

*Uniform Commercial Information Transactions Act*  
Outline  
By Brian McDonald

(Sections I through III remain unchanged except for III.D; see briefing paper for details)

**I. Introduction**

**II. History of UCITA**

**III. The Current Status of UCITA: Three Legislative Models**

***A. Virginia: a High-Tech Mecca***

***B. Iowa: the Poison Pill***

***C. Maryland: Reverse-Engineering UCITA***

(New section not included in briefing paper)

***D. The Reality Behind the Three Different Models***

*1. The Maryland Statute is Not Substantially Different From Virginia's Statute.*

- a. Implied Warranties: due to narrow definition of "consumer," does not apply to businesses, perhaps the largest group of participants in transactions governed by UCITA.
- b. Definition of "mass market license" in UCITA is so oddly defined that many transactions might not be considered mass market at all, evading important limitations placed on these transactions by the Maryland amendments.

*2. Iowa's Statute Still Stands in Stark Contrast to the Other Two.*

Iowa is not anti-technology as many assume (See recent passage of UETA). However, Iowa does not have significant tech industries to appease like other states (e.g. Maryland and Virginia). Furthermore, Iowa does have a desire to protect its citizens from these industries and their perceived power-hold on UCITA states and potential influence over citizens of non-UCITA states.

*3. A Divided House...*

Since Maryland's statute still rigorously adheres to many UCITA provisions which are considered controversial, it is less of a compromise than it would appear upon initial review. This creates two camps: UCITA supporters and anti-UCITA advocates and encourages the states to take sides depending on their policy interests rather than the need for uniform law among the states (may take

some language from earlier sections and put it here to make this section more forceful).

#### **IV. The Future of UCITA: Two Steps Forward, One Step Back**

Thesis: The likely effects of the combination of the three approaches to UCITA is that most states will not adopt UCITA in the short term. Long-term success or failure will largely depend on how well UCITA (or lack thereof) fares in terms of business and consumer welfare in all three states.

##### ***A. Likely Reactions among the States***

###### *1. The double-edged sword of Federalism*

- a. Competition among the states is inevitably a useful process.
- b. Ideal competition takes place where this interaction among the states fosters efforts to implement the most efficient form of law for all sectors of society. Janger terms this the “race-to-the-top.” See Edward J. Janger, *Predicting when the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 Iowa L. Rev. 569 (1998).
- c. However, competition among the states can also lead to the creation of inefficient law due to a desire to placate and attract more industries to the state at a cost to consumer welfare. Janger terms this process the “race-to-the-bottom.”

###### *2. UCITA’s Ever-Elusive “Race-to-the-Top”*

- a. In order for UCITA to become law throughout the states, it is necessary for Janger’s “race to the top” to take place. Two states, however, are not sufficient to jump-start this process, particularly when one of them did not even accept UCITA without significant reservations.
- b. In fact, several states (such as Iowa) currently perceive the efforts of Virginia and Maryland as a “race to the bottom,” which Virginia has currently won without question.
  1. Their primary fear is that drafters of UCITA were “captured” by special interests of tech industries. These fears are not totally unfounded. Many academics have always considered the Uniform Laws in general to be biased towards the interests of big business. See Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 Minn. L. Rev. 83 (1993).

2. States like Iowa want to avoid involving their legislatures in this process since it is viewed as being costly to consumers and primarily beneficial to tech industry interests. States espousing this viewpoint tend to lack the large technology sectors of pro-UCITA states.
- c. Most states currently have a “wait and see attitude” and will continue to abide by that philosophy at least in the short term. UCITA opponent Mary Alice Baish of the American Association of Law Libraries sees a consistent pattern outside of Maryland: "These things get looked at, then legislators learn about the controversy and table it."
1. If Virginia and Maryland are successful in attracting tech companies as a result of passing UCITA without seriously impinging on consumer rights and interests, other states will begin to follow cautiously and then in droves. This will certainly spurn a “race to the top” as states involve themselves immediately to obtain the long-term benefits.
  2. Once a sufficient number of states have adopted UCITA, few states will wait for fear of being left out in the cold and shunned entirely by tech industries. It is unclear what this “critical mass” is, but once it is reached, the race to the top will emerge.
- d. This entire process, however, will take several years at the very least. Therefore, it is highly likely that UCITA will only be enacted by a handful of states at the most in the short term.

### **B. *Why A Federal Solution Might be More Appropriate***

There is no question that states would be best equipped to formulate effective contract legislation dealing with computer transactions. However, should UCITA fail to attract adequate support among the states, a natural consequence might be federal legislation on the subject. The federal government certainly has jurisdiction to regulate these activities under the interstate commerce right granted to congress in the constitution.

It has been suggested from time to time that the Conference should draft uniform laws for enactment at the federal level as well as laws for enactment by the states. Indeed, the Code itself was originally planned as legislation that could be enacted at either the state or the federal level. Although there are concerns that the Conference would be violating its chartered purpose of furthering state autonomy, state interests are preserved since the Conference views itself as representative of the views of the states and the federal government would be working through the Conference. Furthermore, given the present impact of UCITA on the dynamics of federalism discussed above, it would seem irresponsible for the Conference to avoid consideration of such an alternative.

There are three primary reasons why a federal solution might be superior:

1. *No Time Like the Present*

Current legislative processes discussed above indicate that UCITA will be a long-time coming if left to the states, assuming it is eventually adopted by all fifty states -- no small assumption. Considering the rapid pace at which the computer transactions industry is developing, it might be more advantageous to all parties (consumers and industries) to have a uniform law in place sooner rather than later to alleviate many of the tensions developing in this industry as questions arise under traditional contract law. Although the federal government is not known for its speed and agility, it could certainly pass a bill into law faster than fifty separate legislative bodies.

2. *Uniform Laws that are not Uniform*

Even if it is widely adopted by the states, uniformity will certainly be undermined. As Maryland demonstrates, the law will not be adopted as the Commission has promulgated it. In the wake of Maryland's amendments, states are sure to plaster the law with a hodgepodge of amendments to appease consumers and other interest groups. However, uniformity is essential or the purpose of UCITA will be essentially eroded. This uniformity may best be furthered through federal rather than state legislation.

3. *Sniper States and Bomb-Shelter Statutes*

Also assuming UCITA is adopted by a majority of the states, it is highly unlikely that all states will adopt it. Certain states, such as Iowa, simply have no need for UCITA legislation. They do not have significant tech industries within their borders and want to protect their consumers from such industries in other states. Therefore, compliance with UCITA legislation in other states will be chaotic and unpredictable so long as states are able to pass bomb-shelter statutes that nullify fellow states' legislation.

Although these states may not be appeased by federal legislation resembling UCITA, their bomb-shelter statutes would be ineffective against federal law. However, these states are unlikely to be as vehemently opposed to a federal solution because they would, at the very least, have significant influence in drafting the final legislation unlike their total inability to influence legislation in other states.

## **V. Conclusion**

Even if a company is not in a UCITA-approved state, it may still be affected by developments in such states because of UCITA's choice-of-law provisions. In a contract covering an Internet transaction, UCITA provides that the licensor's state law - and not the purchaser's - applies (absent an agreement otherwise). In a consumer transaction where a tangible copy is sent to the consumer, the consumer's state law applies (again absent an enforceable contrary agreement). So if you do business with companies or consumers in Virginia, that commonwealth's adoption of UCITA could apply to your contracts starting next July.<sup>1</sup>

Maryland's adoption could have wide ramifications: Software companies may now seek to apply the law of Maryland in their contracts. Whether they need to establish some form of "nexus," or physical presence, in Maryland to apply its laws to software licensing has drawn a variety of opinions from legal experts.

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<sup>1</sup> BUT...Don't overestimate how much protection this will give you. If your state does enact the software industry's law and you find yourself in a contract dispute with a local software vendor, there is no way to guarantee the court won't use UCITA principles in adjudicating it. In fact, we've seen court decisions (Hill vs. Gateway, Mortenson vs. Timberline Software) that used UCITA-like logic while the law was still being drafted, so you can't base your defense solely on governing law.