1-35, with respect to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law, including the conflict of laws rules, of the jurisdiction issuing the certificate until the earlier of surrender of the certificate or four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

41-02.1-06. (2A-106) Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

1. If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within thirty days thereafter or in which the goods are to be used, the choice is not enforceable.
2. If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

41-02.1-07. (2A-107) Waiver or renunciation of claim or right after default. Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

41-02.1-08. (2A-108) Unconscionability.

1. If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made, the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
2. With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

3. Before making a finding of unconscionability under subsection 1 or 2, the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.
4. In an action in which the lessee claims unconscionability with respect to a consumer lease:
  - a. If the court finds unconscionability under subsection 1 or 2, the court shall award reasonable attorney's fees to the lessee.
  - b. If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action the claimant knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.
  - c. In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections 1 and 2 is not controlling.

41-02.1-09. (2A-109) Option to accelerate at will.

1. A term providing that one party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he or she deems himself or herself insecure" or in words of similar import must be construed to mean that the party has power to do so only if the party in good faith believes that the prospect of payment or performance is impaired.
2. With respect to a consumer lease, the burden of establishing good faith under subsection 1 is on the party who exercised the power; otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised.

41-02.1-10. (2A-201) Statute of frauds.

1. A lease contract is not enforceable by way of action or defense unless:
  - a. The total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than one thousand dollars; or
  - b. There is a writing, signed by the party against whom enforcement is sought or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.
2. Any description of leased goods or of the lease term is sufficient and satisfies subdivision b of subsection 1, whether or not it is specific, if it reasonably identifies what is described.

3. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subdivision b of subsection 1 beyond the lease term and the quantity of goods shown in the writing.
4. A lease contract that does not satisfy the requirements of subsection 1, but which is valid in other respects, is enforceable:
  - a. If the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;
  - b. If the party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or
  - c. With respect to goods that have been received and accepted by the lessee.
5. The lease term under a lease contract referred to in subsection 4 is:
  - a. If there is a writing signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;
  - b. If the party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court a lease term, the term so admitted; or
  - c. A reasonable lease term.

41-02.1-11. (2A-202) Final written expression - Parol or extrinsic evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented by course of dealing or usage of trade or by course of performance; and by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

41-02.1-12. (2A-203) Seals inoperative. The affixing of a seal to a writing evidencing a lease contract or an offer to enter into a lease contract does not render the writing a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer.

41-02.1-13. (2A-204) Formation in general.

1. A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract.
2. An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.
3. Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy.

41-02.1-14. (2A-205) Firm offers. An offer by a merchant to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed three months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

41-02.1-15. (2A-206) Offer and acceptance in formation of lease contract.

1. Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.
2. If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

41-02.1-16. (2A-207) Course of performance or practical construction.

1. If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.
2. The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.
3. Subject to section 41-02.1-17, course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

41-02.1-17. (2A-208) Modification, rescission, and waiver.

1. An agreement modifying a lease contract needs no consideration to be binding.

2. A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.
3. Although an attempt at modification or rescission does not satisfy the requirements of subsection 2, it may operate as a waiver.
4. A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

41-02.1-18. (2A-209) Lessee under finance lease as beneficiary of supply contract.

1. The benefit of the supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but subject to the terms of the warranty and of the supply contract and all of the supplier's defenses or claims arising therefrom.
2. The extension of the benefit of the supplier's promises and warranties to the lessee (subsection 1 of section 41-02.1-09) does not modify the rights and obligations of the parties to the supply contract, or impose any duty or liability under the supply contract on the lessee.
3. Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. Whenever a modification or rescission of the supply contract is effective between the supplier and the lessee, the lessor, in addition to the obligations of the lessor under the lease contract, is treated as having assumed all obligations of the supplier and warranties which were so modified or rescinded as they existed or were available to the lessee prior to modification or rescission.
4. In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection 1, the lessee retains all rights that the lessee may have against the supplier which arise from any agreement between the lessee and the supplier or from any other law.

41-02.1-19. (2A-210) Express warranties.

1. Express warranties by the lessor are created as follows:
  - a. Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis

of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

- b. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.
  - c. Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.
2. It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee", or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty.

41-02.1-20. (2A-211) Warranties against interference and against infringement - Lessee's obligation against infringement.

1. There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest.
2. Except in a finance lease there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.
3. A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications.

41-02.1-21. (2A-212) Implied warranty of merchantability.

1. Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.
2. Goods to be merchantable must:
  - a. Pass without objection in the trade under the description in the lease agreement;
  - b. In the case of fungible goods, be of fair average quality within the description;
  - c. Be fit for the ordinary purposes for which goods of that type are used;
  - d. Run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within each unit and among all units involved;

- e. Be adequately contained, packaged, and labeled as the lease agreement may require; and
  - f. Conform to any promises or affirmations of fact made on the container or label.
3. Other implied warranties may arise from course of dealing or usage of trade.

41-02.1-22. (2A-213) Implied warranty of fitness for particular purpose. Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

41-02.1-23. (2A-214) Exclusion or modification of warranties.

1. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of section 41-02.1-11 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.
2. Subject to subsection 3, to exclude or modify the implied warranty of merchantability or any part of it the language must mention "merchantability", be by a writing, and be conspicuous. Subject to subsection 3, to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose".
3. Notwithstanding subsection 2, but subject to subsection 4:
  - a. Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", or "with all faults", or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous;
  - b. If the lessee before entering into the lease contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed; and
  - c. An implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade.
4. To exclude or modify a warranty against interference or against infringement (section 41-02.1-20) or any part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing,

or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person.

41-02.1-24. (2A-215) Cumulation and conflict of warranties express or implied. Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention the following rules apply:

1. Exact or technical specifications displace an inconsistent sample or model or general language of description.
2. A sample from an existing bulk displaces inconsistent general language of description.
3. Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

41-02.1-25. (2A-216) Third-party beneficiaries of express and implied warranties. A warranty to or for the benefit of a lessee under this chapter, whether express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. The operation of this section may not be excluded, modified, or limited with respect to injury to the person of an individual to whom the warranty extends, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section.

41-02.1-26. (2A-217) Identification. Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

1. When the lease contract is made, if the lease contract is for a lease of goods that are existing and identified.
2. When the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified.
3. When the young are conceived, if the lease contract is for a lease of unborn young of animals.

41-02.1-27. (2A-218) Insurance and proceeds.

1. A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.
2. If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.

3. Notwithstanding a lessee's insurable interest under subsections 1 and 2, the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.
4. Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.
5. The parties by agreement may determine that one or more parties have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance.

41-02.1-28. (2A-219) Risk of loss.

1. Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.
2. Subject to section 41-02.1-29, if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:
  - a. If the lease contract requires or authorizes the goods to be shipped by carrier:
    - (1) And it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but
    - (2) If it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.
  - b. If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgement by the bailee of the lessee's right to possession of the goods.
  - c. In any case not within subdivision a or b, the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

41-02.1-29. (2A-220) Effect of default on risk of loss.

1. Where risk of loss is to pass to the lessee and the time of passage is not stated:
  - a. If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

b. If the lessee rightfully revokes acceptance, the lessee, to the extent of any deficiency in the lessee's effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

2. Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in lessor or supplier's effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

41-02.1-30. (2A-221) Casualty to identified goods. If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee under the lease agreement or section 41-02.1-28, then:

1. If the loss is total, the lease contract is avoided.
2. If the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at the lessee's option either treat the lease contract as avoided or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

41-02.1-31. (2A-301) Enforceability of lease contract. Except as otherwise provided in this chapter, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods and against creditors of the parties.

41-02.1-32. (2A-302) Title to and possession of goods. Except as otherwise provided in this chapter, each provision of this chapter applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee, or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent.

41-02.1-33. (2A-303) Alienability of party's interest under lease contract or of lessor's residual interest in goods - Delegation of performance - Transfer of rights.

1. Except as provided in subsections 2 and 3, a provision in a lease agreement that prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or that makes such a transfer an event of default, is enforceable as provided in subsection 4, but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective. "Creation of a security interest" as used in this section includes the sale of a lease contract that is subject to chapter 41-09.

2. A provision in a lease agreement that prohibits the creation or enforcement of a security interest in an interest of a party under the lease contract, or in the lessor's residual interest in the goods or that makes such a transfer an event of default is not enforceable unless, and then only to the extent that, there is an actual transfer by the lessee of the lessee's right of possession or use of the goods in violation of the provision or delegation of a material performance of either party to the lease contract in violation of the provision.
3. A transfer of a right to damages for default with respect to the whole lease contract or a transfer of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, which includes the creation of a security interest in the right to future payment under a lease contract that is granted by a lessor who has no remaining performance under the lease contract, may not be prohibited or made an event of default and is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on the other party to the lease contract within subsection 4 of this section.
4. Subject to subsections 2 and 3, if a transfer is made that is prohibited or is an event of default under a lease agreement, or if a transfer is made that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on the other party to the lease contract, unless the party prejudiced by the transfer agrees at any time to the transfer in the lease contract or otherwise, then that party has, if the transfer is made an event of default, the rights and remedies provided under subsection 2 of section 41-02.1-48. In all other cases, except as limited by contract, the transferor is liable to the prejudiced party for damages caused by the transfer to the extent the damages could not reasonably be prevented by the prejudiced party. A court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.
5. A transfer of "the lease" or of "all my rights under the lease" or a transfer in similar general terms is a transfer of rights, and unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee and acceptance by the transferee constitutes a promise by the transferee to perform those duties. This promise is enforceable by either the transferor or the other party to the lease contract.
6. Unless otherwise agreed by the lessor and the lessee, no delegation of performance relieves the transferor as against the other party of any duty to perform or any liability for default.
7. To prohibit the transfer of an interest of a party under a consumer lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous.

41-02.1-34. (2A-304) Subsequent lease of goods by lessor.

1. Subject to section 41-02.1-33, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsections 2 and 4 of section 41-02.1-75, takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of purchase the lessor has that power even though any of the following are met:
  - a. The lessor's transferor was deceived as to the identity of the lessor.
  - b. The delivery was in exchange for a check which is later dishonored.
  - c. It was agreed that the transaction was to be a "cash sale".
  - d. The delivery was procured through fraud punishable as larcenous under the criminal law.
2. A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of the lessor's and the existing lessee's rights to the goods, and takes free of the existing lease contract.
3. A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

41-02.1-35. (2A-305) Sale or sublease of goods by lessee.

1. Subject to section 41-02.1-33, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsections 2 and 4 of section 41-02.1-59, takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transfer of lease, the lessee has that power even though any of the following are met:
  - a. The lessor was deceived as to the identity of the lessee.
  - b. The delivery was in exchange for a check which is later dishonored.

- c. The delivery was procured through fraud punishable as larcenous under the criminal law.
2. A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.
3. A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

41-02.1-36. (2A-306) Priority of certain liens arising by operation of law. If a person in the ordinary course of business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this chapter unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

41-02.1-37. (2A-307) Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.

1. Except as otherwise provided in section 41-02.1-36, a creditor of a lessee takes subject to the lease contract.
2. Except as otherwise provided in subsections 3 and 4 of this section and in sections 41-02.1-36 and 41-02.1-38, a creditor of a lessor takes subject to the lease contract unless any of the following is met:
  - a. The creditor holds a lien that attached to the goods before the lease contract became enforceable.
  - b. The creditor holds a security interest in the goods and the lessee did not give value and receive delivery of the goods without knowledge of the security interest.
  - c. The creditor holds a security interest in the goods was perfected (section 41-09-24) before the lease contract became enforceable.
3. A lessee in the ordinary course of business takes the leasehold free of a security interest is perfected and the lessee knows of its existence.
4. A lessee other than a lessee in the ordinary course of business takes the leasehold interest free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the lease or more than forty-five days after the lease contract becomes enforceable, whichever first occurs, unless the future advances are made pursuant to a commitment

entered into without knowledge of the lease and before the expiration of the forty-five-day period.

41-02.1-38. (2A-308) Special rights of creditors.

1. A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.
2. Nothing in this chapter impairs the rights of creditors of a lessor if the lease contract becomes enforceable, not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security, or the like, and the lease contract is made under circumstances which under any statute or rule of law apart from this chapter would constitute a fraudulent transfer or voidable preference.
3. A creditor of a seller may treat a sale or an identification of goods to contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods under a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

41-02.1-39. (2A-309) Lessor's and lessee's rights when goods become fixtures.

1. In this section:
  - a. Goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law.
  - b. A "fixture filing" is the filing, in the office where a mortgage on the real estate would be recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of subsection 5 of section 41-09-41.
  - c. A lease is a "purchase money lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable.
  - d. A mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.
  - e. "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

2. Under this chapter a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this chapter of ordinary building materials incorporated into an improvement on land.
3. This chapter does not prevent creation of a lease of fixtures under real estate law.
4. The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if either of the following exists:
  - a. The lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate.
  - b. The interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.
5. The interest of a lessor of fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate if any of the following are met:
  - a. The fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable.
  - b. The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable.
  - c. The encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures.
  - d. The lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.
6. Notwithstanding subdivision a of subsection 4 but otherwise subject to subsections 4 and 5, the interest of a lessor of fixtures including the lessor's residual interest is subordinate to the conflicting interest of an encumbrance of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real

estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

7. In cases not within the preceding subsections, priority between the interest of a lessor of fixtures including the lessor's residual interest and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.
8. If the interest of a lessor of fixtures including the lessor's residual interest has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may on default, expiration, termination, or cancellation of the lease agreement by the other party but subject to the provisions of the lease agreement and this chapter, or if necessary to enforce other rights and remedies under this chapter of the lessor or the lessee, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the party removing the goods must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.
9. Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures including the lessor's residual interest is perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the chapter on secured transactions (chapter 41-09).

41-02.1-40. (2A-310) Lessor's and lessee's rights when goods become accessions.

1. Goods are "accessions" when they are installed in or affixed to other goods.
2. The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in subsection 4.
3. The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection 4 but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.
4. The interest of a lessor or a lessee under a lease contract described in subsection 2 or 3 is subordinate to the interest of:

- a. A buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions.
  - b. A creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.
5. When under subsection 2 or 3 a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may on default, expiration, termination, or cancellation of the lease contract by the other party, but subject to the provisions of the lease contract and this chapter, or if necessary to enforce his or her other rights and remedies under this chapter, remove the goods from the whole, free and clear of all interests in the whole. However, the lessor or the lessee must reimburse any holder of an interest in the whole, who is not the lessee and who has not otherwise agreed, for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

41-02.1-41. (2A-311) Priority subject to subordination. Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

41-02.1-42. (2A-401) Insecurity - Adequate assurance of performance.

1. A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.
2. If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which the insecure party has not already received the agreed return.
3. A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed thirty days after receipt of a demand by the other party.
4. Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.
5. Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

41-02.1-43. (2A-402) Anticipatory repudiation. If either party repudiates a lease contract with respect to a performance not yet due under

the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may:

1. For a commercially reasonable time, await retraction of repudiation and performance by the repudiating party.
2. Make demand under section 41-02.1-42 and await assurance of future performance adequate under the circumstances of the particular case.
3. Resort to any right or remedy upon default under the lease contract or this chapter, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction.

In addition, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this chapter on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (section 41-02.1-71).

41-02.1-44. (2A-403) Retraction of anticipatory repudiation.

1. Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless the aggrieved party has canceled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.
2. Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under section 41-02.1-42.
3. Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

41-02.1-45. (2A-404) Substituted performance.

1. If without fault of the lessee, the lessor, or the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.
2. If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:
  - a. The lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent.
  - b. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's

obligation unless the regulation is discriminatory, oppressive, or predatory.

41-02.1-46. (2A-405) Excused performance.

Subject to section 41-02.1-45 on substituted performance, the following rules apply:

1. Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with subsections 2 and 3 is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, regardless of whether the regulation or order later proves to be invalid.
2. If the causes mentioned in subsection 1 affect only part of the lessor's or the supplier's capacity to perform, the lessor or supplier shall allocate production and deliveries among its customers but at its option may include regular customers not then under contract for sale or lease as well as its own requirements for further manufacture. The lessor or supplier may so allocate in any manner that is fair and reasonable.
3. The lessor seasonably shall notify the lessee and, in the case of a finance lease, the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under subsection 2, of the estimated quote thus made available for the lessee.

41-02.1-47. (2A-406) Procedure on excused performance.

1. If the lessee receives notification of a material or indefinite delay or an allocation justified under section 41-02.1-46, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 41-02.1-58), either:
  - a. Terminate the lease contract (subsection 2 of section 41-02.1-53).
  - b. Except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quote in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.
2. If, after receipt of a notification from the lessor under section 41-02.1-46, the lessee fails so to modify the lease agreement within a reasonable time not exceeding thirty days, the lease contract lapses with respect to any deliveries affected.

41-02.1-48. (2A-407) Irrevocable promises - Finance leases.

1. In the case of a finance lease that is not a consumer lease, the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.
2. A promise that has become irrevocable and independent under subsection 1:
  - a. Is effective and enforceable between the parties and by or against third parties including assignees of the parties.
  - b. Is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.
3. This section does not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods.

41-02.1-49. (2A-501) Default - Procedure.

1. Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this chapter.
2. If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this chapter and, except as limited by this chapter, as provided in the lease agreement.
3. If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, under this chapter.
4. Except as otherwise provided in subsection 1 of section 41-01-06, this chapter, or the lease agreement, the rights and remedies referred to in subsections 2 and 3 are cumulative.
5. If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this part as to the goods, or under other applicable law as to both the real property and the goods in accordance with the party's rights and remedies in respect of the real property, in which case this part does not apply.

41-02.1-50. (2A-502) Notice after default. Except as otherwise provided in this chapter or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement.

41-02.1-51. (2A-503) Modification or impairment of rights and remedies.

1. Except as otherwise provided in this chapter, the lease agreement may include rights and remedies for default in addition to or in

substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter.

2. Resort to a remedy provided under this chapter or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this chapter.
3. Consequential damages may be liquidated under section 41-02.1-52, or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation, alteration, or exclusion of damages where the loss is commercial is not prima facie unconscionable.
4. Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this chapter.

41-02.1-52. (2A-504) Liquidation of damages.

1. Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.
2. If the lease agreement provides for liquidation of damages, and the provision does not comply with subsection 1, or the provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this chapter.
3. If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (section 41-02.1-73 or 41-02.1-74), the lessee is entitled to restitution of any amount by which the sum of the lessee's payments exceeds:
  - a. The amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages under subsection 1; or
  - b. In the absence of those terms, twenty percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of that amount or five hundred dollars.
4. A lessee's right to restitution under subsection 3 is subject to offset to the extent the lessor establishes:
  - a. A right to recover damages under the provisions of this chapter other than subsection 1; and

- b. The amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

41-02.1-53. (2A-505) Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

1. On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the canceling party also retains any remedy for default of the whole lease contract or any unperformed balance.
2. On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.
3. Unless the contrary intention clearly appears, expressions of "cancellation", "rescission", or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.
4. Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this chapter for default.
5. Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

41-02.1-54. (2A-506) Statute of limitations.

1. An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than one year.
2. A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.
3. If an action commenced within the time limited by subsection 1 is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
4. This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before this chapter becomes effective.

41-02.1-55. (2A-507) Proof of market rent - Time and place.

1. Damages based on market rent (section 41-02.1-67 or 41-02.1-76) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the time of the default.
2. If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this chapter is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.
3. Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in this chapter offered by one party is not admissible unless and until the party has given the other party notice that the court finds sufficient to prevent unfair surprise.
4. If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility.

41-02.1-56. (2A-508) Lessee's remedies.

1. If a lessor fails to deliver the goods in conformity to the lease contract (section 41-02.1-57) or repudiates the lease contract (section 41-02.1-43), or a lessee rightfully rejects the goods (section 41-02.1-57) or justifiably revokes acceptance of the goods (section 41-02.1-65), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 41-02.1-58), the lessor is in default under the lease contract and the lessee may:
  - a. Cancel the lease contract (subsection 1 of section 41-02.1-53).
  - b. Recover so much of the rent and security as has been paid as is just under the circumstances.
  - c. Cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (sections 41-02.1-66 and 41-02.1-68), or recover damages for nondelivery (sections 41-02.1-67 and 41-02.1-68).
  - d. Exercise any other rights or remedies provided in the lease contract.
2. If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:

- a. If the goods have been identified, recover them (section 41-02.1-70); or
  - b. In a proper case, obtain specific performance or replevy the goods (section 41-02.1-80).
3. If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and remedies provided in the lease contract, which may include a right to cancel the lease, and under subsection 3 of section 41-02.1-67.
  4. If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (subsection 4 of section 41-02.1-67).
  5. On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to the provisions of subsection 5 of section 41-02.1-75.
  6. Subject to the provisions of section 41-02.1-48, a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

41-02.1-57. (2A-509) Lessee's rights on improper delivery - Rightful rejection.

1. Subject to the provisions of section 41-02.1-58 on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.
2. Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor.

41-02.1-58. (2A-510) Installment lease contracts - Rejection and default.

1. Under an installment lease contract, a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents. If, however, the nonconformity does not fall within subsection 2 and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.
2. Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole, there is a default with respect to the whole.

But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

41-02.1-59. (2A-511) Merchant lessee's duties as to rightfully rejected goods.

1. Subject to any security interest of a lessee (subsection 5 of section 41-02.1-56), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in the merchant lessee's possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.
2. If a merchant lessee or any other lessee (section 41-02.1-60) disposes of goods, the lessee is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding ten percent of the gross proceeds.
3. In complying with this section or section 41-02.1-60, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.
4. A purchaser who purchases in good faith from a lessee under this section or section 41-02.1-60 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this chapter.

41-02.1-60. (2A-512) Lessee's duties as to rightfully rejected goods.

1. Except as otherwise provided with respect to goods that threaten to decline in value speedily (section 41-02.1-59) and subject to any security interest of a lessee (subsection 5 of section 41-02.1-56):
  - a. The lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;
  - b. If the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in section 41-02.1-59; but

c. The lessee has no further obligations with regard to goods rightfully rejected.

2. Action by the lessee pursuant to subsection 1 is not acceptance or conversion.

41-02.1-61. (2A-513) Cure by lessor of improper tender or delivery - Replacement.

1. If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract.

2. If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if the lessor or the supplier seasonably notifies the lessee.

41-02.1-62. (2A-514) Waiver of lessee's objections.

1. In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

a. If, stated seasonably, the lessor or the supplier could have cured it (section 41-02.1-61); or

b. Between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

2. A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent on the face of the documents.

41-02.1-63. (2A-515) Acceptance of goods.

1. Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and:

a. The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or

b. The lessee fails to make an effective rejection of the goods (subsection 2 of section 41-02.1-57).

2. Acceptance of a part of any commercial unit is acceptance of that entire unit.

41-02.1-64. (2A-516) Effect of acceptance of goods - Notice of default - Burden of establishing default after acceptance - Notice of claim or litigation to person answerable over.

1. A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered.
2. A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this chapter or the lease agreement for nonconformity.
3. If a tender has been accepted:
  - a. Within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified;
  - b. Except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (section 41-02.1-20) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and
  - c. The burden is on the lessee to establish any default.
4. If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over:
  - a. The lessee may give the lessor or the supplier written notice of the litigation. If the notice states that the lessor or the supplier may come in and defend and that if the lessor or the supplier does not do so, the lessor or the supplier will be bound in any action by the lessee by any determination of fact common to the two litigations, then unless the lessor or the supplier after seasonable receipt of the notice does come in and defend the lessor or the supplier is so bound.
  - b. The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (section 41-02.1-20) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over control the lessee is so barred.
5. The provisions of subsections 3 and 4 apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (section 41-02.1-20).

41-02.1-65. (2A-517) Revocation of acceptance of goods.

1. A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if:
  - a. Except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
  - b. Without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.
2. Except in the case of a finance lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor commits a default under the lease contract which substantially impairs the value of that lot or commercial unit to the lessee.
3. If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit for other defaults by the lessor.
4. Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.
5. A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

41-02.1-66. (2A-518) Cover - Substitute goods.

1. After default by a lessor under the lease contract as described in subsection 1 of section 41-02.1-56 or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease or contract to purchase or lease goods in substitution for those due from the lessor.
2. Except as otherwise provided with respect to damages liquidated in the lease agreement (section 41-02.1-52) or determined by agreement of the parties (subsection 3 of section 41-01-02 and section 41-02.1-51), if a lessee's cover is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

3. If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection 2, or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and section 41-02.1-67 governs.

41-02.1-67. (2A-519) Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods.

1. Except as otherwise provided with respect to damages liquidated in the lease agreement (section 41-02.1-52) or determined by agreement of the parties (subsection 3 of section 41-01-02 and section 41-02.1-51), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under subsection 2 of section 41-02.1-66, or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.
2. Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.
3. If the lessee has accepted goods and given notification (subsection 3 of section 41-02.1-64), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.
4. The measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

41-02.1-68. (2A-520) Lessee's incidental and consequential damages.

1. Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses, or commissions in connection with effecting cover, and any other reasonable expense incident to the default.
2. Consequential damages resulting from a lessor's default include:
  - a. Any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason

to know and which could not reasonably be prevented by cover or otherwise; and

- b. Injury to person or property proximately resulting from any breach of warranty.

41-02.1-69. (2A-521) Lessee's right to specific performance or replevin.

1. Specific performance may be decreed if the goods are unique or in other proper circumstances.
2. A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.
3. A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

41-02.1-70. (2A-522) Lessee's right to goods on lessor's insolvency.

1. Subject to subsection 2 and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (section 41-02.1-26) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified to a lease contract only if they conform to the lease contract.
2. A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract.

41-02.1-71. (2A-523) Lessor's remedies.

1. If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 41-02.1-58), the lessee is in default under the lease contract and the lessor may:
  - a. Cancel the lease contract (subsection 1 of section 41-02.1-53).
  - b. Proceed respecting goods not identified to the lease contract (section 41-02.1-72).
  - c. Withhold delivery of the goods and take possession of goods previously delivered (section 41-02.1-73).
  - d. Stop delivery of the goods by any bailee (section 41-02.1-74).

- e. Dispose of the goods and recover damages (section 41-02.1-75), or retain the goods and recover damages (section 41-02.1-76), or in a proper case recover rent (section 41-02.1-77).
  - f. Exercise any other rights or remedies provided in the lease contract.
2. If a lessor does not exercise the rights to which the lessor is entitled under subsection 1, the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any manner which is reasonable, together with incidental damages, less expenses saved in consequence of the lessee's default.
3. If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and remedies provided in the lease contract, which may include a right to cancel the lease, and unless otherwise provided in the lease contract:
- a. If the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and remedies provided under subsection 1 or 2.
  - b. If the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover under subsection 2.

41-02.1-72. (2A-524) Lessor's right to identify goods to lease contract.

1. A lessor aggrieved under subsection 1 of section 41-02.1-70 may:
- a. Identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and
  - b. Dispose of goods (subsection 1 of section 41-02.1-74) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.
2. If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner.

41-02.1-73. (2A-525) Lessor's right to possession of goods.

1. If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.
2. The lessor has on a default by the lessee under the lease contract described in subsection 1 of section 41-02.1-71 or in subdivision a of subsection 3 of section 41-02.1-71 the right to take possession

of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business and may dispose of goods on the lessee's premises (section 41-02.1-75).

3. The lessor may proceed under subsection 2 without judicial process if that can be done without breach of the peace or the lessor may proceed by action.

41-02.1-74. (2A-526) Lessor's stoppage of delivery in transit or otherwise.

1. A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason that the lessor has a right to withhold or take possession of the goods.
2. In pursuing its remedies under subsection 1, the lessor may stop delivery until:
  - a. Receipt of the goods by the lessee;
  - b. Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or
  - c. Such an acknowledgment to the lessee by a carrier via reshipment or as warehouseman.
3. a. To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.
  - b. After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.
  - c. A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

41-02.1-75. (2A-527) Lessor's rights to dispose of goods.

1. After a default by a lessee under the lease contract described in subsection 1 of section 41-02.1-71 or in subdivision a of subsection 3 of section 41-02.1-71 or after the lessor refuses to deliver or takes possession of goods (section 41-02.1-73 or 41-02.1-74), the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale, or otherwise.
2. Except as otherwise provided with respect to damages liquidated in the lease agreement (section 41-02.1-52) or determined by agreement of the parties (subsection 3 of section 41-01-02 and section

41-02.1-51), if the disposition is by lease agreement substantially similar to the original lease agreement and the lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages accrued and unpaid rent as of the date of the commencement of the new term of the new lease agreement, the present value, as of the same date, of the total rent for the remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and any incidental damages allowed under section 41-02.1-78, less expenses saved in consequence of the lessee's default.

3. If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection 2, or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and section 41-02.1-76 governs.
4. A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this chapter.
5. The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (subsection 5 of section 41-02.1-56).

41-02.1-76. (2A-528) Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.

1. Except as otherwise provided with respect to damages liquidated in the lease agreement (section 41-02.1-52) or determined by agreement of the parties (subsection 3 of section 41-01-02 and section 41-02.1-51), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and disposition is by lease agreement that for any reason does not qualify for treatment under subsection 2 of section 41-02.1-75, or is by sale or otherwise, the lessor may recover from the lessee as damages for a default described in subsection 1 of section 41-02.1-70 or in subdivision a of subsection 3 of section 41-02.1-70, or, if agreed, for other default of the lessee accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or if the lessee has taken possession of the goods, as of the date the lessor repossess the goods or an earlier date on which the lessee makes a tender of the goods to the lessor; the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement; and any incidental damages allowed under section 41-02.1-78, less expenses saved in consequence of the lessee's default.

2. If the measure of damages provided in subsection 1 is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under section 41-02.1-78, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

41-02.1-77. (2A-529) Lessor's action for the rent.

1. After default by the lessee under the lease contract as described in subsection 1 of section 41-02.1-71 or subdivision a of subsection 3 of section 41-02.1-70 or, if agreed, after other default by the lessee, if the lessor complies with subsection 2, the lessor may recover from the lessee as damages:
  - a. For goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (section 41-02.1-28), accrued and unpaid rent as of the date of entry of judgment in favor of the lessor the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and any incidental damages allowed under section 41-02.1-78, less expenses saved in consequence of the lessee's default; and
  - b. For goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, accrued and unpaid rent as of the date of entry of judgment in favor of the lessor the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and any incidental damages allowed under section 41-02.1-78, and the lessor will cause an appropriate credit to be provided against any judgment for damages to the extent that the amount of the judgment exceeds the recovery available under section 41-02.1-75 or 41-02.1-76 less expenses saved in consequence of the lessee's default.
2. Except as provided in subsection 3, the lessor shall hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control.
3. The lessor may dispose of the goods at any time before collection of the judgment for damages obtained under subsection 1. If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages will be governed by section 41-02.1-75 or 41-02.1-76.
4. Payment of the judgment for damages obtained under subsection 1 entitles the lessee to use and possession of the goods not then disposed of for the remaining lease term of and in accordance with the lease agreement.
5. After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (section

41-02.1-42), a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for nonacceptance under sections 41-02.1-75 and 41-02.1-76.

41-02.1-78. (2A-530) Lessor's incidental damages. Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.

41-02.1-79. (2A-531) Standing to sue third parties for injury to goods.

1. If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract, the lessor has a right of action against the third party, and the lessee also has a right of action against the third party if the lessee:
  - a. Has a security interest in the goods;
  - b. Has an insurable interest in the goods; or
  - c. Bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.
2. If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, the plaintiff's suit or settlement, subject to the plaintiff's own interest, is as a fiduciary for the other party to the lease contract.
3. Either party with the consent of the other may sue for the benefit of whom it may concern.

41-02.1-80. (2A-532) Lessor's rights to residual interest. In addition to any other recovery permitted by this chapter or other law, the lessor is entitled to recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee.

SECTION 10. Chapter 41-03 of the North Dakota Century Code is created and enacted as follows:

41-03-01. (3-101) Short title. This chapter may be cited as Uniform Commercial Code - Negotiable instruments.

41-03-02. (3-102) Subject matter.

1. This chapter applies to negotiable instruments. It does not apply to money, to payment orders governed by chapter 41-04.1, or to securities governed by chapter 41-08.

2. In the event of conflict between this chapter and chapter 41-04 or 41-09, chapters 41-04 and 41-09 prevail over this chapter.
3. Regulations of the board of governors of the federal reserve system and operating circulars of the federal reserve banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

41-03-03. (3-103) Definitions.

1. In this chapter:

- a. "Acceptor" means a drawee that has accepted a draft.
- b. "Drawee" means a person ordered in a draft to make payment.
- c. "Drawer" means a person that signs a draft as a person ordering payment.
- d. "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.
- e. "Maker" means a person that signs a note as promisor of payment.
- f. "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.
- g. "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards prevailing in the area in which that person is located with respect to the business in which that person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or chapter 41-04.
- h. "Party" means a party to an instrument.
- i. "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.
- j. "Prove" with respect to a fact means to meet the burden of establishing the fact (subsection 8 of section 41-01-11).
- k. "Remitter" means a person that purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

2. Other definitions applying to this chapter and the sections in which they appear are:
- a. "Acceptance". Section 41-03-46.
  - b. "Accommodated party". Section 41-03-56.
  - c. "Accommodation party". Section 41-03-56.
  - d. "Alteration". Section 41-03-44.
  - e. "Anomalous endorsement". Section 41-03-24.
  - f. "Blank endorsement". Section 41-03-24.
  - g. "Cashier's check". Section 41-03-04.
  - h. "Certificate of deposit". Section 41-03-04.
  - i. "Certified check". Section 41-03-46.
  - j. "Check". Section 41-03-04.
  - k. "Consideration". Section 41-03-29.
  - l. "Draft". Section 41-03-04.
  - m. "Endorsement". Section 41-03-23.
  - n. "Endorser". Section 41-03-23.
  - o. "Fiduciary". Section 41-03-33.
  - p. "Holder in due course". Section 41-03-28.
  - q. "Incomplete instrument". Section 41-03-15.
  - r. "Instrument". Section 41-03-04.
  - s. "Issue". Section 41-03-05.
  - t. "Issuer". Section 41-03-05.
  - u. "Negotiable instrument". Section 41-03-04.
  - v. "Negotiation". Section 41-03-20.
  - w. "Note". Section 41-03-04.
  - x. "Payable at a definite time". Section 41-03-08.
  - y. "Payable on demand". Section 41-03-08.
  - z. "Payable to bearer". Section 41-03-09.
  - aa. "Payable to order". Section 41-03-09.

- bb. "Payment". Section 41-03-64.
- cc. "Person entitled to enforce". Section 41-03-27.
- dd. "Presentment". Section 41-03-58.
- ee. "Reacquisition". Section 41-03-26.
- ff. "Represented person". Section 41-03-33.
- gg. "Special endorsement". Section 41-03-24.
- hh. "Teller's check". Section 41-03-04.
- ii. "Transfer of instrument". Section 41-03-22.
- jj. "Traveler's check". Section 41-03-04.
- kk. "Value". Section 41-03-29.

3. The following definitions in other chapters apply to this chapter:

- a. "Bank". Section 41-04-05.
- b. "Banking day". Section 41-04-04.
- c. "Clearinghouse". Section 41-04-04.
- d. "Collecting bank". Section 41-04-05.
- e. "Customer". Section 41-04-04.
- f. "Depository bank". Section 41-04-05.
- g. "Documentary draft". Section 41-04-04.
- h. "Intermediary bank". Section 41-04-05.
- i. "Item". Section 41-04-04.
- j. "Payor bank". Section 41-04-05.
- k. "Suspends payments". Section 41-04-04.

4. In addition, chapter 41-01 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

41-03-04. (3-104) Negotiable instrument.

- 1. "Negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
  - a. Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

- b. Is payable on demand or at a definite time; and
- c. Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, except that the promise or order may contain an undertaking or power to give, maintain, or protect collateral to secure payment, an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or a waiver of the benefit of any law intended for the advantage or protection of any obligor.
2. "Instrument" means a negotiable instrument.
3. An order that meets all of the requirements of subsection 1 except subdivision a and otherwise falls within the definition of "check" in subsection 6 is a negotiable instrument and a check.
4. Notwithstanding subsection 1, a promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this chapter.
5. An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft", the person entitled to enforce the instrument may treat it as either.
6. "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank or a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term such as "money order".
7. "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.
8. "Teller's check" means a draft drawn by a bank on another bank or payable at or through a bank.
9. "Traveler's check" means an instrument that is payable on demand, is drawn on or payable at or through a bank, is designated by the term "traveler's check" or by a substantially similar term, and requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.
10. "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.
- 41-03-05. (3-105) Issue of instrument.
1. "Issue" means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person.

2. An unissued instrument or an unissued incomplete instrument (section 41-03-15) that is completed is binding on the maker or drawer, but nonissuance is a defense. An instrument that is conditionally issued or is issued for a special purpose is binding on the maker or drawer, but failure of the condition or special purpose to be fulfilled is a defense.
3. "Issuer" applies to issued and unissued instruments and means any person that signs an instrument as maker or drawer.

41-03-06. (3-106) Unconditional promise or order.

1. Except as provided in this section, for the purposes of subsection 1 of section 41-03-04, a promise or order is unconditional unless it states an express condition to payment or states that the promise or order is subject to or governed by another writing or that rights or obligations with respect to the promise or order are stated in another writing. A mere reference to another writing does not make the promise or order conditional.
2. A promise or order is not made conditional by a reference to another writing for a statement of rights with respect to collateral, prepayment, or accelerating or because payment is limited to resort to a particular fund or source.
3. If a promise or order requires as a condition to payment a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of subsection 1 of section 41-03-04. If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.
4. If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of subsection 1 of section 41-03-04, but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

41-03-07. (3-107) Instrument payable in foreign money. Unless the instrument otherwise provides, an instrument that states the amount payable in foreign money may be paid in the foreign money or in an equivalent amount in dollars calculated by using the current bank-offered spot rate at the place of payment for the purchase of dollars on the day on which the instrument is paid.

41-03-08. (3-108) Payable on demand or at a definite time.

1. A promise or order is "payable on demand" if it states that it is payable on demand or at sight, or otherwise indicates that it is

payable at the will of the holder, or if it does not state any time of payment.

2. A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of prepayment, acceleration, extension at the option of the holder, or extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.
3. If an instrument, payable at a fixed date, is also payable upon demand made before the fixed date, the instrument is payable on demand until the fixed date and, if demand for payment is not made before that date, becomes payable at a definite time on the fixed date.

41-03-09. (3-109) Payable to bearer or to order.

1. A promise or order is payable to bearer if it meets any of the following conditions:

- a. States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment.
  - b. Does not state a payee.
  - c. States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.
2. A promise or order that is not payable to bearer is payable to order if it is payable to the order of an identified person or to an identified person or order. A promise or order that is payable to order is payable to the identified person.
  3. An instrument payable to bearer may become payable to an identified person if it is specially endorsed as stated in subsection 1 of section 41-03-24. An instrument payable to an identified person may become payable to bearer if it is endorsed in blank as stated in subsection 2 of section 41-03-24.

41-03-10. (3-110) Identification of person to whom instrument is payable.

1. The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized, signing as or in the name or behalf of the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by a name or other identification that is not that of the intended person. If more than one person signs in the name or behalf of the issuer of an instrument and all the signers do not intend the same person as payee, the instrument is payable to any person intended by one or more of the signers.

2. If the signature of the issuer of an instrument is made by automated means such as a checkwriting machine, the payee of the instrument is determined by the intent of the person who supplied the name or identification of the payee, whether or not authorized to do so.
3. A person to whom an instrument is payable may be identified in any way including by name, identifying number, office, or account number. For the purpose of determining the holder of an instrument, the following rules apply:
  - a. If an instrument is payable to an account and the account is identified only by number, the instrument is payable to the person to whom the account is payable. If an instrument is payable to an account identified by number and by the name of a person, the instrument is payable to the named person, whether or not that person is the owner of the account identified by number.
  - b. If an instrument is payable to:
    - (1) A trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named.
    - (2) A person described as agent or similar representative of a named or identified person, the instrument is payable either to the represented person, the representative, or a successor of the representative.
    - (3) A fund or organization that is not a legal entity, the instrument is payable to a representative of the members of the fund or organization.
    - (4) An office or to a person described as holding an office, the instrument is payable to the named person, the incumbent of the office, or a successor to the incumbent.
4. If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.

41-03-11. (3-111) Place of payment. Except as otherwise provided for items in chapter 41-04, an instrument is payable at the place of payment stated in the instrument. If no place of payment is stated, an instrument is payable at the address of the drawee or maker stated in the instrument. If no address is stated, the place of payment is the place of business of the drawee or maker. If a drawee or maker has more than one place of business, the place of payment is any place of business of the drawee or maker chosen

by the person entitled to enforce the instrument. If the drawee or maker has no place of business, the place of payment is the residence of the drawee or maker.

41-03-12. (3-112) Interest.

1. Unless otherwise provided in the instrument, an instrument is not payable with interest and interest on an interest-bearing instrument is payable from the date of the instrument.
2. Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues.

41-03-13. (3-113) Date of instrument.

1. An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date. Except as provided in subsection 3 of section 41-04-28, an instrument payable on demand is not payable before the date of the instrument.
2. If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder.

41-03-14. (3-114) Contradictory terms of instrument. If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.

41-03-15. (3-115) Incomplete instrument.

1. "Incomplete instrument" means a signed writing, whether or not issued by the signer, the contents of which show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers.
2. Subject to subsection 3, if an incomplete instrument is an instrument under section 41-03-04, it may be enforced according to its terms if it is not completed or according to its terms as augmented by completion. If an incomplete instrument is not an instrument under section 41-03-04 but, after completion, the requirements of section 41-03-04 are met, the instrument may be enforced according to its terms as augmented by completion.
3. If words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument governed by section 41-03-44.

4. The burden of establishing that words or numbers were added to an incomplete instrument without authority of the signer is on the person asserting the lack of authority.

41-03-16. (3-116) Joint and several liability - Contribution.

1. Except as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, endorsers who are endorsing joint payees, or anomalous endorsers are jointly and severally liable in the capacity in which they sign.
2. Except as provided in subsection 5 of section 41-03-56 or by agreement of the affected parties, a party having joint and several liability that pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.
3. Discharge of one party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection 2 of a party having the same joint and several liability to receive contribution from the party discharged.

41-03-17. (3-117) Other agreements affecting an instrument. Subject to applicable law regarding exclusion of proof of contemporaneous or prior agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument if the instrument is issued or the obligation is incurred in reliance on the agreement or as a part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.

41-03-18. (3-118) Statute of limitations.

1. Except as provided in subsection 5, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.
2. Except as provided in subsection 4 or 5, if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for continuous period of ten years.
3. Except as provided in subsection 4, an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or ten years after the date of the draft, whichever period expires first.
4. An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or

traveler's check must be commenced within three years after demand for payment is made to the acceptor or issuer, as the case may be.

5. An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.
6. This subsection applies to an action to enforce the obligation of a party to pay an accepted draft, other than a certified check. If the obligation of the acceptor is payable at a definite time, the action must be commenced within six years after the due date or dates stated in the draft or acceptance. If the obligation of the acceptor is payable on demand, the action must be commenced within six years after the date of the acceptance.
7. Unless governed by other law regarding claims for indemnity or contribution, an action for conversion of an instrument, for money had and received, or like action based on conversion, for breach of warranty, or to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three years after the cause of action accrues.

41-03-19. (3-119) Notice of right to defend action. In an action for breach of an obligation for which a third person is answerable over under to this chapter or chapter 41-04, the defendant may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over. If the notice states that the person notified may come in and defend and that failure to do so will bind the person notified in an action later brought by the person giving the notice as to the determination of fact common to the two litigations, the person notified is so bound unless after reasonable receipt of the notice the person notified does come in and defend.

41-03-20. (3-201) Negotiation.

1. "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument to a person who thereby becomes its holder, if possession is obtained from a person other than the issuer of the instrument.
2. Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

41-03-21. (3-202) Negotiation subject to rescission.

1. Negotiation is effective even if obtained from an infant, a corporation exceeding its powers, or a person without capacity, by fraud, duress, or mistake, or in breach of duty or as part of an illegal transaction.

2. To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy.

41-03-22. (3-203) Rights acquired by transfer.

1. An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

2. Transfer of an instrument, regardless of whether the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

3. Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of endorsement by the transferor, the transferee has a specifically enforceable right to the unqualified endorsement of the transferor, but negotiation of the instrument does not occur until the endorsement is made.

4. If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

41-03-23. (3-204) Endorsement.

1. "Endorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring endorser's liability on the instrument regardless of the intent of the signer, a signature and its accompanying words is an endorsement unless the accompanying words, the terms of the instrument, the place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

2. "Endorser" means a person who makes an endorsement.

3. For the purpose of determining whether the transferee of an instrument is a holder, an endorsement that transfers a security interest in the instrument is effective as an unqualified endorsement of the instrument.

4. If an instrument is payable to a holder under a name that is not the name of the holder, endorsement may be made by the holder in the name stated in the instrument or in the holder's name or both,

but signature in both names may be required by a person paying or taking the instrument for value or collection.

41-03-24. (3-205) Special endorsement - Blank endorsement - Anomalous endorsement.

1. If an endorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the endorsement identifies a person to whom it makes the instrument payable, it is a "special endorsement". When specially endorsed, an instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. The principles stated in section 41-03-10 apply to special endorsements.
2. If an endorsement is made by the holder of an instrument and it is not a special endorsement, it is a "blank endorsement". When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed.
3. The holder may convert a blank endorsement that consists only of a signature into a special endorsement by writing, above the signature of the endorser, words identifying the person to whom the instrument is made payable.
4. "Anomalous endorsement" means an endorsement made by a person that is not the holder of the instrument. An anomalous endorsement does not affect the manner in which the instrument may be negotiated.

41-03-25. (3-206) Restrictive endorsement.

1. An endorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument.
2. An endorsement stating a condition to the right of the endorsee to receive payment does not affect the right of the endorsee to enforce the instrument. A person paying the instrument or taking it for value or collection may disregard the condition, and the rights and liabilities of that person are not affected by whether the condition has been fulfilled.
3. The following rules apply to an instrument bearing an endorsement described in subsection 2 of section 41-04-13, or in blank or to a particular bank using the words "for deposit", "for collection", or other words indicating a purpose of having the instrument collected by a bank for the endorser or for a particular account:
  - a. A person, other than a bank, that purchases the instrument when so endorsed converts the instrument unless the amount paid for the instrument is received by the endorser or applied consistently with the endorsement.
  - b. A depository bank that purchases the instrument or takes it for collection when so endorsed converts the instrument unless the amount paid by the bank with respect to the instrument is

- received by the endorser or applied consistently with the endorsement.
- c. A payor bank that is also the depository bank or that takes the instrument for immediate payment over the counter from a person other than a collecting bank converts the instrument unless the proceeds of the instrument are received by the endorser or applied consistently with the endorsement.
  - d. Except as otherwise provided in subdivision c, a payor bank or intermediary bank may disregard the endorsement and is not liable if the proceeds of the instrument are not received by the endorser or applied consistently with the endorsement.
4. Except for an endorsement covered by subsection 3, the following rules apply to an instrument bearing an endorsement using words to the effect that payment is to be made to the endorsee as agent, trustee, or other fiduciary for the benefit of the endorser or another person:

    - a. Unless there is notice of breach of fiduciary duty as provided in section 41-03-33, a person that purchases the instrument from the endorsee or takes the instrument from the endorsee for collection or payment may pay the proceeds of payment or the value given for the instrument to the endorsee without regard to whether the endorsee violates a fiduciary duty to the endorser.
    - b. A later transferee of the instrument or person that pays the instrument is neither given notice of nor otherwise affected by the restriction in the endorsement unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of fiduciary duty.
  5. The presence on an instrument of an endorsement to which this section applies does not prevent a purchaser of the instrument from becoming a holder in due course of the instrument unless the purchaser is a converter under subsection 3 or has notice or knowledge of breach of fiduciary duty as stated in subsection 4.
  6. If an action to enforce the obligation of a party to pay the instrument, the obligor has a defense if payment would violate an endorsement to which this section applies and the payment is not permitted by this section.

41-03-26. (3-207) Reacquisition. Reacquisition of an instrument occurs if it is transferred, by negotiation or otherwise, to a former holder. A former holder that reacquires the instrument may cancel endorsements made after the the reacquirer first became a holder of the instrument. If the cancellation causes the instrument to be payable to the reacquirer or to bearer, the reacquirer may negotiate the instrument. An endorser whose endorsement is canceled is discharged, and the discharge is effective against any later holder.

41-03-27. (3-301) Person entitled to enforce instrument. "Person entitled to enforce" an instrument means the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or

a person not in possession of the instrument who is entitled to enforce the instrument under section 41-03-35 or subsection 4 of section 41-03-55. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

41-03-28. (3-302) Holder in due course.

1. Subject to subsection 3 and to subsection 4 of section 41-03-06, "holder in due course" means the holder of an instrument if:
  - a. The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity.
  - b. The holder took the instrument for value, in good faith, without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, without notice that the instrument contains an unauthorized signature or has been altered, without notice of any claim to the instrument stated in section 41-03-32, and without notice that any party has a defense or claim in recoupment stated in subsection 1 of section 41-03-31.
2. Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection 1, but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.
3. Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken by legal process or by purchase at an execution, bankruptcy, or creditor's sale or similar proceeding; by purchase as part of a bulk transaction not in ordinary course of business of the transferor; or as the successor in interest to an estate or other organization.
4. If, under subdivision a of subsection 1 of section 41-03-29, the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.
5. If the person entitled to enforce an instrument has only a security interest in the instrument and the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of

the instrument, does not exceed the amount of the unpaid obligation secured.

6. To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.
7. This section is subject to any law limiting status as a holder in due course in particular classes of transactions.

41-03-29. (3-303) Value and consideration.

1. An instrument is issued or transferred for value if any of the following exist:
  - a. The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed.
  - b. The transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding.
  - c. The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due.
  - d. The instrument is issued or transferred in exchange for a negotiable instrument.
  - e. The instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.
2. "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection 1, the instrument is also issued for consideration.

41-03-30. (3-304) Overdue instrument.

1. An instrument payable on demand becomes overdue at the earliest of the following times:
  - a. On the day after the day demand for payment is duly made.
  - b. If the instrument is a check, ninety days after its date.
  - c. If the instrument is not a check, when the instrument has been outstanding for a period of time after its date which is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and trade usage.
2. With respect to an instrument payable at a definite time the following rules apply:

- a. If the principal is payable in installments and a due date has not been accelerated, the instrument becomes overdue upon default under the instrument for nonpayment of an installment, and the instrument remains overdue until the default is cured.
  - b. If the principal is not payable in installments and the due date has not been accelerated, the instrument becomes overdue on the day after the due date.
  - c. If a due date with respect to principal has been accelerated, the instrument becomes overdue on the day after the accelerated due date.
3. Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal.

41-03-31. (3-305) Defenses and claims in recoupment.

1. Except as stated in subsection 2, the right to enforce the obligation of a party to pay the instrument is subject to the following:
  - a. A defense of the obligor based on infancy of the obligor to the extent it is a defense to a simple contract, duress, lack of legal capacity, or illegality of the transaction that nullifies the obligation of the obligor; fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms; and discharge of the obligor in insolvency proceedings.
  - b. A defense of the obligor stated in another section of this chapter or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract.
  - c. A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument. The claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.
2. The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subdivision a of subsection 1, but is not subject to defenses of the obligor stated in subdivision b of subsection 1 or claims in recoupment stated in subdivision c of subsection 1 against a person other than the holder.
3. Except as stated in subsection 4, in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (section 41-03-32) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the

person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

4. In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert the person entitled to enforce the instrument any defense of claim in recoupment under subsection 1 that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, or lack of legal capacity.

41-03-32. (3-306) Claims to an instrument. A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument.

41-03-33. (3-307) Notice of breach of fiduciary duty.

1. In this section:

- a. "Fiduciary" means an agent, trustee partner, corporate officer or director, or other representative owing a fiduciary duty with respect to an instrument.
- b. In the case of an instrument payable to the represented person or the fiduciary, as such, the taker has notice of the breach of fiduciary duty if the instrument is taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or deposited to an account other than an account of the fiduciary, as such or an account of the represented person.
- c. If an instrument is issued by the represented person or the fiduciary, as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty.
- d. If the instrument is issued by the represented person or the fiduciary, as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

41-03-34. (3-308) Proof of signatures and status as holder in due course.

1. In an action with respect to an instrument, the authenticity of and authority to make each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person pursuant to subsection 1 of section 41-03-39.
2. If the validity of signatures is admitted or proved and there is compliance with subsection 1, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under section 41-03-27, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

41-03-35. (3-309) Enforcement of lost, destroyed, or stolen instrument.

1. A person not in possession of an instrument is entitled to enforce the instrument if that person was in rightful possession of the instrument and entitled to enforce it when loss of possession occurred; the loss of possession was not the result of a transfer by that person or a lawful seizure; and that person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
2. A person seeking enforcement of an instrument pursuant to subsection 1 must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, section 41-03-34 applies to the case as though the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

41-03-36. (3-310) Effect of instrument on obligation for which taken.

1. Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not

affect any liability that the obligor may have as an endorser of the instrument.

2. Unless otherwise agreed and except as provided in subsection 1, if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken.
  - a. In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.
  - b. In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.
  - c. Except as provided in subdivision d, if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.
  - d. If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.
3. If an instrument other than one described in subsection 1 or 2 is taken for an obligation, the effect is that stated in subsection 1 if the instrument is one on which a bank is liable as maker or acceptor or that stated in subsection 2 in any other case.

41-03-37. (3-311) Accord and satisfaction by use of instrument.

1. This section applies if a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, the amount of the claim was unliquidated or subject to a bona fide dispute, and the claimant obtained payment of the instrument.
2. Unless subsection 3 applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

3. Subject to subsection 4, a claim is not discharged under subsection 2 if either of the following applies:
- a. The claimant, if an organization, proves that within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and the instrument or accompanying communication was not received by that designated person, office, or place.
  - b. The claimant, whether or not an organization, proves that within ninety days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This subdivision does not apply if the claimant is an organization that sent a statement under subdivision a.
4. A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation knew that the instrument was tendered in full satisfaction of the claim.

41-03-38. (3-401) Signature.

1. A person is not liable on an instrument unless the person signed the instrument or the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under section 41-03-39.
2. A signature may be made manually or by means of a device or machine and by the use of any name, including any trade or assumed name, or by any word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.

41-03-39. (3-402) Signature by representative.

1. If a person acting, or purporting to act, as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were of a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in the instrument.
2. If a representative signs the name of the representative to an instrument and that signature is an authorized signature of the represented person, the following rules apply:
  - a. If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is

identified in the instrument, the representative is not liable on the instrument.

b. Subject to subsection 3, if the form of the signature does not show unambiguously that the signature is made in a representative capacity or if the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

3. If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person.

#### 41-03-40. (3-403) Unauthorized signature.

1. Unless otherwise provided in this chapter or chapter 41-04, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of this chapter.

2. If the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is missing.

3. The civil or criminal liability of a person who makes an unauthorized signature is not affected by any provision of this chapter that makes the unauthorized signature effective for the purposes of this chapter.

#### 41-03-41. (3-404) Impostors - Fictitious payees.

1. If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an endorsement of the instrument by any person in the name of the payee is effective as the endorsement of the payee in favor of any person that in good faith pays the instrument or takes it for value or for collection.

2. If a person whose intent determines to whom an instrument is payable under subsection 1 or 2 of section 41-03-10 does not intend the person identified as payee to have any interest in the instrument or if the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special endorsement:

a. Any person in possession of the instrument is its holder.

- b. An endorsement by any person in the name of the payee stated in the instrument is effective as the endorsement of the payee in favor of any person that in good faith pays the instrument or takes it for value or for collection.
3. Under subsection 1 or 2, an endorsement is made in the name of a payee if it is made in a name substantially similar to that of the payee or if the instrument, whether or not endorsed, or deposited in a depository bank to an account in a name substantially similar to that of the payee.
4. With respect to an instrument to which subsection 1 or 2 applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

41-03-42. (3-405) Employer responsibility for fraudulent endorsement by employee.

1. This section applies to fraudulent endorsements of instruments with respect to which an employer has entrusted an employee with responsibility as part of the employee's duties. The following definitions apply to this section:
  - a. "Employee" includes, in addition to an employee of an employer, an independent contractor and employee of an independent contractor retained by the employer.
  - b. "Fraudulent endorsement" means, in the case of an instrument payable to the employer, a forged endorsement purporting to be that of the employer or, in the case of an instrument with respect to which the employer is the issuer, a forged endorsement purporting to be that of the person identified as payee.
  - c. "Responsibility" with respect to instruments means authority to sign or endorse instruments on behalf of the employer; to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition; to prepare or process instruments for issue in the name of the employer; to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer; to control the disposition of instruments to be issued in the name of the employer; or to otherwise act with respect to instruments in a responsible capacity. "Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.
2. For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value

or for collection, if an employee entrusted with responsibility with respect to the instrument or a person acting in concert with the employee makes a fraudulent endorsement to the instrument, the endorsement is effective as the endorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

3. Under subsection 2, an endorsement is made in the name of the person to whom an instrument is payable if it is made in a name substantially similar to the name of that person or if the instrument, whether or not endorsed, is deposited in a name substantially similar to the name of that person.

41-03-43. (3-406) Negligence contributing to forged signature or alteration of instrument.

1. A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person that, in good faith, pays the instrument or takes it for value or for collection.
2. If the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.
3. Under subsection 1, the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection 2, the burden of proving failure to exercise ordinary care is on the person precluded.

41-03-44. (3-407) Alteration.

1. "Alteration" means an unauthorized change in an instrument that purports to modify in any respect the obligation of a party to the instrument or an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of any party to the instrument.
2. Except as provided in subsection 3, an alteration fraudulently made discharges any party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges any party, and the instrument may be enforced according to its original terms.
3. A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument according to its original terms or in the case of an incomplete

instrument altered by unauthorized completion, according to its terms as completed.

41-03-45. (3-408) Drawee not liable on unaccepted draft. A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.

41-03-46. (3-409) Acceptance of draft - Certified check.

1. "Acceptance" means the drawee's signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person.
2. A draft may be accepted although it has not been signed by the drawer, is otherwise incomplete, is overdue, or has been dishonored.
3. If a draft is payable at a fixed period after sight and the acceptor fails to date the acceptance, the holder may complete the acceptance by supplying a date in good faith.
4. "Certified check" means a check accepted by the bank on which it is drawn. Acceptance may be made as stated in subsection 1 or by a writing on the check which indicates that the check is certified. The drawee of a check has no obligation to certify the check, and refusal to certify is not dishonor of the check.

41-03-47. (3-410) Acceptance varying draft.

1. If the terms of a drawee's acceptance vary from the terms of the draft as presented, the holder may refuse the acceptance and treat the draft as dishonored. In that case, the drawee may cancel the acceptance.
2. The terms of a draft are not varied by an acceptance to pay at a particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at that bank or place.
3. If the holder assents to an acceptance varying the terms of a draft, the obligation of each drawer and endorser that does not expressly assent to the acceptance is discharged.

41-03-48. (3-411) Refusal to pay cashier's checks, teller's checks, and certified checks.

1. In this section, "obligated bank" means the acceptor of a certified check or the issuer of a cashier's check or teller's check bought from the issuer.
2. If the obligated bank wrongfully refuses to pay a cashier's check or certified check, stops payment of a teller's check, or refuses to pay a dishonored teller's check, the person asserting the right

to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages.

3. Expenses or consequential damages under subsection 2 are not recoverable if the refusal of the obligated bank to pay occurs because the bank suspends payments; the obligated bank is asserting a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument; the obligated bank has a reasonable doubt whether the person demanding payment is the person entitled to enforce the instrument; or payment is prohibited by law.

41-03-49. (3-412) Obligation of issuer of note or cashier's check. The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or, if the issuer signed an incomplete instrument, according to its terms when completed as stated in sections 41-03-15 and 41-03-42. The obligation is owed to a person entitled to enforce the instrument or to an endorser that paid the instrument under section 41-03-52.

41-03-50. (3-413) Obligation of acceptor.

1. The acceptor of a draft is obliged to pay the draft according to its terms at the time it was accepted, even though the acceptance states that the draft is payable "as originally drawn" or equivalent terms; if the acceptance varies the terms of the draft, according to the terms of the draft as varied; or if the acceptance is of a draft that is an incomplete instrument, according to its terms when completed as stated in sections 41-03-15 and 41-03-44. The obligation is owed to a person entitled to enforce the draft or to the drawer or an endorser that paid the draft under section 41-03-51 or 41-03-52.
2. If the certification of a check or other acceptance of a draft states the amount certified or accepted, the obligation of the acceptor is that amount. If the certification or acceptance does not state an amount, the amount of the instrument is subsequently raised, and the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course.

41-03-51. (3-414) Obligation of drawer.

1. This section does not apply to cashier's checks or other drafts drawn on the drawer.
2. If an unaccepted draft is dishonored, the drawer is obliged to pay the draft according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or if the drawer signed an incomplete instrument, according to its terms when completed as stated in sections 41-03-15 and 41-03-44. The obligation is owed to a person entitled to enforce the draft or to an endorser that paid the draft pursuant to section 41-03-52.

3. If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained.
4. If a draft is accepted and the acceptor is not a bank, the obligation of the drawer to pay the draft if the draft is dishonored by the acceptor is the same as the obligation of an endorser stated in subsections 1 and 3 of section 41-03-52.
5. If a draft states that it is drawn "without recourse" or otherwise disclaims liability of the drawer to pay the draft, the drawer is not liable under subsection 2 to pay the draft if the draft is not a check. No disclaimer of the liability stated in subsection 2 is effective if the draft is a check.
6. If a check is not presented for payment or given to a depository bank for collection within thirty days after its date, the drawee suspends payments after expiration of the thirty-day period without paying the check, and because of the suspension of payments the drawer is deprived of funds maintained with the drawee to cover payment of the check, the drawer to the extent deprived of funds may discharge its obligation to pay the check by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds.

41-03-52. (3-415) Obligation of endorser.

1. Subject to subsections 2, 3, and 4 and to subsection 4 of section 41-03-56, if an instrument is dishonored, an endorser is obliged to pay the amount due on the instrument according to the terms of the instrument at the time it was endorsed or, if the endorser endorsed an incomplete instrument, according to its terms when completed as stated in sections 41-03-15 and 41-03-44. The obligation of the endorser is owed to a person entitled to enforce the instrument or to a subsequent endorser that paid the instrument pursuant to this section.
2. If an endorsement states that it is made "without recourse" or otherwise disclaims liability of the endorser, the endorser is not liable under subsection 1 to pay the instrument.
3. If notice of dishonor of an instrument is required by section 41-03-60 and notice of dishonor complying with that section is not given to an endorser, the liability of the endorser under subsection 1 is discharged.
4. If a draft is accepted by a bank after an endorsement is made, the liability of the endorser under subsection 1 is discharged.
5. If an endorser of a check is liable under subsection 1 and the check is not presented for payment or given to a depository bank for collection within thirty days after the day the endorsement was made, the liability of the endorser under subsection 1 is discharged.

41-03-53. (3-416) Transfer warranties.

1. A person that transfers an instrument for consideration warrants to the transferee and, if the transfer is by endorsement, to any subsequent transferee that:
  - a. The warrantor is a person entitled to enforce the instrument.
  - b. All signatures on the instrument are authentic and authorized.
  - c. The instrument has not been altered.
  - d. The instrument is not subject to a defense or claim in recoupment (subsection 1 of section 41-03-31) of any party which can be asserted against the warrantor.
  - e. The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.
2. A person to whom the warranties under subsection 1 are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.
3. The warranties stated in subsection 1 may not be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection 2 is discharged to the extent of any loss caused by the delay in giving notice of the claim.
4. A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

41-03-54. (3-417) Presentment warranties.

1. If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, the person obtaining payment or acceptance, at the time of presentment, and a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:
  - a. The warrantor is or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft.
  - b. The draft has not been altered.
  - c. The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized.
2. A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the

amount the drawee received or is entitled to receive from the drawer because of the payment. In addition the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in the first two sentences of this subsection.

3. If a drawee asserts a claim for breach of warranty under subsection 1 based on an unauthorized endorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the endorsement is effective under section 41-03-41 or 41-03-42 or the drawer is precluded under section 41-03-43 or 41-04-37 from asserting against the drawee the unauthorized endorsement or alteration.
4. If a dishonored draft is presented for payment to the drawer or an endorser or any other instrument is presented for payment to a party obliged to pay the instrument, and payment is received, the following rules apply:
  - a. The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument.
  - b. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.
5. The warranties stated in subsections 1 and 4 cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection 2 or 4 is discharged to the extent of any loss caused by the delay in giving notice of the claim.
6. A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

41-03-55. (3-418) Payment or acceptance by mistake.

1. Except as provided in subsection 3, if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that payment of the draft had not been stopped under section 41-04-34 or that the signature of the purported drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. Rights of the

drawee under this subsection are not affected by failure of the drawee to exercise ordinary care in paying or accepting the draft.

2. Except as provided in subsection 3, if an instrument has been paid or accepted by mistake and the case is not covered by subsection 1, the person paying or accepting may, to the extent permitted by the law governing mistake and restitution, recover the payment from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance.
3. The remedies provided by subsection 1 or 2 may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This subsection does not limit remedies provided by section 41-03-54 or 41-04-38.
4. Notwithstanding section 41-04-27, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under subsection 1 or 2, the instrument is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument.

41-03-56. (3-419) Instruments signed for accommodation.

1. If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation".
2. An accommodation party may sign the instrument as maker, drawer, acceptor, or endorser and, subject to subsection 4, is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced withstanding any statute of frauds and regardless of whether the accommodation party receives consideration for the accommodation.
3. A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous endorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in section 41-03-67, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the instrument for accommodation.
4. If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if execution of judgment against the other party has been returned

unsatisfied, the other party is insolvent or in an insolvency proceeding, the other party cannot be served with process, or it is otherwise apparent that payment cannot be obtained from the party whose obligation is guaranteed.

5. An accommodation party that pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party that pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

41-03-57. (3-420) Conversion of instrument.

1. The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is purchased from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by the issuer or acceptor of the instrument or by a payee or endorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a copayee.
2. In an action under subsection 1, the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.
3. A representative, other than a depository bank, that has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

41-03-58. (3-501) Presentment.

1. "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or to accept a draft made to the drawee.
2. The following rules are subject to chapter 41-04, agreement of the parties, and clearinghouse rules and the like:
  - a. Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; is effective if made to any one of two or more makers, acceptors, drawees, or other payors.
  - b. Upon demand of the person to whom presentment is made, the person making presentment must exhibit the instrument; give

- reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so; and sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.
- c. Without dishonoring the instrument, the party to whom presentment is made may return the instrument for lack of a necessary endorsement or refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other law or applicable rule.
  - d. The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cutoff hour not earlier than two p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cutoff hour.

41-03-59. (3-502) Dishonor.

1. Dishonor of a note is governed by the following rules:
  - a. If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.
  - b. If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later.
  - c. If the note is not payable on demand and subdivision b does not apply, the note is dishonored if it is not paid on the day it becomes payable.
2. Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:
  - a. If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under section 41-04-29 or 41-04-30, or becomes accountable for the amount of the check under section 41-04-30.
  - b. If the draft is payable on demand and subdivision a does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.
  - c. If a draft is payable on a date stated in the draft, the draft is dishonored if presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later, or presentment for acceptance is duly made before the day the

draft becomes payable and the draft is not accepted on the day of presentment.

- d. If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment.
3. Dishonor of an unaccepted documentary draft occurs according to the rules stated in subdivisions b, c, and e of subsection 2, except that payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by those paragraphs.
4. Dishonor of an accepted draft is governed by the following rules:
  - a. If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment.
  - b. If the draft is not payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and payment is not made on the day it becomes payable or the day of presentment, whichever is later.
5. In any case in which presentment is otherwise required for dishonor under this section and presentment is excused under section 41-03-61, dishonor occurs without presentment if the instrument is not duly accepted or paid.
6. If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance the draft is treated as never having been dishonored.

41-03-60. (3-503) Notice of dishonor.

1. The obligation of an endorser stated in subsection 1 of section 41-03-52 and the obligation of a drawer stated in subsection 3 of section 41-03-51 may not be enforced unless the endorser or drawer is given notice of dishonor of the instrument complying with this section or notice of dishonor is excused under subsection 3 of section 41-03-51.
2. Notice of dishonor may be given by any person; may be given by any commercially reasonable means including an oral, written, or electronic communication; and is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted. Return of an instrument given to a bank for collection is a sufficient notice of dishonor.
3. Subject to subsection 4 of section 41-03-61, with respect to an instrument taken for collection by a collecting bank, notice must be given by the bank before midnight of the next banking day following the banking day on which the bank receives the notice of

dishonor of the instrument and by any other person within thirty days following the day on which dishonor occurs.

41-03-61. (3-504) Excused presentment and notice of dishonor.

1. Presentment for payment or acceptance of an instrument is excused if the person entitled to present the instrument cannot with reasonable diligence make presentment; the maker or acceptor has repudiated an obligation to pay the instrument or is dead or in insolvency proceedings; by the terms of the instrument presentment is not necessary to enforce the obligation of endorsers or the drawer; the drawer or endorser whose obligation is being enforced has waived presentment or otherwise has no reason to expect or right to require that the instrument be paid or accepted; or the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft.
2. Notice of dishonor is excused if by the terms of the instrument notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument or if the party whose obligation is being enforced waived notice of dishonor. A waiver of presentment is also a waiver of notice of dishonor.
3. Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving the notice and the person giving the notice exercised reasonable diligence after the cause of the delay ceased to operate.

41-03-62. (3-505) Evidence of dishonor.

1. The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor stated:
  - a. A document regular in form as provided in subsection 2 which purports to be a protest.
  - b. A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor.
  - c. A book or record of the drawee, payor bank, or collecting bank, kept in the usual course of business which shows dishonor, even if there is no evidence of who made the entry.
2. A protest is a certificate of dishonor made by a United States consul or vice consul, or a notary public or other person authorized to administer oaths by the law of the place where dishonor occurs. It may be made upon information satisfactory to that person. The protest must identify the instrument and certify either that presentment has been made or, if not made, the reason why it was not made, and that the instrument has been dishonored by nonacceptance or nonpayment. The protest may also certify that notice of dishonor has been given to some or all parties.

41-03-63. (3-601) Discharge and effect of discharge.

1. The obligation of a party to pay the instrument is discharged as stated in this chapter or by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.
2. Discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument without notice of the discharge.

41-03-64. (3-602) Payment.

1. Subject to subsection 2, an instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument to a person entitled to enforce the instrument. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under section 41-03-32 by another person.
2. The obligation of a party to pay the instrument is not discharged under subsection 1 if either:
  - a. A claim to the instrument under section 41-03-32 is enforceable against the party receiving payment and payment is made with knowledge by the payor that payment is prohibited by jurisdiction or, in the case of an instrument other than a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument.
  - b. The person making payment knows that the instrument is a stolen instrument and pays a person that it knows is in wrongful possession of the instrument.

41-03-65. (3-603) Tender of payment.

1. If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.
2. If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an endorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates.
3. If tender of payment of an amount due on an instrument is made to the person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument.

41-03-66. (3-604) Discharge by cancellation or renunciation.

1. A person entitled to enforce an instrument may, with or without consideration, discharge the obligation of a party to pay the instrument by an intentional voluntary act such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge or by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.
2. Cancellation or striking out of an endorsement under subsection 1 does not affect the status and rights of a party derived from the endorsement.

41-03-67. (3-605) Discharge of endorsers and accommodation parties.

1. For the purposes of this section, the term "endorser" includes a drawer having the obligation stated in subsection 3 of section 41-03-51.
2. Discharge under section 41-03-66 of the obligation of a party to pay an instrument does not discharge the obligation of an endorser or accommodation party having a right of recourse against the discharged party.
3. If a person entitled to enforce an instrument agrees, with or without consideration, to an extension of the due date of the obligation of a party to pay the instrument, the extension discharges an endorser or accommodation party having a right of recourse against the party whose obligation is extended to the extent the endorser or accommodation party proves that the extension caused loss to the endorser or accommodation party with respect to the right of recourse.
4. If a person entitled to enforce an instrument agrees, with or without consideration, to a material modification of the obligation of a party other than an extension of the due date, the modification discharges the obligation of an endorser or accommodation party having a right of recourse against the person whose obligation is modified to the extent the modification causes loss to the endorser or accommodation party with respect to the right of recourse. The endorser or accommodation party is deemed to have suffered loss as a result of the modification equal to the amount of the right of recourse unless the person enforcing the instrument proves that no loss was caused by the modification or that the loss caused by the modification was less than the amount of the right of recourse.
5. If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an endorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent that the value of the interest is reduced to an amount less than the amount of the right of recourse of the party

asserting discharge or that the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the values of the interest. The burden of proving impairment is on the party asserting discharge.

6. If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. If the party asserting discharge is an accommodation party not entitled to discharge under subsection 5, the party is deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment is on the party asserting discharge.
7. Under subsection 5 or 6, impairing value of an interest in collateral includes failure to obtain or maintain perfection or recordation of the interest in collateral; release of collateral without substitution of collateral of equal value; failure to perform a duty to preserve the value of collateral owed, under chapter 41-01 or other law, to a debtor or surety or other person secondarily liable; or failure to comply with applicable law in disposing of collateral.
8. An accommodation party is not discharged under subsection 3, 4, or 5 unless the person entitled to enforce the instrument knows of the accommodation or has notice under subsection 3 or 4 of section 41-03-56 that the instrument was signed for accommodation.
9. A party is not discharged under this section if the party asserting discharge consents to the event or conduct that is the basis of the discharge or the instrument or a separate agreement of the party provides for waiver of discharge under this section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral.

SECTION 11. Chapter 41-04 of the North Dakota Century Code is created and enacted as follows:

41-04-01. (4-101) Short title. This chapter shall be known and may be cited as Uniform Commercial Code - Bank deposits and collections.

41-04-02. (4-102) Applicability.

1. To the extent that items within this chapter are also within the scope of chapters 41-03 and 41-08, they are subject to the provisions of those chapters. In the event of conflict, the provisions of this chapter govern those of chapter 41-03 but the provisions of chapter 41-08 govern those of this chapter.
2. The liability of a bank for action or nonaction with respect to any item handled by it for purposes of presentment, payment, or collection is governed by the law of the place where the bank is

located. In the case of action or nonaction by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

41-04-03. (4-103) Variation by agreement - Measure of damages - Action constituting ordinary care.

1. The effect of the provisions of this chapter may be varied by agreement, but the parties to the agreement may not disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. The parties may, however, determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.
2. Federal reserve regulations and operating circulars, clearinghouse rules, and the like have the effect of agreements under subsection 1, whether or not specifically assented to by all parties interested in items handled.
3. Action or nonaction approved by this chapter or under federal reserve regulations or operating circulars constitutes the exercise of ordinary care and, in the absence of special instructions, action or nonaction consistent with clearinghouse and similar rules or with a general banking usage not disapproved by this chapter, constitutes prima facie the exercise of ordinary care.
4. The specification or approval of certain procedures by this chapter does not constitute disapproval of other procedures that may be reasonable under the circumstances.
5. The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there is also bad faith it includes any other damages the party suffered as a proximate consequence.

41-04-04. (4-104) Definitions and index of definitions.

1. In this chapter, unless the context otherwise requires:
  - a. "Account" means any deposit or credit account with a bank and includes a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit.
  - b. "Afternoon" means the period of a day between noon and midnight.
  - c. "Banking day" means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions.
  - d. "Clearinghouse" means an association of banks or other payors regularly clearing items.

- e. "Customer" means a person having an account with a bank or for whom a bank has agreed to collect items and includes a bank maintaining an account at another bank.
  - f. "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (section 41-08-02), or instructions for uncertificated securities (section 41-08-24), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft.
  - g. "Draft" means a draft as defined in section 41-03-04 or an item, other than an instrument, that is an order.
  - h. "Drawee" means a person ordered in a draft to make payment.
  - i. "Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by chapter 41-04.1 or a credit or debit card slip.
  - j. "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later.
  - k. "Settle" means to pay in cash, by clearinghouse settlement, in a charge or credit, or by remittance, or otherwise as agreed. A settlement may be either provisional or final.
  - l. "Suspends payments" with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business.
2. Other definitions applying to this chapter and the sections in which they appear are:
- a. "Bank". Section 41-04-05.
  - b. "Collecting bank". Section 41-04-05.
  - c. "Depository bank". Section 41-04-05.
  - d. "Electronic presentment agreement". Section 41-04-10.
  - e. "Intermediary bank". Section 41-04-05.
  - f. "Payor bank". Section 41-04-05.
  - g. "Presenting bank". Section 41-04-05.
  - h. "Presentment notice". Section 41-04-10.
3. The following definitions in other chapters apply to this chapter:

- a. "Acceptance". Section 41-03-46.
- b. "Alteration". Section 41-03-44.
- c. "Cashier's check". Section 41-03-04.
- d. "Certificate of deposit". Section 41-03-04.
- e. "Certified check". Section 41-03-45.
- f. "Check". Section 41-03-04.
- g. "Good faith". Section 41-03-03.
- h. "Holder in due course". Section 41-03-28.
- i. "Instrument". Section 41-03-04.
- j. "Notice of dishonor". Section 41-03-60.
- k. "Order". Section 41-03-03.
- l. "Ordinary care". Section 41-03-03.
- m. "Person entitled to enforce". Section 41-03-27.
- n. "Presentment". Section 41-03-58.
- o. "Promise". Section 41-03-03.
- p. "Prove". Section 41-03-03.
- q. "Teller's check". Section 41-03-04.
- r. "Unauthorized signature". Section 41-03-40.

4. In addition, chapter 41-01 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

41-04-05. (4-105) Bank - Collecting bank - Depository bank - Payor bank - Presenting bank. In this chapter, unless the context otherwise requires:

- 1. "Bank" means any person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company.
- 2. "Collecting bank" means a bank handling an item for collection except the payor bank.
- 3. "Depository bank" means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter.
- 4. "Intermediary bank" means a bank to which an item is transferred in course of collection except the depository or payor bank.

5. "Payor bank" means a bank that is the drawee of a draft.
6. "Presenting bank" means a bank presenting an item except a payor bank.

41-04-06. (4-106) Payable through or payable at bank - Collecting bank.

1. If an item states that it is "payable through" a bank identified in the item, the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and the item may be presented for payment only by or through the bank.
2. If an item states that it is "payable at" a bank identified in the item, the item is equivalent to a draft drawn on the bank.
3. If a draft names a nonbank drawee and it is unclear whether a bank named in the draft is a codrawee or a collecting bank, the bank is a collecting bank.

41-04-07. (4-107) Separate office of bank. A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notice or orders must be given under this chapter and under chapter 41-03.

41-04-08. (4-108) Time of receipt of items.

1. For the purpose of allowing time to process items, prove balances, and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of two p.m. or later as a cutoff hour for the handling of money and items and the making of entries on its books.
2. Any item or deposit of money received on any day after a cutoff hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.

41-04-09. (4-109) Delays.

1. Unless otherwise instructed, a collecting bank in a good faith effort to secure payment of a specific item drawn on a payor other than a bank, and with or without the approval of any person involved, may waive, modify, or extend time limits imposed or permitted by this chapter for a period not exceeding two additional banking days without discharge of drawers or endorsers or liability to its transferor or a prior party.
2. Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this chapter or by instructions is excused if the delay is caused by interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank, and if the bank exercises such diligence as the circumstances require.

41-04-10. (4-110) Electronic presentment.

1. "Electronic presentment agreement" means an agreement, clearinghouse rule, or federal reserve regulation or operating circular, providing that presentment of an item may be made by transmission of an image of an item or information describing the item ("presentment notice") rather than delivery of the item itself. The agreement may provide for procedures governing retention, presentment, payment, dishonor, and other matters concerning items subject to the agreement.
2. Presentment of an item under an electronic presentment agreement is made when the presentment notice is received.
3. If presentment is made by presentment notice, a reference to "item" or "check" in this chapter means the presentment notice unless the context otherwise indicates.

41-04-11. (4-111) Statute of limitations. An action to enforce an obligation, duty, or right arising under this chapter must be commenced within three years after the cause of action accrues.

41-04-12. Construction of chapter - Branch banking. This chapter may not be construed to permit branch banking.

41-04-13. (4-201) Agency status of collecting banks and provisional status of credits - Applicability of chapter - Item endorsed "pay any bank".

1. Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank with respect to the item is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of endorsement or lack of endorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank, such as those resulting from outstanding advances on the item and valid rights of recoupment or setoff. If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of this chapter apply even though action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it.
2. After an item has been endorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder until:
  - a. The item has been returned to the customer initiating collection; or
  - b. The item has been specially endorsed by a bank to a person who is not a bank.

41-04-14. (4-202) Responsibility for collection or return - When action timely.

1. A collecting bank must exercise ordinary care in the following matters:

- a. Presenting an item or sending it for presentment.
  - b. Sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted.
  - c. Settling for an item when the bank receives final settlement.
  - d. Notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.
2. A collecting bank exercises ordinary care under subsection 1 by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time may constitute the exercise of ordinary care but the bank has the burden or so establishing.
  3. Subject to subdivision a of subsection 1, a bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for loss or destruction of an item in transit or in the possession of others.

41-04-15. (4-203) Effect of instructions. Subject to the provisions of chapter 41-03 concerning conversion of instruments (section 41-03-57) and restrictive endorsements (section 41-03-25), only a collecting bank's transferor may give instructions which affect the bank or constitute notice to it, and a collecting bank is not liable to prior parties for any action taken under those instructions or any agreement with its transferor.

41-04-16. (4-204) Methods of sending and presenting - Sending directly to payor bank.

1. A collecting bank shall send items by a reasonably prompt method taking into consideration any relevant instructions, the nature of the item, the number of those items on hand, the cost of collection involved and the method generally used by it or others to present those items.
2. A collecting bank may send:
  - a. An item directly to the payor bank.
  - b. An item to any nonbank payor if authorized by its transferor.
  - c. An item other than a documentary draft to a nonbank payor, if authorized by federal reserve regulation or operating circular, clearinghouse rule or the like.
3. Presentment may be made by a presenting bank at a place where the payor bank or other payor has requested that presentment be made.

41-04-17. (4-205) Depository bank holder of unendorsed item. If a customer delivers an item to a depository bank for collection:

1. The depository bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer

endorses, and, if it satisfies the other requirements of section 41-03-28, it may be a holder in due course.

2. The depository bank warrants to subsequent collecting banks, the payor bank or other payor, and the drawer that the amount of the item was paid to the customer or deposited to the customer's account.

41-04-18. (4-206) Transfer between banks. Any agreed method that identifies the transferor bank is sufficient for further transfer of the item to another bank.

41-04-19. (4-207) Transfer warranties.

1. A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:
  - a. The warrantor is a person entitled to enforce the item.
  - b. All signatures on the item are authentic and authorized.
  - c. The item has not been altered.
  - d. The item is not subject to a defense or claim in recoupment (subsection 1 of section 41-03-31) of any party that can be asserted against the warrantor.
  - e. The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.
2. If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item according to the terms of the item at the time it was transferred, or, if the transfer was of an incomplete item, according to its terms when completed as stated in sections 41-03-15 and 41-03-44. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor may not disclaim its obligation under this subsection by an endorsement stating that it is made "without recourse" or otherwise disclaiming liability.
3. A person to whom the warranties under subsection 1 are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.
4. The warranties stated in subsection 1 cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

5. A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

41-04-20. (4-208) Presentment warranties.

1. If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, the person obtaining payment or acceptance, at the time of presentment, and a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:
- a. The warrantor is or was at the time the warrantor transferred the draft a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft.
  - b. The draft has not been altered.
  - c. The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized.
2. A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor and, if the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in the first two sentences of this subsection.
3. If a drawee asserts a claim for breach of warranty under subsection 1 based on an unauthorized endorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the endorsement is effective under section 41-03-41 or 41-03-42 or the drawer is precluded under section 41-03-43 or 41-04-37 from asserting against the drawee the unauthorized endorsement or alteration.
4. This subsection applies if a dishonored draft is presented for payment to the drawer or an endorser or if any other item is presented for payment to a party obliged to pay the item, and the item is paid. The person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is or was at the time the warrantor transferred the item a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.
5. The warranties stated in subsections 1 and 4 may not be disclaimed with respect to checks. Unless notice of a claim for breach of

warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

6. A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

41-04-21. (4-209) Encoding and retention warranties.

1. A person that encodes information on or with respect to an item after issue warrants to any subsequent collecting bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depository bank encodes, that bank also makes the warranty.
2. A person that undertakes to retain an item under an electronic presentment agreement warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply with the agreement. If a customer of a depository bank undertakes to retain an item, that bank also makes this warranty.
3. A person to whom warranties are made under this section and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus expenses and loss of interest incurred as a result of the breach.

41-04-22. (4-210) Security interest of collecting bank in items, accompanying documents, and proceeds.

1. A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:
  - a. In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied.
  - b. In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge back.
  - c. If it makes an advance on or against the item.
2. If credit given for several items received at one time or under a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents, or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.
3. Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. To the extent and so long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other

than collection, the security interest continues and is subject to the provisions of chapter 41-09, except that:

- a. No security agreement is necessary to make the security interest enforceable (subdivision a of subsection 1 of section 41-09-16).
- b. No filing is required to perfect the security interest.
- c. The security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

41-04-23. (4-211) When bank gives value for purposes of holder in due course. For purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item, provided the bank otherwise complies with the requirements of section 41-03-28.

41-04-24. (4-212) Presentment by notice of item not payable by, through, or at bank - Liability of drawer or endorser.

1. Unless otherwise instructed, a collecting bank may present an item not payable by, through, or at a bank by sending to the party to accept or pay a written notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under section 41-03-58 by the close of the bank's next banking day after it knows of the requirement.
2. If presentment is made by notice and neither payment, acceptance, nor request for compliance with a requirement under section 41-03-58 is received by the close of business on the day after maturity or in the case of demand items by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any drawer or endorser by sending it notice of the facts.

41-04-25. (4-213) Medium and time of settlement by bank.

1. With respect to settlement by a bank, the medium and time of settlement may be prescribed by federal reserve regulations or circulars, clearinghouse rules, and the like, or agreement. In the absence of such prescription:
  - a. The medium of settlement is cash or credit to an account in a federal reserve bank of or specified by the person to receive settlement.
  - b. The time of settlement is:
    - (1) With respect to tender of settlement by cash, cashier's check, or teller's check, when the cash or check is sent or delivered.

- (2) With respect to tender of settlement by credit in an account in a federal reserve bank, when the credit is made.
        - (3) With respect to tender of settlement by a credit or debit to an account in a bank, when the credit or debit is made or, in the case of tender of settlement by authority to charge an account, when the authority is sent or delivered.
        - (4) With respect to tender of settlement by a funds transfer, when payment is made under subsection 1 of section 41-04.1-31 to the person receiving settlement.
2. If the tender of settlement is not by a medium authorized by or the time of settlement is not fixed by subsection 1, no settlement occurs until the tender of settlement is accepted by the person receiving settlement.
3. If settlement for an item is made by cashier's check or teller's check and the person receiving settlement, before its midnight deadline:
  - a. Presents or forwards the check of collection, settlement is final when the check is finally paid.
  - b. Fails to present or forward the check for collection, settlement is final at the midnight deadline of the person receiving settlement.
4. If settlement for an item is made by giving authority to charge the account of the bank giving settlement in the bank receiving settlement, settlement is final when the charge is made by the bank receiving settlement if there are funds available in the account for the amount of the item.

41-04-26. (4-214) Right of charge back or refund - Liability of collecting bank - Return of item.

1. If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer, whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer but is liable for any loss resulting from the delay. These rights to revoke, charge back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final.

2. A collecting bank returns an item when it is sent or delivered to the bank's customer or transferor or under its instructions.
3. A depository bank which is also the payor may charge back the amount of an item to its customer's account or obtain refund under the section governing return of an item received by a payor bank for credit on its books (section 41-04-29).
4. The right to charge back is not affected by:
  - a. Previous use of a credit given for the item.
  - b. Failure by any bank to exercise ordinary care with respect to the item, but any bank so failing remains liable.
5. A failure to charge back or claim refund does not affect other rights of the bank against the customer of any other party.
6. If credit is given in dollars as the equivalent of the value of an item payable in foreign money, the dollar amount of any charge back or refund must be calculated on the basis of the bank-offered spot rate for the foreign money prevailing on the day when the person entitled to the charge back or refund learns that it will not receive payment in ordinary course.

41-04-27. (4-215) Final payment of item by payor bank - When provisional debits and credits become final - When certain credits become available for withdrawal.

1. An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
  - a. Paid the item in cash.
  - b. Settled for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement.
  - c. Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule, or agreement.
2. If provisional settlement for an item does not become final, the item is not finally paid.
3. If provisional settlement for an item between the presenting and payor banks is made through a clearinghouse or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the items by the payor bank.
4. If a collecting bank receives a settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

5. Subject to applicable law stating a time for availability of funds and any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in a customer's account becomes available for withdrawal as of right:
  - a. If the bank has received a provisional settlement for the item, when such settlement becomes final and the bank has had a reasonable time to receive return of the item and has not received the item within that time.
  - b. If the bank is both the depository bank and the payor bank and the item is finally paid, at the opening of the bank's second banking day following receipt of the item.
6. Subject to applicable law stating a time for availability of funds and any right of a bank to apply a deposit to an obligation of the depositor, a deposit of money becomes available for withdrawal as of right at the opening of the bank's next banking day after receipt of the deposit.

41-04-28. (4-216) Insolvency and preference.

1. Any item in or coming into the possession of a payor or collecting bank that suspends payment and which item is not finally paid must be returned by the receiver, trustee, or agent in charge of the closed bank to the presenting bank or the closed bank's customer.
2. If a payor bank finally pays an item and suspends payments without making a settlement for the item with its customer or the presenting bank which settlement is or becomes final, the owner of the item has a preferred claim against the payor bank.
3. If a payor bank gives or a collecting bank gives or receives a provisional settlement for an item and thereafter suspends payments, the suspension does not prevent or interfere with the settlement becoming final if such finality occurs automatically upon the lapse of certain time or the happening of certain events.
4. If a collecting bank receives from subsequent parties settlement for an item which settlement is or becomes final and suspends payments without making a settlement for the item with its customer which is or becomes final, the owner of the item has a preferred claim against that collecting bank.

41-04-29. (4-301) Deferred posting - Recovery of payment by return of items - Time of dishonor - Return of items by payor bank.

1. If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke the settlement and recover any settlement if before it has made final payment and before its midnight deadline it:
  - a. Returns the item.
  - b. Sends written notice of dishonor or nonpayment if the item is unavailable for return.

2. If a demand item is received by a payor bank for credit on its books, it may return that item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in subsection 1.
3. Unless previous notice of dishonor has been sent, an item is dishonored at the time when for purposes of dishonor it is returned or notice sent under this section.
4. An item is returned:
  - a. As to an item presented through a clearinghouse, when it is delivered to the presenting or last collecting bank or to the clearinghouse or is sent or delivered under clearinghouse rules.
  - b. In all other cases, when it is sent or delivered to the bank's customer or transferor or under instructions.

41-04-30. (4-302) Payor bank's responsibility for late return of item.

1. If an item is presented to and received by a payor bank, the bank is accountable for the amount of:
  - a. A demand item, other than a documentary draft, whether properly payable or not if the bank, in any case in which it is not also the depository bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline.
  - b. Any other properly payable item, unless within the time allowed for acceptance or payment of that item the bank either accepts or pays the item or returns it and accompanying documents.
2. The liability of a payor bank to pay an item under subsection 1 is subject to defenses based on breach of a presentment warranty (section 41-04-20) or proof that the person seeking enforcement of the liability presented or transferred the item for the purpose of defrauding the payor bank.

41-04-31. (4-303) When items subject to notice, stop order, legal process, or setoff - Order is which items may be charged or certified.

1. Any knowledge, notice, or stop order received by, legal process served upon, or setoff exercised by a payor bank comes too late to terminate, suspend, or modify the bank's right or duty to pay an item or to charge its customer's account for the item if the knowledge, notice, stop order, or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the earliest of the following:
  - a. The bank accepts or certifies the item.

- b. The bank pays the item in cash.
  - c. The bank settles for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement.
  - d. The bank becomes accountable for the amount of the item under section 41-04-30 dealing with the payor bank's responsibility for late return of items.
  - e. With respect to checks, a cutoff hour no earlier than one hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check.
2. Subject to subsection 1, items may be accepted, paid, certified, or charged to the indicated account of its customer in any order.

41-04-32. (4-401) When bank may charge customer's account.

- 1. A bank may charge against the account of a customer an item which is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and complies with any agreement between the customer and bank.
- 2. A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.
- 3. A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice will be effective for the period stated in subsection 1 of section 41-04-34 for stop orders, and must be received at a time and in a manner as to afford the bank a reasonable opportunity to act on it before any action by the bank with respect to the check described in section 41-04-31. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items pursuant to section 41-04-33.
- 4. A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:
  - a. The original terms of the altered item; or
  - b. The terms of the completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

41-04-33. (4-402) Bank's liability to customer for wrongful dishonor - Time of determining insufficiency of account.

1. Except as otherwise provided in this chapter, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it had agreed to pay the overdraft.
2. A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact.
3. A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one such determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available fund is wrongful.

41-04-34. (4-403) Customer's right to stop payment - Burden of proof of loss.

1. A customer or any other person authorized to draw on the account may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in section 41-04-31. If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account.
2. A stop order is effective for six months after the time it is received, but it lapses after fourteen calendar days if the original order was oral and was not confirmed in writing within that period. A stop order may be renewed for additional six-month periods by a writing given to the bank within a period during which the stop order is effective.
3. The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop payment order or order to close an account is on the customer. The loss from payment of an item contrary to a stop payment order may include damages for dishonor of subsequent items pursuant to section 41-04-33.

41-04-35. (4-404) Bank not obliged to pay check more than six months old. A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer's account for a payment made thereafter in good faith.

41-04-36. (4-405) Death or incompetence of customer.

1. A payor or collecting bank's authority to accept, pay or collect an item, or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes the authority to accept, pay, collect, or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.
2. Even with knowledge a bank may for ten days after the date of death pay or certify checks drawn on or before that date unless ordered to stop payment by a person claiming an interest in the account.

41-04-37. (4-406) Customer's duty to discover and report unauthorized signature or alteration.

1. A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.
2. If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of seven years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item.
3. If a bank sends or makes available a statement of account or items under subsection 1, the customer shall exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer has a duty to give prompt notification to the bank of the relevant facts.
4. If the bank proves that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection 3, the customer is precluded from asserting against the bank:
  - a. The customer's unauthorized signature or any alteration on the item if the bank also proves that it suffered a loss by reason of that failure.
  - b. The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notification from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of

time not exceeding thirty days in which to examine the item or statement of account and notify the bank.

5. If subsection 4 applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion to the extent that the failure of each to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection 4 does not apply.
6. Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement or items are made available to the customer under subsection 1 discover and report the customer's unauthorized signature or any alteration is precluded from asserting against the bank such unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under section 41-04-20 with respect to the unauthorized signature or alteration to which the preclusion applies.

41-04-38. (4-407) Payor bank's right to subrogation on improper payment. If a payor bank has paid an item over the stop payment order of the drawer or maker, or after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights of:

- a. Any holder in due course on the item against the drawer or maker.
- b. The payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose.
- c. The drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

41-04-39. (4-501) Handling of documentary drafts - Duty to send for presentment and to notify customer of dishonor. A bank that takes a documentary draft for collection must present or send the draft and accompanying documents for presentment and upon learning that the draft has not been paid or accepted in due course must seasonably notify its customer of that fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

41-04-40. (4-502) Presentment of "on arrival" drafts. When a draft or the relevant instructions require presentment "on arrival", "when goods arrive", or the like, the collecting bank need not present until in its judgment a reasonable time for arrival of the goods has expired. Refusal to pay or accept because the goods have not arrived is not dishonor. The bank must notify its transferor of the refusal but need not present the draft again until it is instructed to do so or learns of the arrival of the goods.

41-04-41. (4-503) Responsibility of presenting bank for documents and goods - Report of reasons for dishonor - Referee in case of need. Unless otherwise instructed and except as provided in chapter 41-05 a bank presenting a documentary draft:

1. Must deliver the documents to the drawee either on payment or on acceptance of the draft if it is payable more than three days after presentment.
2. Upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or if the presenting bank does not choose to utilize the referee's services it must use diligence and good faith to ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor, and must request instructions.

But the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received. It has a right to reimbursement for any expense incurred in following instructions and to prepayment of or indemnity for those expenses.

41-04-42. (4-504) Privilege of presenting bank to deal with goods - Security interest for expenses.

1. A presenting bank that, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.
2. For its reasonable expenses incurred by action under subsection 1 the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien.

SECTION 12. Chapter 41-04.1 of the North Dakota Century Code is created and enacted as follows:

41-04.1-01. (4A-101) Short title. This chapter may be cited as Uniform Commercial Code - funds transfers.

41-04.1-02. (4A-102) Subject matter. Except as otherwise provided in section 41-05.1-08, this chapter applies to funds transfers defined in section 41-05.1-04.

41-04.1-03. (4A-103) Payment order - Definitions.

1. In this chapter:
  - a. "Payment order" means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:

- (1) The instruction does not state a condition to payment to the beneficiary other than time of payment.
  - (2) The receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender.
  - (3) The instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.
- b. "Beneficiary" means the person to be paid by the beneficiary's bank.
- c. "Beneficiary's bank" means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.
- d. "Receiving bank" means the bank to which the sender's instruction is addressed.
- e. "Sender" means the person giving the instruction to the receiving bank.

2. If an instruction complying with subdivision a of subsection 1 is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

3. A payment order is issued when it is sent to the receiving bank.

41-04.1-04. (4A-104) Funds transfer - Definitions. In this chapter:

1. "Funds transfer" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.
2. "Intermediary bank" means a receiving bank other than the originator's bank or the beneficiary's bank.
3. "Originator" means the sender of the first payment order in a funds transfer.
4. "Originator's bank" means the receiving bank to which the payment order of the originator is issued if the originator is not a bank or the originator if the originator is a bank.

41-04.1-05. (4A-105) Other definitions.

1. In this chapter:

- a. "Authorized account" means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.
  - b. "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this chapter.
  - c. "Customer" means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.
  - d. "Funds-transfer business day" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.
  - e. "Funds-transfer system" means a wire transfer network, automated clearinghouse, or other communication system of a clearinghouse or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.
  - f. "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.
  - g. "Prove" with respect to a fact means to meet the burden of establishing the fact subsection 8 of section 41-01-11.
2. Other definitions applying to this chapter and the sections in which they appear are:
- a. "Acceptance". Section 41-04.1-17.
  - b. "Beneficiary". Section 41-04.1-03.
  - c. "Beneficiary's bank". Section 41-04.1-03.
  - d. "Executed". Section 41-04.1-21.
  - e. "Execution date". Section 41-04.1-21.
  - f. "Funds transfer". Section 41-04.1-04.
  - g. "Funds-transfer system rule". Section 41-04.1-32.
  - h. "Intermediary bank". Section 41-04.1-04.
  - i. "Originator". Section 41-04.1-04.
  - j. "Originator's bank". Section 41-04.1-04.

- k. "Payment by beneficiary's bank to beneficiary". Section 41-04.1-30.
  - l. "Payment by originator to beneficiary". Section 41-04.1-31.
  - m. "Payment by sender to receiving bank". Section 41-04.1-28.
  - n. "Payment date". Section 41-04.1-26.
  - o. "Payment order". Section 41-04.1-03.
  - p. "Receiving bank". Section 41-04.1-03.
  - q. "Security procedure". Section 41-04.1-26.
  - r. "Sender". Section 41-04.1-03.
3. The following definitions in chapter 41-04 apply to this chapter:
- a. "Clearinghouse". Section 41-04-04
  - b. "Item". Section 41-04-04
  - c. "Suspends payments". Section 41-04-04
4. In addition chapter 41-01 contains general definitions and principles of construction and interpretation applicable throughout this chapter.
- 41-04.1-06. (4A-106) Time payment order is received.
- 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 subsection 27 of section 41-01-11. 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.
  - 2. If this chapter refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this chapter.

41-04.1-07. (4A-107) Federal reserve regulations and operating circulars. Regulations of the board of governors of the federal reserve system and operating circulars of the federal reserve banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

41-04.1-08. (4A-108) Exclusion of consumer transactions governed by federal law. This chapter does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 [Title XX, Pub. L. 95-630, 92 Stat. 3728, 15 U.S.C. 1693 et seq.] as amended from time to time.

41-04.1-09. (4A-201) Security procedure. "Security procedure" means a procedure established by agreement of a customer and a receiving bank for the purpose of verifying that a payment order or communication amending or canceling a payment order is that of the customer or detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.

41-04.1-10. (4A-202) Authorized and verified payment orders.

1. A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.
2. If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified under a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.
3. Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the

bank in compliance with the security procedure chosen by the customer.

4. In this chapter the term "sender" includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection 1 or is effective as the order of the customer under subsection 2.
5. This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.
6. Except as provided in this section and in subdivision a of subsection 1 of section 41-04.1-11, rights and obligations arising under this section or section 41-04.1-11 may not be varied by agreement.

41-04.1-11. (4A-203) Unenforceability of certain verified payment orders.

1. If an accepted payment order is not, under subsection 1 of section 41-04.1-10, an authorized order of a customer identified as sender, but is effective as an order of the customer under subsection 2 of section 41-04.1-10, the following rules apply:

- a. By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.
- b. The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure or by a person who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

2. This section applies to amendments of payment orders to the same extent it applies to payment orders.

41-04.1-12. (4A-204) Refund of payment and duty of customer to report with respect to unauthorized payment order.

1. If a receiving bank accepts a payment order issued in the name of its customer as sender which is not authorized and not effective as the order of the customer under section 41-04.1-10 or is not enforceable, in whole or in part, against the customer under section 41-04.1-11, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer

fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding ninety days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer because of a failure by the customer to give notification as stated in this section.

2. Reasonable time under subsection 1 may be fixed by agreement under subsection 1 of section 41-01-14, but the obligation of a receiving bank to refund payment as stated in subsection 1 may not otherwise be varied by agreement.

#### 41-04.1-13. (4A-205) Erroneous payment orders.

1. If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order erroneously instructed payment to a beneficiary not intended by the sender, erroneously instructed payment in an amount greater than the amount intended by the sender, or was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:
  - a. If the sender proves that the sender or a person acting on behalf of the sender pursuant to section 41-04.1-14 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in subdivisions b and c.
  - b. If the funds transfer is completed on the basis of an erroneous payment order, other than an erroneously transmitted duplicate of a payment order, the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.
  - c. If the funds transfer is completed on the basis of a payment order erroneously instructing payment in an amount greater than intended by the sender, the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution.
2. If the sender of an erroneous payment order described in subsection 1 is not obliged to pay all or part of the order and if the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding ninety days, after the bank's notification was received by the sender. If the bank proves that the sender failed to

perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

3. This section applies to amendments to payment orders to the same extent it applies to payment orders.

41-04.1-14. (4A-206) Transmission of payment order through funds-transfer or other communication system.

1. If a payment order addressed to a receiving bank is transmitted to a funds-transfer system or other third-party communication system for transmittal to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. This section does not apply to a funds-transfer system of the federal reserve banks.
2. This section applies to cancellations and amendments of payment orders to the same extent it applies to payment orders.

41-04.1-15. (4A-207) Misdescription of beneficiary.

1. Subject to subsection 2, if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.
2. If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:
  - a. Except as otherwise provided in subsection 3, if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.
  - b. If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.
3. If a payment order described in subsection 2 is accepted, the originator's payment order described the beneficiary inconsistently by name and number, and the beneficiary's bank pays the person

identified by number as permitted by subdivision a of subsection 2, the following rules apply:

- a. If the originator is a bank, the originator is obliged to pay its order.
  - b. If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates.
4. In a case governed by subdivision a of subsection 2, if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:
- a. If the originator is obliged to pay its payment order as stated in subsection 3, the originator has the right to recover.
  - b. If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

41-04.1-16. (4A-208) Misdescription of intermediary bank of beneficiary's bank.

1. This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number.
  - a. The receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank and need not determine whether the number identifies a bank.
  - b. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in execution or attempting to execute the order.
2. This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify different persons.
  - a. If the sender is a bank, the receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank if the receiving bank, when it executes the

sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

- b. If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by subdivision a of subsection 2, as though the sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates.
- c. Regardless of whether the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person.
- d. If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in subdivision a of subsection 1 of section 41-04.1-22.

41-04.1-17. (4A-209) Acceptance of payment order.

1. Subject to subsection 4, a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.
2. Subject to subsections 3 and 4, a beneficiary's bank accepts a payment order at the earliest of the following times:
- a. When the bank pays the beneficiary as stated in subsection 1 or 2 of section 41-04.1-30 or notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order.
- b. When the bank receives payment of the entire amount of the sender's order under subdivision a or b of subsection 1 of section 41-04.1-28.

- c. The opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within one hour after that time or one hour after the opening of the next business day of the sender following the payment date if that time is later. If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly.
3. Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under subdivision b or c of subsection 2 if the beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.
4. A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank or the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently canceled under subsection 2 of section 41-04.1-19, the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.
- 41-04.1-18. (4A-210) Rejection of payment order.

1. A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, any means complying with the agreement is reasonable, and any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.
2. This subsection applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order.

If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled under subsection 4 of section 41-04.1-19 or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

3. If a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time the bank suspends payments.
4. Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order.

41-04.1-19. (4A-211) Cancellation and amendment of payment order.

1. A communication of the sender of a payment order canceling or amending the order may be transmitted to the receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.
2. Subject to subsection 1, a communication by the sender canceling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.
3. After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.
  - a. With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.
  - b. With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order that is a duplicate of a payment order previously issued by the sender, that orders payment to a beneficiary not entitled to receive payment from the originator, or that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the

beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

4. An unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order.
5. A canceled payment order cannot be accepted. If an accepted payment order is canceled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issuance of a new payment order in the amended form at the same time.
6. Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.
7. A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.
8. A funds-transfer system rule is not effective to the extent it conflicts with subdivision b of subsection 3.

41-04.1-20. (4A-212) Liability and duty of receiving bank regarding unaccepted payment order. If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this chapter, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action or refrain from taking action with respect to the order except as provided in this chapter or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in section 41-04.1-17, and liability is limited to that provided in this chapter. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this chapter or by express agreement.

41-04.1-21. (4A-301) Execution and execution date.

1. A payment order is "executed" by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary's bank may be accepted but may not be executed.
2. "Execution date" of a payment order means the day on which the receiving bank may properly issue a payment order execution of the sender's order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the

order is received and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date.

41-04.1-22. (4A-302) Obligations of receiving bank in execution of payment order.

1. Except as provided in subsections 2 through 4, if the receiving bank accepts a payment order under subsection 1 of section 41-04.1-17, the bank has the following obligations in executing the order:
  - a. The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning any intermediary bank or funds-transfer system to be used in carrying out the funds transfer or the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.
  - b. If the sender's instruction states that the funds transfer is to be carried out telephonically or by wire transfer or otherwise indicates that the funds transfer is to be carried out by the most expeditious means, the receiving bank is obliged to transmit its payment order by the most expeditious available means and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible.
2. Unless otherwise instructed, a receiving bank executing a payment order may use any funds-transfer system if use of that system is reasonable in the circumstances and issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank. A receiving bank is not required to follow an instruction of the sender designating a funds-transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer.
3. Unless subdivision b of subsection 1 applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first-class mail or by any means reasonable in the circumstances. If the receiving bank is

instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated.

4. Unless instructed by the sender, the receiving bank may not obtain payment of its charges for services and expenses in connection with the execution of the sender's order by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges and may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner.

41-04.1-23. (4A-303) Erroneous execution of payment order.

1. A receiving bank that executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order or issues a payment order in execution of the sender's order and then issues a duplicate order is entitled to payment of the amount of the sender's order under subsection 3 of section 41-04.1-27 if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.
2. A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under subsection 3 of section 41-04.1-27 if that subsection is otherwise satisfied and the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted only to the extent of the amount of the erroneous order. This subsection does not apply if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.
3. If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed and all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received to the extent allowed by the law governing mistake and restitution.

41-04.1-24. (4A-304) Duty of sender to report erroneously executed payment order. If the sender of a payment order that is erroneously executed as stated in section 41-04.1-23 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding ninety days after the notification

from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under subsection 4 of section 41-04.1-27 for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.

41-04.1-25. (4A-305) Liability for late or improper execution or failure to execute payment order.

1. If a funds transfer is completed but execution of a payment order by the receiving bank in breach of section 41-04.1-22 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in subsection 3 additional damages are not recoverable.
2. If execution of a payment order by a receiving bank in breach of section 41-04.1-22 results in noncompletion of the funds transfer, failure to use an intermediary bank designated by the originator, or issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by subsection 1, resulting from the improper execution. Except as provided in subsection 3, additional damages are not recoverable.
3. In addition to the amounts payable under subsections 1 and 2, damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.
4. If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, but are not otherwise recoverable.
5. Reasonable attorney's fees are recoverable if demand for compensation under subsection 1 or 2 is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection 4 and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection 4 is made and refused before an action is brought on the claim.
6. Except as stated in this section, the liability of a receiving bank under subsections 1 and 2 may not be varied by agreement.

41-04.1-26. (4A-401) Payment date. "Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the

beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank.

41-04.1-27. (4A-402) Obligation of sender to pay receiving bank.

1. This section is subject to sections 41-04.1-13 and 41-04.1-15.
2. With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.
3. This subsection is subject to subsection 5 and to section 41-04.1-23. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order.
4. If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in sections 41-04.1-12 and 41-04.1-24, interest is payable on the refundable amount from the date of payment.
5. If a funds transfer is not completed as stated in subsection 3 and an intermediary bank is obliged to refund payment as stated in subsection 4 but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in subdivision a of subsection 1 of section 41-04.1-22, to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in subsection 4.
6. The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection 3 or to receive refund under subsection 4 may not be varied by agreement.

41-04.1-28. (4A-403) Payment by sender to receiving bank.

1. Payment of the sender's obligation under section 41-04.1-27 to pay the receiving bank occurs as follows:
  - a. If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a federal reserve bank or through a funds-transfer system.

- b. If the sender is a bank and the sender credited an account of the receiving bank with the sender or caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.
- c. If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.
2. If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection has been exercised.
3. If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under section 41-04.1-27 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other.
4. In a case not covered by subsection 1, the time when payment of the sender's obligation under subsection 2 or 3 of section 41-04.1-27 occurs is governed by applicable principles of law that determine when an obligation is satisfied.

41-04.1-29. (4A-404) Obligation of beneficiary's bank to pay and give notice to beneficiary.

1. Subject to subsection 5 of section 41-04.1-19 and subsections 4 and 5 of section 41-04.1-30, if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover

damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

2. If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds-transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first-class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable attorney's fees are also recoverable if demand for interest is made and refused before an action is brought on the claim.
3. The right of a beneficiary to receive payment and damages as stated in subsection 1 may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as stated in subsection 2 may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer.

41-04.1-30. (4A-405) Payment by beneficiary's bank to beneficiary.

1. If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under subsection 1 of section 41-04.1-29 occurs when and to the extent the beneficiary is notified of the right to withdraw the credit, the bank lawfully applies the credit to a debt of the beneficiary, or funds with respect to the order are otherwise made available to the beneficiary by the bank.
2. If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under subsection 1 of section 41-04.1-29 occurs is governed by principles of law that determine when an obligation is satisfied.
3. Except as stated in subsections 4 and 5, if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.
4. A funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if the rule requires that both the beneficiary

and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated, the beneficiary, the beneficiary's bank and the originator's bank agreed to be bound by the rule, and the beneficiary's bank did not receive payment of the payment order that it accepted. If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under section 41-04.1-31.

5. This subsection applies to a funds transfer that includes a payment order transmitted over a funds-transfer system that nets obligations multilaterally among participants and has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one or more participants that do not meet their settlement obligations. If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement under its rules with respect to any payment order in the funds transfer, the acceptance by the beneficiary's bank is nullified and no person has any right or obligation based on the acceptance; the beneficiary's bank is entitled to recover payment from the beneficiary; no payment by the originator to the beneficiary occurs under section 41-04.1-31 and subject to subsection 5 of section 41-04.1-27, each sender in the funds transfer is excused from its obligation to pay its payment order under subsection 3 of section 41-04.1-27 because the funds transfer has not been completed.

41-04.1-31. (4A-406) Payment by originator to beneficiary - Discharge of underlying obligation.

1. Subject to subsection 5 of section 41-04.1-19 and to subsections 4 and 5 of section 41-04.1-30, the originator of a funds transfer pays the beneficiary of the originator's payment order at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.
2. If payment under subsection 1 is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless the payment under subsection 1 was made by a means prohibited by the contract of the beneficiary with respect to the obligation; the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment; funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary; and the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract. If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under subsection 1 of section 41-04.1-29.

3. For the purpose of determining whether discharge of an obligation occurs under subsection 2, if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.
4. Rights of the originator or of the beneficiary of a funds transfer under this section may be varied only by agreement of the originator and the beneficiary.

41-04.1-32. (4A-501) Variation by agreement and effect of funds-transfer system rule.

1. Except as otherwise provided in this chapter the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.
2. "Funds-transfer system rule" means a rule of an association of banks (a) which governs transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders or (b) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a federal reserve bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this chapter, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this chapter and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in subsection 3 of section 41-04.1-29, subsection 4 of section 41-04.1-30, and subsection 3 of section 41-04.1-38.

41-04.1-33. (4A-502) Creditor process served on receiving bank - Setoff by beneficiary's bank.

1. As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.
2. This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

3. If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:
  - a. The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.
  - b. The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.
  - c. If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.
4. Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

41-04.1-34. (4A-503) Injunction or restraining order with respect to funds transfer. For proper cause and under applicable law, a court may restrain a person from issuing a payment order to initiate a funds transfer, an originator's bank from executing the payment order of the originator, the beneficiary's bank from releasing funds to the beneficiary, or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

41-04.1-35. (4A-504) Order in which items and payment orders may be charged to account - Order withdrawal from account.

1. If a receiving bank has received more than one payment order of the sender or one or more payment orders and other items that are payable from the sender's account, the bank may charge the sender's account with respect to the various orders and items in any sequence.
2. In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied.

41-04.1-36. (4A-505) Preclusion of objection to debit of customer's account. If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one year after the notification was received by the customer.

41-04.1-37. (4A-506) Rate of interest.

1. If, under this chapter, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined by agreement of the sender and receiving bank or by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system.
2. If the amount of interest is not determined by an agreement or rule as stated in subsection 1, the amount is calculated by multiplying the applicable federal funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable federal funds rate is the average of the federal funds rates published by the federal reserve bank of New York for each of the days for which interest is payable divided by three hundred sixty. The federal funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank.

41-04.1-38. (4A-507) Choice of law.

1. The following rules apply unless the affected parties otherwise agree or subsection 3 applies:
  - a. The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.
  - b. The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.
  - c. The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.
2. If the parties described in each paragraph of subsection 1 have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.
3. A funds-transfer system rule may select the law of a particular jurisdiction to govern the:
  - a. Rights and obligations between participating banks with respect to payment orders transmitted or processed through the system.

b. The rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system.

A choice of law made under subdivision a is binding on participating banks. A choice of law made under subdivision b is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this subsection may govern, whether or not that law bears a reasonable relation to the matter in issue.

4. In the event of inconsistency between an agreement under subsection 2 and a choice-of-law rule under subsection 3, the agreement under subsection 2 prevails.

5. If a funds transfer is made by use of more than one funds-transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue.

SECTION 13. AMENDMENT. Subsection 3 of section 41-05-03 of the North Dakota Century Code is amended and reenacted as follows:

3. Definitions in other chapters applying to this chapter and the sections in which they appear are:

a. "Accept" or "Acceptance". Section ~~41-03-47~~ 41-03-46.

b. "Contract for sale". Section 41-02-06.

c. "Draft". Section 41-03-04.

d. "Holder in due course". Section 41-03-32.

e. "Midnight deadline". Section 41-04-04.

f. "Security". Section 41-08-02.

SECTION 14. AMENDMENT. Subdivision a of subsection 2 of section 41-05-14 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

a. The issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances that would make it a holder in due course (section ~~41-03-32~~ 41-03-28) and in an appropriate case would make it a person to whom a document of title has been

duly negotiated (section 41-07-31) or a bona fide purchaser of a certificated security (section 41-08-18); and

SECTION 15. AMENDMENT. Subsection 3 of section 41-09-05 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

3. The following definitions in other chapters apply to this chapter:
  - a. "Check". Section 41-03-04.
  - b. "Contract for sale". Section 41-02-06.
  - c. "Holder in due course". Section ~~41-03-32~~ 41-03-28.
  - d. "Note". Section 41-03-04.
  - e. "Sale". Section 41-02-06.

SECTION 16. AMENDMENT. Section 41-09-13 of the North Dakota Century Code is amended and reenacted as follows:

41-09-13. (9-113) Security interests arising under chapter 41-02 or 41-02.1. A security interest arising solely under the chapter on sales ~~chapter 41-02~~ or 41-02.1 is subject to the provisions of this chapter except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods:

1. No security agreement is necessary to make the security interest enforceable;
2. No filing is required to perfect the security interest; and
3. The rights of the secured party on default by the debtor are governed by ~~the chapter on sales~~ ~~chapter 41-02~~ in the case of a security interest arising solely under chapter 41-02 or by chapter 41-02.1 in the case of a security interest arising solely under chapter 41-02.1.

SECTION 17. AMENDMENT. Subsection 1 of section 41-09-16 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. Subject to the provisions of section ~~41-04-18~~ 41-04-22 on the security interest of the collecting bank, section ~~41-08-36.1~~ on security interests in securities, and section 41-09-13 on a security interest arising under the chapter on sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless all of the following take place:
  - a. The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement that contains a description of the collateral and, in addition, if the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned.

- b. Value has been given.
- c. The debtor has rights in the collateral.

SECTION 18. AMENDMENT. Subdivision f of subsection 1 of section 41-09-23 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

- f. A security interest of a collecting bank (section ~~41-04-18~~ 41-04-22) or in securities (section 41-08-36.1) or arising under the chapter on sales (see section 41-09-13) or covered in subsection 3.

SECTION 19. AMENDMENT. Section 41-09-30 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

41-09-30. (9-309) Protection of purchasers of instruments, documents, and securities. Nothing in this chapter limits the rights of a holder in due course of a negotiable instrument (section ~~41-03-32~~ 41-03-28) or a holder to whom a negotiable document of title has been duly negotiated (section 41-07-30) or a bona fide purchaser of a security (section 41-08-18) and those holders or purchasers take priority over an earlier security interest even though perfected. Filing under this chapter does not constitute notice of the security interest to those holders or purchasers.

SECTION 20. AMENDMENT. Subsection 1 of section 41-09-33 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: section ~~41-04-18~~ 41-04-22 with respect to the security interests of collecting banks in items being collected, accompanying documents, and proceeds; section 41-09-03 on security interests related to other jurisdictions; and section 41-09-14 on consignments.

SECTION 21. AMENDMENT. Section 47-15-01 of the North Dakota Century Code is amended and reenacted as follows:

47-15-01. "Hiring" defined. Hiring is a contract by which one gives to another the temporary possession and use of personal property, other than goods subject to chapter 41-02.1 or money, for reward, and the latter agrees to return the same to the former at a future time.

SECTION 22. REPEAL. Chapters 41-03 and 41-04 and section 41-09-11 of the North Dakota Century Code are repealed.

SECTION 23. TRANSITION. Rights and obligations that arose under section 41-09-11 before its repeal remain valid and may be enforced as though this section had not been repealed.

SECTION 24. EFFECTIVE DATE. This Act becomes effective on July 1, 1993.

Approved April 5, 1991  
Filed April 8, 1991

## CHAPTER 449

SENATE BILL NO. 2024  
(Legislative Council)  
(Interim Agriculture Committee)

### AGRICULTURAL LIENS

AN ACT to create and enact a new section to chapter 35-17, a new section to chapter 35-30, a new section to chapter 35-31, and a new section to chapter 41-09 of the North Dakota Century Code, relating to the destruction of certain lien documents and facsimile filing; to amend and reenact sections 11-18-14, 35-05-04, 35-17-01, 35-17-03, 35-17-04, 35-30-01, 35-30-02, 35-31-02, subsection 9 of section 41-09-28, sections 41-09-28.1, 41-09-40, 41-09-41, subdivision a of subsection 5 and subsection 8 of section 41-09-42, and sections 41-09-42.1, 41-09-43, and 41-09-46 of the North Dakota Century Code, relating to agister's liens, the establishment of a computerized central notice system and the computerized Uniform Commercial Code central filing system fund, and the filing of security interests and liens; to repeal section 35-17-05 and subsection 10 of section 41-09-28 of the North Dakota Century Code, relating to information to be filed with the secretary of state regarding agister's liens; to provide a penalty; to provide an appropriation; to provide an effective date; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 11-18-14 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

11-18-14. Register of deeds to remove and destroy certain documents - Records to be made. The register of deeds in each county in this state, unless otherwise earlier permitted by law, shall remove from the files in the register's office, and destroy, all seed liens, chattel mortgages, threshing or drying liens, crop production liens, combining liens, agricultural processor's liens, agricultural supplier's liens, agister's liens, mechanic's liens, repairman's liens, unpaid earned insurance premium liens, and sales contracts together with any releases for the same upon which a claim for relief has accrued and which claim for relief is more than ten years old. At the time of destroying the files the register of deeds shall note on the margin of the index opposite the record of each instrument so removed and destroyed the date when the same was destroyed.

SECTION 2. AMENDMENT. Section 35-05-04 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

35-05-04. Security agreement not to include other personal property. A security agreement covering specific crops is not valid to create a security interest therein, nor entitled to be filed in the office of the register of deeds or the secretary of state, if the security agreement contains any provision by which a security interest is claimed in any other

personal property. For the purpose of this section, the term "crops" means crops, crop proceeds and products, supplementary price payments and payments made in lieu of crop proceeds, including crop insurance payments, for the period of time authorized in this section, but does not include diversion payments or third-party payments made to producers which are not directly related to crop production or proceeds.

SECTION 3. AMENDMENT. Section 35-17-01 of the North Dakota Century Code is amended and reenacted as follows:

35-17-01. Agister's lien authorized. Any person to whom any ~~horses, mules, cattle, or sheep~~ animal is entrusted by the owner thereof for the purpose of feeding, herding, pasturing, or ranching has a lien upon the ~~horses, mules, cattle, or sheep~~ animals for the amount that may be due for feeding, herding, pasturing, or ranching, and is authorized to retain possession of the ~~horses, mules, cattle, or sheep~~ animal until the amount is paid. ~~These provisions may~~ This section does not be construed to apply to stolen stock.

SECTION 4. AMENDMENT. Section 35-17-03 of the North Dakota Century Code is amended and reenacted as follows:

35-17-03. Agister's lien by filing - Priority of lien. In addition to sections 35-17-01 and 35-17-02, any person to whom any ~~horses, mules, cattle, or sheep~~ animal is entrusted by the owner for the purpose of feeding, herding, pasturing, or ranching, upon filing the statement prescribed in section 35-17-04, is entitled to a lien upon the ~~horses, mules, cattle, or sheep~~ animal for the amount that may be due for feeding, herding, pasturing, or ranching, effective from the date the person entitled to the lien comes into possession of the ~~horses, mules, cattle, or sheep~~ animal. A lien taken pursuant to this section upon anything other than the animal is void. An agister's lien has priority, as to the animals covered by the lien, over all other liens or encumbrances, except agricultural processors' or agricultural suppliers' liens. This section does not apply to stolen stock.

SECTION 5. AMENDMENT. Section 35-17-04 of the North Dakota Century Code is amended and reenacted as follows:

35-17-04. Procedure to obtain lien - Statement filed - Contents - Waiver. Any person entitled to an agister's lien, within ninety days after taking possession of the ~~horses, mules, cattle, or sheep~~ animal, may file in the office of the register of deeds of the in any county in which the owner of the horses, mules, cattle, or sheep resides this state or in the office of the secretary of state, a verified statement containing ~~all of~~ the following information:

1. The number of and a description of the animals subject to the lien and the legal description as to the location of the animals.
2. The name and address of the person for whom the ~~horses, mules, cattle, or sheep~~ animals are kept.
3. The name and address of the lienholder.
4. The price agreed upon for keeping the animals and, if no price was agreed upon, the reasonable value of the services.

5. The social security number or, in the case of a debtor doing business other than as an individual, the internal revenue service taxpayer identification number of the person for whom the animals are kept.

The secretary of state shall prescribe one form that can be used to obtain a lien under this section or gain protection under the central notice system, or both. If the statement is not filed within ninety days as required by this section, the person entitled to the lien under section 35-17-03 waives the lien.

SECTION 6. A new section to chapter 35-17 of the North Dakota Century Code is created and enacted as follows:

Secretary of state to remove and destroy certain documents. The secretary of state shall remove and destroy liens filed in the secretary of state's office pursuant to this chapter in the manner provided for in section 11-18-14 for the register of deeds.

SECTION 7. AMENDMENT. Section 35-30-01 of the North Dakota Century Code is amended and reenacted as follows:

35-30-01. Agricultural processor's lien authorized. Any person who processes any crop or agricultural product is entitled to a lien upon the crop or product processed for the reasonable value of the services performed. A lien taken pursuant to this section upon anything other than the crop or product processed is void. As used in this chapter, the term "processor" includes persons threshing, combining, drying, or harvesting any crop or agricultural product. The agricultural processor's lien is effective from the date the processing is completed.

SECTION 8. AMENDMENT. Section 35-30-02 of the North Dakota Century Code is amended and reenacted as follows:

35-30-02. Procedure to obtain lien. To obtain an agricultural processor's lien, the person entitled to the lien, within ninety days after the processing is completed, shall file a verified statement in the office of the register of deeds in the any county or counties in which the crop or agricultural product was grown in this state or in the office of the secretary of state. The statement must contain the following information:

1. The name and address of the person for whom the processing was done.
2. The name and address of the processor.
3. A description of the crops or agricultural products and their amount, if known, subject to the lien together with the legal description as to the location where the crops or agricultural products were grown.
4. The price agreed upon for processing, or if no price was agreed upon, the reasonable value of the processing.
5. The social security number or, in the case of a debtor doing business other than as an individual, the internal revenue service

taxpayer identification number of the person for whom the processing was done.

The secretary of state shall prescribe one form that can be used to obtain a lien under this section or gain protection under the central notice system, or both.

SECTION 9. A new section to chapter 35-30 of the North Dakota Century Code is created and enacted as follows:

Secretary of state to remove and destroy certain documents. The secretary of state shall remove and destroy liens filed in the secretary of state's office pursuant to this chapter in the manner provided for in section 11-18-14 for the register of deeds.

\* SECTION 10. AMENDMENT. Section 35-31-02 of the North Dakota Century Code is amended and reenacted as follows:

35-31-02. Procedure to obtain lien. To obtain an agricultural supplier's lien, except an agricultural supplier's lien for furnishing petroleum products, the person entitled to the lien, within ninety days after the supplies are furnished or the services performed, shall file a verified statement in the office of the register of deeds of the any county or counties in which the crop, agricultural product, or livestock was grown in this state or in the office of the secretary of state. To obtain an agricultural supplier's lien for furnishing and delivering petroleum products, the person entitled to the lien, within one hundred eighty days after the petroleum products are furnished or delivered, shall file a verified statement in the office of the register of deeds of any county in the state or in the office of the secretary of state. The statement must contain the following information:

1. The name and address of the person to whom the supplies were furnished.
2. The name and address of the supplier.
3. A description of the crops, agricultural products, or livestock and their amount or number, if known, subject to the lien together with the legal description as to the location of the crops, agricultural products, or livestock.
4. A description and value of the supplies furnished.
5. The social security number or, in the case of a debtor doing business other than as an individual, the internal revenue service taxpayer identification number of the person to whom the supplies were furnished.

The secretary of state shall prescribe one form that can be used to obtain a lien under this section or gain protection under the central notice system, or both.

SECTION 11. A new section to chapter 35-31 of the North Dakota Century Code is created and enacted as follows:

- \* NOTE: Section 35-31-02 was also amended by section 1 of House Bill No. 1538, chapter 369.

Secretary of state to remove and destroy certain documents. The secretary of state shall remove and destroy liens filed in the secretary of state's office pursuant to this chapter in the manner provided for in section 11-18-14 for the register of deeds.

SECTION 12. AMENDMENT. Subsection 9 of section 41-09-28 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

9. If a secured party who has perfected a security interest in crops or livestock, or if a lienholder who has created a lien by statute or otherwise; which includes, ~~but is not limited to,~~ liens for threshing; crop or agricultural product processing; crop production; fertilizer, farm chemicals, and seed; agricultural supplies; and landlord's lien; intends to impose liability for such security interest or lien against a crop or livestock buyer, the name of the secured party or lienholder must appear on the most current list or lists distributed by the secretary of state pursuant to subsection 4 of section 41-09-46. In order to appear on the list or lists, secured parties or lienholders must file with the secretary of state or in the office of the register of deeds in any county in this state a form prescribed by the secretary of state which contains ~~all of the following~~ information:
  - a. ~~The name and address of the person engaged in farming operations.~~
  - b. ~~The county of residence of the person engaged in farming operations.~~
  - c. ~~The social security number of the person engaged in farming operations or, in the case of a debtor doing business other than as an individual, the internal revenue service taxpayer identification number of the debtor except that the social security number is not required for a crop, agricultural processor's, or agricultural supplier's lien obtained under chapter 35-30 or 35-31 unless the social security number is required for certification of the central notice system pursuant to section 1324 of the Food Security Act of 1985 [Pub. L. 99-198; 99 Stat. 1535; 7 U.S.C. 1631].~~
  - d. ~~The name and address of the secured party or lienholder.~~
  - e. ~~A description of the crops or livestock and their amount, if known, subject to the security interest or lien.~~
  - f. ~~The legal description as to the location of the crops or livestock.~~
  - g. ~~The signature of the debtor against whom the loan or lien is filed is not required unless the signature is required for certification of the central notice system pursuant to section 1324 of the Food Security Act of 1985 [Pub. L. 99-198; 99 Stat. 1535; 7 U.S.C. 1631].~~
  - h. ~~The signature of the secured party or lienholder.~~

A form filed pursuant to this section is effective for a period of five years. The effectiveness and continuation of the form filed is to be treated as if it were filed as a financing statement prescribed by the secretary of state under section 41-09-41 or contained on a form prescribed by the secretary of state under section 35-17-04, 35-30-02, or 35-31-02.

SECTION 13. AMENDMENT. Section 41-09-28.1 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

41-09-28.1. Transition provision to computerized central notice system.

1. Until January 1, 1986, a merchant who purchases or commission merchant who sells farm products for another for a fee or commission takes free of security interest created by the seller only if the requirements of subsection 7 of section 41-09-28 are met.
2. Until December 1, 1985, copies of security documents filed by secured parties or lienholders with the register of deeds along with the additional information to be filed pursuant to subsection 9 of section 41-09-28 may be filed with the secretary of state and such documents shall be effective for five years under the central notice system.
3. The secretary of state or a designee shall mail the first lists for crops and livestock created under the central notice system five business days prior to their effective day in January 1986. Any security document filed by secured parties or lienholders before January 1, 1992, lapses on June 30, 1992, unless after January 1, 1992, but before June 30, 1992, there is filed in the office of the secretary of state a copy of the security document, along with the additional information to be filed pursuant to section 35-17-04, 35-30-02, 35-31-02, or 41-09-40, and all related documents on file. A refiled document must be filed in the office in which the original document was first filed. The order of perfection is governed by the date and the time of filing of the original financing statement or statement of lien. Refiling a lien pursuant to this section does not affect the priority of that lien. No filing fees may be charged or collected for the refiling of any security document pursuant to this section. At the time of the refiling of any security document pursuant to this section, the fee for filing and indexing a termination statement pursuant to subsection 3 of section 41-09-43 must be paid, unless that fee was paid with the original filing of the security document.

SECTION 14. AMENDMENT. Section 41-09-40 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

41-09-40. (9-401) Place of filing - Erroneous filing - Removal of collateral.

1. The proper place to file in order to perfect a security interest is as follows:

- a. When the collateral is farm products, or growing crops, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the register of deeds in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the register of deeds in the county where the goods are kept.
  - b. When the collateral is timber to be cut, or is minerals or the like (including oil and gas), or accounts subject to subsection 5 of section 41-09-03, or when the financing statement is filed as a fixture filing (section 41-09-34) and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded.
  - c. When the collateral is equipment used in farming operations, then in the office of the register of deeds in the county of the debtor's residence and in the office of the secretary of state, or if the debtor is not a resident of this state then in the office of the register of deeds in the county where the equipment is kept.
  - d. b. In all other cases, in the office of the register of deeds in any county in this state or in the office of the secretary of state.
2. A filing, other than a filing made pursuant to subdivision c of subsection 4, which that is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this chapter and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement. A filing made pursuant to subdivision c of subsection 4 in an improper county is nevertheless effective if the creditor perceived the place in which the creditor filed to be the debtor's county of residence and the creditor filed in the office of the secretary of state.
  3. Filing which A filing that is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.
  4. If collateral is brought into this state from another jurisdiction, the rules stated in section 41-09-03 determine whether filing is necessary in this state.
  5. Notwithstanding subsections 1, 2, 3, and 4, and subject to subsection 3 of section 41-09-23, the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is in the office of the secretary of state. This filing constitutes a fixture filing (section 41-09-34) as to the collateral described therein which is or is to become fixtures.

6. For the purposes of this section, the residence of an organization is its place of business, if it has one, or its chief executive office, if it has more than one place of business.

SECTION 15. AMENDMENT. Section 41-09-41 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

41-09-41. (9-402) Formal requisites of financing statement - Amendments - Mortgage as financing statement.

1. A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral; except a financing statement that is to be filed to gain protection under the central notice system must include any additional information required by the Food Security Act of 1985 [Pub. L. 99-198; 99 Stat. 1535; 7 U.S.C. 1631], as prescribed by the secretary of state. The secretary of state shall prescribe one form that can be used to perfect a security interest in farm products or gain protection under the central notice system, or both. In addition, to be sufficient a financing statement filed after July 1, 1987, must include either the social security number or federal tax identification number of the debtor. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection 5 of section 41-09-03, or when the financing statement is filed as a fixture filing (section 41-09-34), and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection 5. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic, or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this state.
2. A financing statement ~~which~~ that otherwise complies with subsection 1 is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in:
  - a. Collateral already subject to a security interest in another jurisdiction when it is brought into this state, or when the debtor's location is changed to this state. The financing statement must state that the collateral was brought into this state or that the debtor's location was changed to this state under such circumstances;
  - b. Proceeds under section 41-09-27 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral;

- c. Collateral as to which the filing has lapsed; or
- d. Collateral acquired after a change of name, identity, or corporate structure of the debtor (subsection 7).

3. A form substantially as follows is sufficient to comply with subsection 1:

Name of debtor (or assignor) -----  
 Address -----  
 Debtor's social security number or federal tax  
 identification number -----  
 Name of secured party (or assignee) -----  
 Address -----

a. This financing statement covers the following types (or items) of property:

(Describe) -----

b. (If collateral is crops) The above described crops are growing or are to be grown on:

(Describe real estate) -----

c. (If applicable) The above goods are to become fixtures on:

(Describe real estate) -----

and this financing statement is to be filed for record in the real estate records. (If the debtor does not have an interest of record.) The name of a record owner is -----.

d. (If products of collateral are claimed)

Products of the collateral are also covered.

(use ) -----  
 whichever ) Signature of Debtor (or Assignor)  
 is ) -----  
 applicable) ) Signature of Secured Party (or  
 Assignor)

4. A financing statement may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment. In this chapter, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

5. A financing statement covering timber to be cut or covering minerals or the like (including oil and gas) or accounts subject to subsection 5 of section 41-09-03, or a financing statement filed as a fixture filing (section 41-09-34) where the debtor is not a transmitting utility, must show that it covers this type of collateral, must recite that it is to be filed for record in the

real estate records, and the financing statement must contain a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state. If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner.

6. A mortgage is effective as a financing statement filed as a fixture filing from the date of its recording if:
  - ↔ a. The goods are described in the mortgage by item or type;
  - ↔ b. The goods are or are to become fixtures related to the real estate described in the mortgage;
  - ↔ c. The mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records; and
  - ↔ d. The mortgage is duly recorded.

No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.

7. A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership, or corporate name of the debtor, whether or not it adds other trade names or the names of partners. Where the debtor so changes his name, or in the case of an organization, its name, identity, or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.
8. A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.
9. A financing statement covering crops growing or to be grown must show that it covers crops and where the debtor is not a transmitting utility the financing statement must contain a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state.
10. A financing statement filed to gain protection under the central notice system must be amended within three months of a material change to reflect that change. The amended financing statement must be signed by both the debtor and secured party and filed in the same manner as the original financing statement.

SECTION 16. AMENDMENT. Subdivision a of subsection 5 and subsection 8 of section 41-09-42 of the 1989 Supplement to the North Dakota Century Code are amended and reenacted as follows:

a. For filing and indexing any statement under the Uniform Commercial Code, five dollars, and when a nonstandard statement is presented for filing, an additional fee of five dollars plus one dollar per page must be made. No additional fee may be charged if the form is filed also to gain protection under the central notice system.

8. The fee secretary of state shall establish fees for filing a form with the secretary of state pursuant to subsection 9 of section 41-09-28 is not to exceed five dollars. This fee may not directly be charged to the person to whom the loan is made inputting data to, and for obtaining computer access to the computerized central notice system, to the computerized Uniform Commercial Code central filing data base, or to the computerized statutory liens data base, for receiving printouts, and for other services provided through the computerized system.

SECTION 17. AMENDMENT. Section 41-09-42.1 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

41-09-42.1. Creation of special fund - Fees collected by secretary of state ~~Deposit in general fund.~~ A special fund is hereby established in the state treasury to be known as the computerized Uniform Commercial Code central filing system fund. Any fees collected by the secretary of state pursuant to subsections 5, 8, 9, 10, and 11 of section 41-09-42 must be deposited in the state general fund computerized Uniform Commercial Code central filing system fund and may be spent within the limits of legislative appropriations for the purpose of implementing, maintaining, updating, and administering the computerized Uniform Commercial Code central filing data base system, the computerized central notice system, and the computerized statutory lien data base system. This fund is not subject to section 54-44.1-11.

SECTION 18. A new section to chapter 41-09 of the North Dakota Century Code is created and enacted as follows:

Facsimile copies of security agreements, financing statements, and other documents permitted - Penalty for false filing. The secretary of state or the register of deeds should treat a facsimile copy of a security agreement, financing statement, or other document and the signatures on the facsimile copy in the same manner as an original for purposes of sections 41-09-41 and 41-09-42, if the person who received the facsimile copy receives the original document, or a carbon, photographic, or other reproduction if allowed under subsection 1 of section 41-09-41, within five working days of receipt of the facsimile copy. The date of filing relates back to the date of receipt of the facsimile copy. The facsimile copy must be legible and the same size as the original document. During the five-day period, the facsimile copy constitutes constructive notice of the original document. If the required document is not received within five working days of receipt of the facsimile copy, the filing of the facsimile copy is void. A person who files a false document by a facsimile copy is liable to the party aggrieved for treble damages resulting from the filing of the false document.

\* SECTION 19. AMENDMENT. Section 41-09-43 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

41-09-43. (9-404) Termination statement.

1. If a financing statement covering consumer goods is filed on or after January 1, 1974, then within one month or within ten days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must file with each filing officer with whom the financing statement was filed, a termination statement to the effect that he the secured party no longer claims a security interest under the financing statement, which shall be identified by file number. In other cases where there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value, the secured party must send to the debtor on written demand by the debtor send the debtor, for each filing officer with whom the financing statement was filed, a termination statement to the effect that he the secured party no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record complying with subsection 2 of section 41-09-44, including payment of the required fee, if any. If the affected secured party fails to file such a termination statement as required by this subsection, or to send such a termination statement within ten days after proper demand therefor he shall be, the secured party is liable to the debtor for one hundred dollars, and in addition, for any loss caused to the debtor by such failure.
2. On presentation to the filing officer of such a termination statement, he must the filing officer shall note it in the index. If he the filing officer has received the termination statement in duplicate, he the filing officer shall return one copy of the termination statement to the secured party stamped to show the time of receipt thereof. If the filing officer has a microfilm or other photographic record of the financing statement, and of any related continuation statement, statement of assignment, and statement of release, he the filing officer may remove the originals from the files at any time after receipt of the termination statement, or if he the filing officer has no such record, he the filing officer may remove them from the files at any time after one year after receipt of the termination statement.
3. The fee for filing and indexing a termination statement, including sending or delivering the financing statement, is five dollars. For any financing statement filed after the effective date of this section, the fee must be paid at the time the fee for filing the financing statement is paid.

SECTION 20. AMENDMENT. Section 41-09-46 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

\* NOTE: Section 41-09-43 was also amended by section 3 of Senate Bill No. 2129, chapter 624.

41-09-46. (9-407) Information from filing officer - ~~Central~~  
Computerized central notice system - Secretary of state to compile lists for  
crops and livestock - Distribution of lists.

1. If the person filing any financing statement, termination statement, statement of assignment, or statement of release, furnishes the filing officer a copy thereof, the filing officer ~~shall~~ upon request shall note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person.
2. Upon request of any person, the filing officer shall issue ~~his~~ a certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment ~~thereof~~ and if there is, giving the date and hour of filing of each ~~such~~ statement and the names and addresses of each secured party ~~therein~~. The fee for ~~such a~~ this certificate ~~shall be~~ is as provided by section 41-09-42. Upon request the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a fee as provided by section 41-09-42.
3. The secretary of state shall develop and implement a computerized central notice system which ~~shall~~ must contain the information filed with ~~his~~ the office of the secretary of state or with any of the offices of the registers of deeds in this state pursuant to subsection 9 of section 41-09-28 sections 35-17-04, 35-30-02, 35-31-02, and 41-09-40. The system must connect each registers of deeds' office to the secretary of state's office through the information services division. The system must allow access to financing statement information by equipment that conforms to requirements determined by the information services division. The system must have safeguards to allow access to information that is in the system relating to security interests or liens and to prevent unauthorized alteration or deletion of that information and to allow access to other information in the system as prescribed by the secretary of state. Within one working day of receipt of a financing statement, continuation statement, amendment, or termination statement filed pursuant to this chapter or a statement filed pursuant to section 35-17-04, 35-30-02, or 35-31-02, the register of deeds or secretary of state shall record the information contained in the statement in the computerized central notice system. A computer printout of information from the system is prima facie evidence of the existence or nonexistence of the filing of a financing statement or lien. From the computerized central notice system, the secretary of state or a designee shall produce each month one list for crops and one list for livestock which ~~contains~~ contain the information as filed on the forms pursuant to subsection 9 of section 41-09-28 41-09-40. The secretary of state shall also include the information filed for crops and livestock pursuant to sections 35-17-04, 35-30-02, and 35-31-02. The list ~~shall~~ must be in alphabetical order according to the last name of, or in numerical order according to the social security number of, the person engaged in farming operations. The lists may be prepared in categories according to county, regions as designated by the secretary of state, or on a statewide basis. If ~~a request is made~~ requested, the lists ~~shall~~ must be in printed

form and on microfiche. Each list ~~shall~~ must conspicuously note its effective date.

4. The lists prepared pursuant to subsection 3 ~~shall~~ must be distributed monthly by mail at least five business days in advance of their effective date. If requested, the secretary of state shall mail the lists to any person making a request at a fee as provided in section 41-09-42.
5. Upon a verbal request of any person, the secretary of state or a designee or a register of deeds shall verbally provide information contained on the list generated through the computerized central notice system when the collateral is crops or livestock. The requesting party may request a certificate from the secretary of state or the register of deeds and the secretary of state or the register of deeds shall confirm the information given. Direct computer access is equivalent to oral confirmation and a computer printout constitutes the written confirmation of the secretary of state, if use of this method of confirmation does not cause the central notice system to lose its federal certification. The fee for a verbal request and such a certificate ~~shall~~ must be as provided by section 41-09-42.
6. A computer printout from the computerized central notice system constitutes the certificate of the secretary of state or the register of deeds as to whether there is on file, on the date and hour stated on the computer printout, a financing statement.

SECTION 21. REPEAL. Section 35-17-05 of the North Dakota Century Code and subsection 10 of section 41-09-28 of the 1989 Supplement to the North Dakota Century Code are repealed.

SECTION 22. APPROPRIATION. The funds provided in this section, or so much thereof as may be necessary, are appropriated out of any moneys in the computerized Uniform Commercial Code central filing system fund in the state treasury, not otherwise appropriated, to the secretary of state for the purpose of implementing, maintaining, updating, and administering the computerized Uniform Commercial Code central filing data base system, the computerized central notice system, and the computerized statutory lien data base system for the period beginning with the effective date of this Act and ending June 30, 1993, as follows:

Salaries and wages	\$ 212,959
Information services	343,900
Operating expenses	186,210
Equipment	269,600
Grants, benefits, and claims	418,000
Contingency	53,713
Total special funds appropriation	<u>\$1,484,382</u>

SECTION 23. EFFECTIVE DATE. Sections 17, 19, and 22 of this Act become effective on April 1, 1991, and sections 1 through 16, 18, 20, and 21 of this Act become effective on January 1, 1992.

SECTION 24. EMERGENCY. This Act is declared to be an emergency measure.

Approved April 5, 1991  
Filed April 8, 1991