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**“DISHONESTY” IN FACT: THE FUTURE UNCERTAINTY OF
MARYLAND’S STATUTORY INTERPRETATION OF GOOD
FAITH & ENCOURAGING LAX LENDER LIABILITY**

KARA N. ACHILIHU*

Commercial law, ever-present in most aspects of people’s modern lives, is an intricate system of laws that governs businesses, commerce, and consumer transactions.¹ The Uniform Commercial Code, originally published in 1952, serves as a vessel for commercially related transactions occurring in the United States—transcribing measures and policies for consumers, merchants, and institutions alike to follow.² Each separate article of the Uniform Commercial Code (“UCC” or “Code”) addresses a particular area of commercial law, and Article 1 sets the stage for how those principles of interpretation are to be made.³ Article 1 contains the two-prong definition of good faith—“honesty in fact *and* the observance of reasonable commercial standards of fair dealing”—which relates to the Code-wide obligation of good faith.⁴ Notably, the good faith standard regulates the behavior of commercial machines such as banks, which continue to gain negative press for malfeasance against customers.⁵

Although the Uniform Commercial Code is not federal law, all fifty states have adopted this model set of laws; thus, nearly all states closely follow its provisions and amendments within their own statutory schemes.⁶ Exceptions do exist, however. Maryland is one of the few states that have yet to adopt the two-prong standard of good faith, leaving the Maryland

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1. *Commercial Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/commercial_law (last visited Apr. 13, 2018).

2. *See infra* Part I.A.1.

3. *See infra* Part I.A.2.

4. U.C.C. § 1-201(b)(20) (2017) (emphasis added); *Id.* § 1-304.

5. Ryan Cooper, *A Brief History of Crime, Corruption, and Malfeasance at American Banks*, WEEK (Oct. 9, 2017), <http://theweek.com/articles/729052/brief-history-crime-corruption-malfeasance-american-banks>.

6. *See infra* note 59 and accompanying text.

Uniform Commercial Code’s definition as merely “honesty in fact in the conduct or transaction concerned.”⁷

Part I of this Comment begins by exploring the origins and legislative history of the Uniform Commercial Code.⁸ Part I also delves into the development of Article 1’s good faith standard—both through the subjective and objective characterization—and how such changes shifted to other Articles.⁹ Next, this Comment presents Maryland’s “version” of the UCC, including its departure from the Uniform Commercial Code’s homogenous definition of good faith, leaving the sole “honesty in fact” definition.¹⁰ A brief summary of cases decided under both the subjective and subjective-objective standard will follow, analyzing the various consequences in a banking context specifically.¹¹

Part II of this Comment presents arguments in favor of the Maryland General Assembly adopting the Uniform Commercial Code’s amendment to Article 1 in its entirety for the sake of promoting commercial uniformity with other states,¹² clarity on how the judicial application of the standard should occur,¹³ and fairness to consumers and others involved in relationships with banks.¹⁴ In conclusion, this Comment recommends that the Maryland General Assembly adopt the Uniform Commercial Code’s amendment to Article 1’s definition of good faith to include the “observance of reasonable commercial standards of fair dealing.”¹⁵

I. BACKGROUND

Part I.A of this Comment explores the history of the Uniform Commercial Code, beginning with its distinctive contributors and commentators.¹⁶ Part I.A then discusses the introduction of good faith as a standard within Article 1 and its trajectory throughout other Articles.¹⁷ Next, Part I.B focuses on the enactment Maryland’s Uniform Commercial Code and the good faith standard under Title 1, Maryland’s version of Article 1.¹⁸ Part I.B also describes the Maryland General Assembly’s 2012 amendment to Title 1 via passage of House Bill 700 and its ultimate effect on other Ti-

7. *See infra* Part I.A.2.

8. *See infra* Part I.A.1.

9. *See infra* Part I.A.2.

10. *See infra* Part I.B.

11. *See infra* Part I.C.

12. *See infra* Part II.A.

13. *See infra* Part II.B.

14. *See infra* Part II.C.

15. *See infra* Part III.

16. *See infra* Part I.A.1.

17. *See infra* Part I.A.2.

18. *See infra* Part I.B.1.

ties.¹⁹ Finally, Part I.C briefly compares cases, in a lender liability framework, decided both under the sole subjective standard of good faith and the two-prong standard containing both honesty in fact and observance of reasonable commercial standards of fair dealing, to provide context to the outcomes under both standards.²⁰

A. *The History of the Uniform Commercial Code*

1. *From Scattered Transactions to the Uniform Commercial Code: How Private Organizations and Practitioners Shaped the Future of Commercial Law*

In 1942, the American Law Institute (“ALI”) and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”), also known as the Uniform Law Commission, began a joint project of drafting the UCC.²¹ Prior to the enactment of the UCC, commercial transactions were mostly regulated by uniform laws prepared and promulgated by the NCCUSL.²² While those uniform laws were either adopted in every state or followed to a substantial degree by others, each law became engrained in statutes related to commercial transactions.²³ However, the evolution of separate commercial laws and need for revisions hampered uniformity to “modern commercial practices.”²⁴ Consequentially, the purpose of the UCC’s enactment would later be characterized as “(1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.”²⁵ The idea surfaced that each phase of a commercial transaction was so closely intertwined, from start to finish, which called for grouping those differing transactions into a single subject of commercial law.²⁶

As a novel project, compiling commercial subjects into the original Code required both funding and time commitment from those involved.²⁷

19. *See infra* Part I.B.2.

20. *See infra* Part I.C.

21. U.C.C. general cmt. at 3 (AM. L. INST. & UNIF. L. COMM’N 2017).

22. *Id.* at 2. Those acts included the following: Uniform Negotiable Instruments Law (1896); Uniform Warehouse Receipts Act (1906); Uniform Sales Act (1906); Uniform Bills of Lading Act (1909); Uniform Stock Transfer Act (1909); Uniform Conditional Sales Act (1918); and Uniform Trust Receipts Act (1933). *Id.* at 2–3.

23. *Id.* at 3.

24. *Id.*

25. U.C.C. § 1-103(a) (2017).

26. *See supra* note 21, at 3. “A single transaction may very well involve a contract for sale, followed by a sale, the giving of a check or draft for a part of the purchase price, and the acceptance of some form of security for the balance.” *Id.*

27. *Id.* at 3–4.

The project received its main financial support from the Maurice and Laura Falk Foundation of Pennsylvania, along with ninety-eight business affiliates and law firms.²⁸ The drafting process came with responsibility, as multiple drafts were considered and debated by joint committees of both organizations at meetings.²⁹ The drafting and editorial work of the UCC took ten years before the first edition emerged, and an Editorial Board of advisers—consisting of distinguished judges, practicing attorneys, legal scholars, professors, and deans of various law schools—oversaw the task.³⁰

The Editorial Board of advisers, the Council of the ALI, and either the Commercial Acts Section or the Property Acts Section of the Conference of Commissioners approved the drafts before being submitted for discussion to the ALI and NCCUSL.³¹ If approved, the draft came before the general membership of the ALI and the NCCUSL.³² In addition to these final stages, special subcommittees directed the review and discussion of each article with the purpose of providing recommendations to the Enlarged Editorial Board.³³ Informal consultants—including businessmen, operating bankers, and a committee of the Section of Corporation, Banking and Business Law of the American Bar Association—regularly counseled those working on the Code.³⁴ After final approval of the Code by the ALI and NCCUSL, and in accordance with the NCCUSL’s practices, both bodies jointly submitted the finalized version to the American Bar Association for approval by its House of Delegates.³⁵

After ten years of this prolonged process, the official text of the UCC was promulgated in 1951 and published in 1952.³⁶ Pennsylvania became the first state to adopt the UCC in 1953, effective July 1, 1954.³⁷ Over the years, additional official texts and revisions of the UCC appeared.³⁸ Subsequently, other states followed in Pennsylvania’s footsteps and adopted the UCC.³⁹ In 1961, the ALI and NCCUSL established the Permanent Editorial Board (“PEB”) to provide explanatory commentary on the Code, with the

28. *Id.* at 3. Notably, the Maurice and Laura Falk Foundation contributed a total of \$275,000 to the preparation of the Code. U.C.C. report no. 1 (PERMANENT EDITORIAL BD. 1962).

29. *See supra* note 21.

30. *See supra* note 21, at 4. Esteemed Judge Herbert F. Goodrich of the United States Court of Appeals for the Third Circuit served as the Chairman of the Editorial Board of the 1952 edition. *Id.*

31. *See supra* note 21, at 4.

32. *See supra* note 21, at 4.

33. *See supra* note 21, at 4–5. The special subcommittees were assigned to one article each. *Id.* at 4.

34. *See supra* note 21, at 7–8.

35. *See supra* note 21, at 8.

36. *See supra* note 21, at 2, 4.

37. *See supra* note 21, at 2.

38. U.C.C. report no. 1 (PERMANENT EDITORIAL BD. 1962).

39. *Id.*

intention of encouraging uniformity in response to states putting forth their own amendments.⁴⁰ Currently, all fifty states and U.S. territories have adopted some version of the UCC.⁴¹

2. *The Emergence of the “Good Faith” Standard: Governing the Behavior of Parties Under the Uniform Commercial Code*

Within Article 1 are general definitions and principles of interpretations present throughout all parts of the text—one of those important principles being “good faith.”⁴² The concept of good faith arose from language stipulating that every contract or duty within the UCC imposed an obligation of good faith in its performance or enforcement, adopting a critical notion from common law contract theory.⁴³ This concept applied both broadly and narrowly, including governing the option to accelerate at will; the right to cure a defective delivery of goods; the duty of a merchant buyer who has rejected goods to effect salvage operations; substituted performance; and the failure of presupposed conditions.⁴⁴ The standard of good faith also applied to the course of dealing between parties and parties’ usage of trade.⁴⁵ There is no independent cause of action for breach of good faith under the UCC; rather, failure to perform or enforce a duty or obligation in good faith constitutes a breach or makes unavailable, under certain circumstances, a remedial right of power.⁴⁶ The doctrine of good faith simply allows for a court to interpret the commercial context in which contracts are created, performed, and enforced.⁴⁷

In Article 1, the UCC described how to define the obligation of good faith.⁴⁸ Former Section 1-201(19) defined good faith as “honesty in fact in the conduct or transaction concerned.”⁴⁹ This definition applied throughout the UCC except for in Article 2’s former Section 2-103(1)(b), where the

40. *Id.*

41. *See* Gibraltar Fin. Corp. v. Prestige Equip. Corp., 949 N.E.2d 314, 318 (Ind. 2011) (noting that the UCC has been adopted by all fifty states, although not entirely uniform from state to state).

42. U.C.C. § 1-201(b)(20) (2017); *see also* Lisa D. Sparks, *The Regression of “Good Faith” in Maryland Commercial Law*, 47 U. BALT. L. F. 17, 18 (2016).

43. U.C.C. § 1-304 (2017).

44. U.C.C. § 1-203 official cmt. (2000). The obligation of good faith is now referred to in Section 1-304. U.C.C. § 1-304 (2017).

45. U.C.C. § 1-203 official cmt. (2000). For more information about course of dealing and usage of trade, *see also* U.C.C. § 1-303(b)–(c) (2017) (“A ‘course of dealing’ is a sequence of conduct concerning previous transactions . . . that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. . . . A ‘usage of trade’ is any practice or method . . . having such regularity of observance . . . to justify an expectation that it will be observed with respect to the transaction in question.”).

46. U.C.C. § 1-304 official cmt. (2017).

47. *Id.*

48. *See infra* note 49 and accompanying text.

49. U.C.C. § 1-201(19) (2000).

definition of good faith combined honesty in fact with “the observance of reasonable commercial standards of fair dealing in the trade”—a combination of both subjective and objective standards.⁵⁰ However, Article 2’s definition of good faith applied to transactions solely within the scope of said Article and to merchants only, limiting its reach.⁵¹ Over time, other Articles adopted Article 2’s concept of good faith, including both subjective honesty and objective commercial reasonableness.⁵² Article 2A incorporated Article 2’s standard, while other Articles broadened the applicability of good faith beyond merchants to all parties.⁵³ Articles 2 and 2A were eventually amended to extend the good-faith standard to non-merchants as well.⁵⁴ Only Article 5, which maintained the subjective component only, and Article 6 (in the few states that have chosen not to remove the Article) were without the two-part standard of good faith.⁵⁵

In 2003, the UCC again revised Article 1’s definition of good faith to “honesty in fact and the observance of reasonable commercial standards of fair dealing.”⁵⁶ The reasoning behind this amendment came from the multiple cross-references of the subjective-objective definition in nearly every Article and the need for clarifying the scope of Article 1.⁵⁷ This change applied to all definitions of good faith throughout the UCC, including the recently revised Articles (except for Article 5).⁵⁸ As of 2018, only eight states (including Maryland) have declined to adopt the subjective-objective standard of good faith set forth by Section 1-201(b)(20) of the UCC, and instead prescribe good faith to mean “honesty in fact” or “honesty in fact in the conduct or transaction concerned.”⁵⁹

50. *Id.* § 2-103(1)(b); *see also id.* § 2-102 (“Unless the context other requires, [Article 2] applies to transactions in goods; it does not apply to any transaction . . . intended to operate only as a security transaction nor does [Article 2] impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.”).

51. U.C.C. § 1-201 official cmt. 20 (2017).

52. *Id.*

53. *Id.*; *see also* Sparks, *supra* note 42, at 20 n.26 (detailing the Uniform Law Commission’s Reporter Notes behind the rationale for the change of the good faith definition in Article 1).

54. U.C.C. § 1-201 official cmt. 20 (2017).

55. *Id.*

56. U.C.C. § 1-201(b)(20) (2003).

57. U.C.C. § 1-201(b)(20) official cmt. 20 (2017).

58. *Id.*; *see also* Sparks, *supra* note 42, at 20.

59. Hawaii follows an “honesty in fact” definition of good faith. HAW. REV. STAT. ANN. § 490:1-201(b) (LexisNexis 2009). Aside from Maryland, the following states tack on the additional language of “honesty in fact in the conduct or transaction concerned”: Alabama, Idaho, Illinois, New York, Virginia, and Wisconsin. ALA. CODE § 7-1-201(b)(20) (LexisNexis 2006); IDAHO CODE § 28-1-201(b)(20) (2013); 810 ILL. COMP. STAT. ANN. 5 / 1-201(b)(20) (West 2009); N.Y. U.C.C. LAW § 1-201(b)(20) (McKinney 2018); VA. CODE ANN. § 8.1A-201(b)(20) (2015); WIS. STAT. ANN. § 401.201(2)(k) (West 2017).

B. The History of the Maryland Uniform Commercial Code

1. Nearly Fifty Years of the Trickle-Down Effect: The MUCC's Evolution Following Enactment and UCC Amendments

Enacted in 1963, the Maryland Uniform Commercial Code (“MUCC”) took effect on February 1, 1964.⁶⁰ The purpose of the enactment was to incorporate the UCC into the Annotated Code of Maryland, providing legal uniformity with respect to certain commercial transactions.⁶¹ A decade later in 1975, the Maryland General Assembly enacted the new Commercial Law Article, formally designating leading Titles 1 through 10 as the MUCC and amending various provisions of the Annotated Code of Maryland.⁶² Currently, there are twenty-three titles within the Commercial Law Article, covering an expansive list of topics including consumer protection, debt collection, and property.⁶³

Identically to the UCC, the MUCC outlines general provisions, definitions, and principles of interpretation in Title 1.⁶⁴ Under Section 1-201, the explanation of “good faith” appeared as a result of the MUCC’s imposition of an obligation of good faith in every contract or duty.⁶⁵ At the time of enactment, and as it stands today, good faith was defined as “honesty in fact in the conduct or transaction concerned.”⁶⁶ This definition applies throughout the MUCC except for in Title 2 governing sales.⁶⁷ Former Section 2-103(1)(b), now “Reserved,” provided that “[g]ood faith’ in the case of a

60. S.B. 77, 1963 Leg., Reg. Sess. (Md. 1963). The MUCC was formally known as Article 95B at the time of its enactment. *Id.*

61. *Id.*; see also MD. CODE ANN., COM. LAW § 1-103 (LexisNexis 2013) (outlining the purpose and policies of the MUCC as “(1) [t]o simplify, clarify, and modernize the law governing commercial transactions; (2) [t]o permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) [t]o make uniform the law among the various jurisdictions”).

62. H.B. 26, 1975 Leg., Reg. Sess. (Md. 1975); see also Sparks, *supra* note 42, at 17–18, n. 4. The UCC refers to its sections as “articles,” but the language is synonymous with the MUCC’s use of “titles.” To date, the categorization of the MUCC titles is as follows: Title 1: General Provisions; Title 2: Sales; Title 2A: Leases; Title 3: Negotiable Instruments; Title 4: Bank Deposits and Collections; Title 4A: Funds Transfers; Title 5: Letters of Credit; Title 6: Bulk Transfers; Title 7: Documents of Title; Title 8: Investment Securities; Title 9: Secured Transactions; and Title 10: Effective Date and Repealer.

63. See generally MD. CODE ANN., COM. LAW §§ 11–23 (West 2013) (comprising the other topics of the Commercial Law Article).

64. For a list of the general provisions, see generally *id.* § 1.

65. *Id.* § 1-304. There is no separate cause of action for breach of the good faith duty under Maryland law. *Marland v. Safeway, Inc.*, No. 02-1457, 2003 WL 135647, at *11–12 (4th Cir. Jan. 17, 2003).

66. MD. CODE ANN., COM. LAW § 1-201(b)(20) (LexisNexis 2013).

67. *Id.* § 2 (West 2013) (containing no definition of good faith).

merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”⁶⁸

As the amendments of the UCC trickled down to the MUCC over the years, Title 2’s interpretation of good faith—both subjective honesty and objective commercial reasonableness—found its way to other Titles.⁶⁹ Title 2A simply adopted Title 2’s standard, while Titles 3, 4, 4A, 8, and 9 expanded the applicability of the standard to all parties rather than just merchants.⁷⁰ Only revised Title 5 retained just the subjective “honesty in fact” component, and Titles 6 and 7 contained no definition of good faith.⁷¹ The result of these dispersed conditions was that where the subjective-objective definition did not appear in specific language, Title 1’s subjective definition governed the applicability of good faith.⁷²

2. *Maryland’s Statutory Erasure of Commercial Reasonableness in 2012*

In 2012, the Maryland General Assembly unanimously enacted revisions to the MUCC via passage of House Bill 700, which incorporated remnants of the UCC’s revisions to Article 1 in 2003.⁷³ Titled “Commercial Law—Uniform Commercial Code—Revisions to Title 1,” the bill stated the following purpose:

[R]evising, updating, reorganizing, and clarifying Title 1 of the Maryland Uniform Commercial Code (MUCC) relating to general provisions applicable to the MUCC; . . . clarifying the transactions to which Title 1 of the MUCC applies; . . . defining certain terms; altering and repealing certain definitions; making conforming changes to certain provisions of the MUCC; and generally relating to the Maryland Uniform Commercial Code.⁷⁴

The House Economic Matters Committee introduced and first read House Bill 700 on February 8, 2012.⁷⁵ In its initial stage, House Bill 700’s definition of good faith under Section 1-201 changed to “except as other-

68. U.C.C. § 2-103(b) (2000). *Compare* MD. CODE ANN., COM. LAW § 2-103(1)(b) (West 2013), *with* *Tatum v. Richter*, 280 Md. 332, 337, 373 A.2d 923, 926 (1977) (“[U]nder § 2-103(b), when the seller is a merchant, ‘honesty in fact’ has the additional meaning of ‘the observance of reasonable commercial standards of fair dealing in the trade.’”)

69. MD. CODE ANN., COM. LAW § 1-201 cmt. 20 (LexisNexis 2013).

70. *Id.*

71. *Id.*

72. *Id.*

73. H.B. 700, 2012 Leg., 430th Sess. (Md. 2012).

74. *Id.*

75. *Id.* In Maryland, the legislative stages of a bill are divided: (1) drafting of the bill; (2) introduction or first reading; (3) committee hearing, where testimony can be heard to determine amendment; (4) second reading; (5) third reading, where a roll call vote is taken; (5) passing to the second house for approval; (6) resolution of differences; and (7) action by the governor.

wise provided in Title 5 of this article, [good faith] means honesty in fact and the observance of reasonable commercial standards of fair dealing.”⁷⁶ This change made the following sections with identical language unnecessary and accordingly replaced each with “Reserved” placeholders: Sections 2-103(1)(b), 3-103(a)(4), 4A-105(a)(6), 8-102(a)(10), and 9-102(a)(43).⁷⁷ Sections 2A-103(3) and 4-104(c), which contained the expanded good-faith provisions, were deleted altogether.⁷⁸

Prior to the Committee Hearing on House Bill 700, the House of Delegates received a letter in support of the bill from the Chair of the Uniform Commercial Code Subcommittee of the Business Law Section of the Maryland State Bar Association, K. Lee Riley, Jr.⁷⁹ Mr. Riley wrote, “Reasonable commercial standards are added to the definition of ‘good faith’, providing an objective and fairer standard for courts to enforce. . . .”⁸⁰ He also outlined the general basis of his support of House Bill 700:

House Bill[] 700 . . . update[s] the Maryland Uniform Commercial Code to make it consistent with the most recent version[] of the Uniform Commercial Code Article[] 1. . . . [This revision was] developed . . . to conform to modern business practices and to address a number of problems that have arisen over the past several years. Commercial law has been the providence of state law since the formation of the United States. However, as our commerce has become more global it is increasingly essential that commercial law be uniform. That may be achieved through coordinated cooperation of the states and jurisdictions Accordingly, it is important for Maryland to complete the updates of the UCC to maintain and preserve the role of state law in commercial transactions.⁸¹

The Committee also received a letter from the Commissioner of the Maryland Commission on Uniform State Laws, Steven N. Leitess, who more or less provided the same support, stating: “In the interest of maintaining the vitality and vigor of state law responsive to changing business prac-

76. H.B. 700, 2012 Leg., 430th Sess. (Md. 2012) (first reading).

77. *Id.*; see also Sparks, *supra* note 42, at 20.

78. H.B. 700, 2012 Leg., 430th Sess. (Md. 2012) (first reading); see also Sparks, *supra* note 42, at 20.

79. Letter from K. Lee Riley, Jr., Chair, UCC Subcomm. of the Bus. L. Sec., Md. St. Bar Ass’n, to Brian Feldman, Del., Md. H.D. concerning H.B. 700 and 713 (Feb. 21, 2012) (on file with the Maryland Department of Legislative Services and the *Maryland Law Review*).

80. *Id.* at 2. Following his letter, Mr. Riley attached an exhibit titled “Why States Should Adopt the Revised Uniform Commercial Code, Article 1—General Provisions (2001),” listing revisions relating to scope, applicability of supplemental principles of law, course of performance, and the Statute of Frauds. *Id.*

81. *Id.*

tices and technology, it is most important that Maryland’s UCC laws are current and up to date.”⁸²

During House Bill 700’s Committee Hearing on February 21, 2012, both Delegate Feldman and Mr. Riley testified in favor of the bill, citing the reasons outlined in the letters of support.⁸³ Subsequently, a representative on behalf of the Maryland Bankers Association testified in objection to the change of the meaning of good faith.⁸⁴ The representative expressed concern with the substitution of the “dishonesty” standard with reasonable, “commercial standards that exist in the marketplace.”⁸⁵ The representative did not further articulate why this change concerned the Maryland Bankers Association.⁸⁶

Following the committee hearing, an amendment to the good faith definition was introduced.⁸⁷ The amendments eradicated reasonable commercial standards from Title 1’s definition of good faith, leaving merely “honesty in fact in the conduct or transaction concerned.”⁸⁸ However, the amendment failed to reestablish the two-prong standard that had been reserved or removed from certain sections in the first reading of the bill.⁸⁹ Following the hearing, the Committee read House Bill 700 for a second time on March 17, 2012, and the House of Delegates passed the amendment shortly thereafter.⁹⁰

House Bill 700’s legislative history does not expound on the reasoning behind the failure to adopt the two-prong good faith standard.⁹¹ House Bill 700’s Revised Fiscal and Policy Note also did not distinguish between Title 1’s definition of good faith in the analysis of the proposed bill and the current law segments, nor did it mention the removal of the definition in other Titles.⁹² There have been no additional amendments to Title 1 passed by

82. Letter from Steven N. Leitess, Comm’r, Md. Comm’n on Unif. State Laws, to Brian Feldman, Del., Md. H.D. 3 (Feb. 17, 2012) (on file with the Maryland Department of Legislative Services and with *Maryland Law Review*).

83. *Commercial Law—Uniform Commercial Code—Revisions to Title 1: Hearing on H.B. 700 Before the H. Comm. on Economic Matters*, 2012 Leg., 430th Sess. (Md. Feb. 21, 2012) (statements of Del. Brian J. Feldman), <http://mgahouse.maryland.gov/mga/play/8b1591e5-f022-4c73-8940-29ad8a7d4505/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>.

84. *Id.*

85. *Id.*

86. *Id.*

87. ECONOMIC MATTERS COMM., AMENDMENT TO H.B. 700, H.B. 700-863493-1, 2012 Leg., 430th Sess. (Md. 2012).

88. *Id.*

89. H.B. 700, 2012 Leg., 430th Sess. (Md. 2012); *see supra* text accompanying notes 77–78.

90. H.B. 700, 2012 Leg., 430th Sess. (Md. 2012).

91. *Id.*

92. H.B. 700, 2012 Leg., 430th Sess. (Md. 2012) (Revised Fiscal and Policy Note). The analysis segment of the report stated, “The bill alters the definition of ‘good faith’ to mean honesty in fact in the conduct or transaction concerned.” *Id.* While, in the segment describing the current law, “[g]ood faith’ is defined as honesty in fact in the conduct or transaction concerned.” *Id.*

the General Assembly since 2012. As of 2018, the Maryland judiciary has yet to encounter any cases relying on the precise definition of good faith since House Bill 700.⁹³

C. Measuring the Meaning of Good Faith Across Different Jurisdictions in the Lender Liability Framework

1. The “Honesty in Fact” Standard

Along the way of each state eventually adopting the UCC into their statutory schemes, the respective courts of those states and federal courts have analyzed the meaning of good faith when pertaining to lender liability.⁹⁴ At the time of most states’ adoptions of the UCC—many occurring several decades ago—Article 1 contained the “honesty in fact” standard of good faith only.⁹⁵ Thus, courts reasonably evaluated UCC claims pertaining to “good faith” in accordance with that same language.

Banks, as commercial and lending entities, are subject to UCC provisions—frequently under the standard of good faith.⁹⁶ In an Arizona case, the Court of Appeals of Arizona held that where a bank accepted checks bearing stamped endorsements, despite violating the bank’s own established procedures, such actions did not constitute a lack of good faith under Arizona’s “honesty in fact” code standard.⁹⁷ Although the bank in question had a policy against immediate credit on large checks, the court found there was no evidence that the bank’s officer acted fraudulently or dishonestly through their actions.⁹⁸ Similarly, the Florida District Court of Appeal held that a where a bank wrongfully debited its corporate customer’s accounts in

93. Since the 2012 amendment, there have been very few cases that address good faith in the MUCC context at all. *See, e.g.,* Great Am. Ins. Co. v. Nextday Network Hardware Corp., 73 F. Supp.3d 636, 640–41 (D. Md. 2014) (discussing good faith purchasers under Title 2).

94. *See generally* U.C.C. CASE DIG. (West, eds. 2009) (providing up-to-date coverage of all 50 states interpreting and applying the UCC).

95. *See infra* Part I.A.2.

96. *Id.*

97. *Valley Bank of Nev. v. JER Mgmt.*, 719 P.2d 301, 306–07 (Ariz. Ct. App. 1986). The bank failed to obtain a corporate resolution from the payee-depositor authorizing checking accounts and naming authorized signatories, against its own policy. *Id.* at 306. One of the bank officers also made a decision to give the payee-depositor immediate credit on the checks, against directions and personal instinct. *Id.* The court’s focus was not on the possible violation by the bank of its own procedures in establishing the corporate checking account on the payee’s behalf, but on the conduct of the bank officer in permitting an immediate credit to the account for the endorsed checks. *Id.*; *see also* *City of Phoenix v. Great W. Bank & Tr.*, 712 P.2d 966, 971 (Ariz. Ct. App. 1985) (rejecting the appellant’s claim of the appellee bank’s lack of good faith by differentiating between lack of good faith and negligence).

98. *Valley Bank of Nev.*, 719 P.2d at 307. The court reasoned that the bank officer’s actions were due to his desire to protect the interests of the bank, relying on the drawee bank’s oral assurances that the checks would be paid. *Id.* There were no triable factual issues on the question of the bank’s good faith. *Id.*

disregard of its corporate resolution requiring the signature of two officers, there was no bad faith on the bank’s behalf when considering Florida’s definition of good faith as “honesty in fact in the conduct or transaction concerned.”⁹⁹ Although the bank failed to discover its oversight and had not yet begun enforcing the two-signature requirement until it had invested \$500,000 in the corporation, the court held such actions did not show bad faith.¹⁰⁰ The court based its ruling on the bank’s subjective state of mind only, not considering any lack of commercial reasonableness.¹⁰¹

Courts have also analyzed the “honesty in fact” good faith standard when banks deal with “insecure” or “at will” acceleration clauses. One court found that a bank acted in good faith in exercising the option to accelerate at will when an agent of the bank (namely a creditor) acted on what they believed they knew, whether or not what they believed was accurate in terms of insecurity and called for additional collateral.¹⁰² Other courts found that it made no difference that the facts ultimately established that the creditor was wrong and payment was not impaired—relying on whether the creditor acted *honestly*, not reasonably.¹⁰³

The honesty in fact standard has also been referred to as “honesty in intent” by some courts.¹⁰⁴ The Supreme Court of Minnesota accepted the definition of good faith as “honesty in fact or put another way, honesty in intent” in a check kiting scheme.¹⁰⁵ As a subjective test, it required “hones-

99. *Espirito Santo Bank of Fla. v. Agronomics Fin. Corp.*, 591 So. 2d 1078, 1079–80 (Fla. Dist. Ct. App. 1991) (quoting FLA. STAT. § 671.201(19) (1989)). This case considered on appeal what kind of damages should have been awarded for the bank’s actions. *Id.* at 1079. The bank conceded to negligently debiting the accounts upon the signature of just one corporate officer, and the lower court awarded consequential damages and damages consisting of the improperly debited items. *Id.* The appellate court found that awarding consequential damages was inappropriate because absent a showing of bad faith on the part of the bank, the measure of damages should have been limited to the amounts of the items wrongfully transferred. *Id.* Although Florida’s specific statute did not define “bad faith,” the court held that bad faith is the lack of good faith. *Id.* at 1080.

100. *Id.*

101. *Id.*

102. *Rigby Corp. v. Boatmen’s Bank & Tr. Co.*, 713 S.W.2d 517, 533 (Mo. Ct. App. 1986).

103. *Jackson v. State Bank of Wapello*, 488 N.W.2d 151, 156 (Iowa 1992). *But see* *Barlett Bank & Tr. Co. v. McJunkins*, 497 N.E.2d 398, 404 (Ill. App. Ct. 1986) (explaining that a promissory note stating that in order to accelerate due to insecurity, a bank had to “reasonably” consider itself to be insecure, was indication of a requirement of a rational basis for the bank’s determination of insecurity in contrast to a mere subjective belief that payment or performance was impaired).

104. *See infra* text accompanying notes 105–110.

105. *Town & Country State Bank of Newport v. First State Bank of St. Paul*, 358 N.W.2d 387, 392 (Minn. 1984). A check kiting scheme involves the abuse of a bank’s procedure allowing customers to write checks on “uncollected funds.” *Id.* at 389. Uncollected funds in an account represent funds posted to that account for deposited checks drawn on a separate bank but which have yet to be paid for said bank. *Id.* at 390. The process involves the depository bank forwarding an accepted check to its clearinghouse, then to the drawee bank—a process that normally takes two days. *Id.* A customer who is short of funds can obtain an interest-free “loan” within those two

ty of intent rather than absence of circumstances which would put an ordinarily prudent holder on inquiry.”¹⁰⁶ The trial court found that there was evidence supporting that the bank had neither acted in bad faith nor acted with any dishonest intent to shift the kite loss to other banks.¹⁰⁷ Another case mentioned the honesty of intent test where a bank took from a corporation—in whose assets the bank had a security interest—cashier’s checks given by the plaintiff for the purchase of the corporation’s business and endorsed by the corporation’s president.¹⁰⁸ The court found that the bank should be held to the honesty in fact standard only and had no duty to inquire into the potentially irregular nature of the transaction.¹⁰⁹ There was no indication that the bank had failed the honesty of intent test.¹¹⁰

A shift in the interpretation of “honesty in fact” occurred in *J.R. Hale Contracting Company v. United New Mexico Bank at Albuquerque*.¹¹¹ In this case, a debtor brought suit claiming the bank had wrongfully accelerated a \$400,000 promissory note despite a pre-existing relationship of excused late payments.¹¹² The court held that when a bank accelerates payments under a promissory note because it believes “in good faith” that the debtor’s prospect for repayment is impaired, Section 1-208 of the UCC required the application of a subjective standard of good faith rather than an objective standard of commercial reasonableness.¹¹³ Nevertheless, the court held that the determination of the ultimate fact (i.e. whether the bank lacked a good faith belief in the impairment of its prospect for repayment) should be based on facts and circumstances surrounding the acceleration and not solely on the bank’s testimony concerning its state of mind.¹¹⁴

The result of *J.R. Hale* meant that even under a subjective test of good faith, when the trier of fact evaluates the credibility of a bank’s claims, the

days by waiting for the check to clear, writing a series of bad checks for deposit and withdrawal and thus creating fraudulent credit for the preceding check. *Id.*

106. *Id.* (quoting *Eldon’s Super Fresh Stores, Inc. v. Merrill Lynch*, 207 N.W.2d 282, 287 (Minn. 1973)).

107. *Town & Country State Bank of Newport*, 358 N.W.2d at 392. Rather, the bank’s actions were an attempt to “carry” a long-established banking relationship with a customer who had previously rectified overdraft situations to see if the cash flow problem could be resolved. *Id.*

108. *Leininger v. Anderson*, 255 N.W.2d 22, 25–26 (Minn. 1977).

109. *Id.* at 29–30.

110. *Id.* at 29.

111. 799 P.2d 581 (N.M. 1990).

112. *Id.* at 583–84. The company had been a customer of the bank for approximately eleven years prior to this case. *Id.* at 583. During that time, the company entered into several revolving credit notes with the bank in increased amounts each time. *Id.* The bank continued to renew the notes on or about the due date despite the company’s frequent late payments. *Id.* at 583–84. On those occasions, the bank never took action other than contacting the company to request payments be made up to date, which the company complied with. *Id.* at 584.

113. *Id.* at 591.

114. *Id.*

fact-finder *may* take into account the reasonableness of that claim.¹¹⁵ Consequently, the conduct and credibility of the bank may be tested by objective standards subject to proof and conducive to the application of reasonable expectations in commercial affairs.¹¹⁶ The ruling in *J.R. Hale* signaled the change to come, thirteen years later, to the UCC’s definition of good faith.¹¹⁷

2. *The Incorporation of the “Observance of Reasonable Commercial Standards of Fair Dealing” Standard*

The 2003 amendment to the UCC’s definition of good faith catapulted most of the fifty states’ emulation of such standard within their own codes.¹¹⁸ Yet many years prior to the amendment, some courts had already incorporated commercial reasonableness into the good faith standard. In states that chose to adopt the change, their respective courts adjusted their analysis to include the objective, commercial reasonableness standard.¹¹⁹ In *K.M.C. Company v. Irving Trust Company*,¹²⁰ the United States Court of Appeals for the Sixth Circuit held that a lender who refused to continue funding a line of credit under a loan agreement was nonetheless liable for lack of good faith when it failed to notify the borrower prior to termination and the borrower’s business collapsed.¹²¹ The court stated that the demand provision was subject to a good faith standard of reasonableness and fairness.¹²² The court first examined the lender’s subjective beliefs about the borrower’s financial situation.¹²³ The court cautioned that such beliefs need not be correct, but must be *reasonable*.¹²⁴ If the lender’s view was indeed reasonable, the court analyzed the reasonableness of the lender’s response to the situation; the lender’s actions would not violate the good-faith obligation so long as they represented the actions of a reasonable lender under similar circumstances.¹²⁵ The court held that although the loan officer rea-

115. *Id.*

116. *Id.*

117. *See supra* Part I.C.2.

118. *See supra* text accompanying note 59.

119. *Id.*

120. 757 F.2d 752 (6th Cir. 1985).

121. *Id.* at 760.

122. *Id.* “The demand provision is a kind of acceleration clause, upon which the Uniform Commercial Code and the courts have imposed limitations of reasonableness and fairness.” *Id.*

123. *Id.* at 761–62 (stating that if the loan officer’s subjective beliefs were dispositive, the evidence would have likely been insufficient to support a breach of good faith).

124. *Id.* at 761. “While it is not necessary that [the loan officer has] been correct in his understanding of the facts and circumstances pertinent to his decision not to advance funds . . . to find that he made a valid business judgment in doing so, there must at least be *some* objective basis upon which a reasonable loan officer in the exercise of his discretion would have acted in that manner.” *Id.*

125. *Id.* at 761–62.

sonably believed certain facts about the borrower's weakened financial condition, he did not act reasonably in refusing to advance the funds without prior notice, and thus violated his obligation of good faith.¹²⁶

Two years later, in 1987, the United States Court of Appeals for the First Circuit considered whether a bank lacked good faith when terminating a credit arrangement in *Reid v. Key Bank of Southern Maine, Inc.*¹²⁷ In this case, the plaintiffs entered into a \$25,000 credit agreement with the bank.¹²⁸ After three months, the bank abruptly discontinued its line of credit once receiving false information that the borrowers were mismanaging their business.¹²⁹ As a result, the plaintiffs lost their home and business.¹³⁰ Although the good faith standard at the time only included "honesty in fact," the trial judge concluded that the good faith test was to include an objective standard of reasonableness, which the defendant challenged.¹³¹ Despite a loan agreement containing various provisions rendering the note payable on demand after enumerated events, the First Circuit held that the bank's failure to both warn the borrowers before terminating further credit advances and negotiate alternative solutions with the borrowers constituted bad faith.¹³²

While the above cases do not encompass all outcomes in cases involving the good faith standard in relation to banks, the trend is certain: when a bank's action is called into question within an "honesty in fact" jurisdiction, the bank's own subjectivity of its actions takes precedence over any reasonable commercial practices. As a result, borrowers and other plaintiffs may be unsuccessful with bringing claims against banks, even in egregious situations. However, jurisdictions that include the addition of objective, commercial reasonableness to the definition of good faith often impose some level of accountability against banks where necessary. The stark difference between courts' analyses of the singular and two-prong classifications, and the ensuing impact on consumers, serves as a compelling reason for all states to adhere to Article 1's current definition of good faith.

II. ANALYSIS

This Part argues that Maryland should adopt the UCC's 2003 amendment to Article 1 in its entirety. Part II.A discusses how good faith under Title 1 of the MUCC, in its current state, fails to adhere to the basic (and

126. *Id.* at 763.

127. 821 F.2d 9 (1st Cir. 1987).

128. *Id.* at 11.

129. *Id.*

130. *Id.*

131. *Id.* at 14.

132. *Id.* at 16.

arguably most important) principle of uniformity advanced by the UCC.¹³³ Next, Part II.B posits that the vague, subjective notion of “honesty in fact” pales in comparison, when interpreted by the courts and others, to the two-prong standard including the observance of reasonable commercial standards of fair dealing.¹³⁴ Part II.C explains how the MUCC’s definition of good faith opens the door to abuse by banking institutions, and why amendment to Title 1 should be welcomed by all, including banks.¹³⁵ Finally, Part II.D advances possible theories as to why the Maryland legislature has failed to amend Title 1 to Article 1.¹³⁶

A. Maryland’s Departure from Article 1 Disrupts Uniformity Amongst States, Undermining the Essential Purpose of the Uniform Commercial Code

The structure of the American legal system permits each state to implement laws that are deemed best for that state, either through administrative, judicial, or legislative procedure.¹³⁷ As a result, state law is only applicable within that particular state’s jurisdiction.¹³⁸ Through a state’s legislative process, an opportunity for adoption of critical uniform laws arises.¹³⁹ Although uniform laws set exemplary guidelines for states to follow, state legislatures may elect to reject them, enact them in entirety, or enact them with modifications.¹⁴⁰ Yet, there are a number of subject matters that necessitate adherence to uniform laws in *all* states.¹⁴¹ Perhaps as one of the most prominent examples, commercial transactions almost always transcend state lines in one way or another.¹⁴²

Article 1 is arguably the most critical of the UCC, setting the stage for the interpretation of other Articles. Article 1’s goal is to achieve uniformity by providing definitions and general provisions that apply as default rules covering commercial transactions throughout the UCC, absent conflicting

133. *See infra* Part II.A.

134. *See infra* Part II.B.

135. *See infra* Part II.C.

136. *See infra* Part II.D.

137. *An Overview of the Uniform Commercial Code*, LAWINFO, <https://resources.lawinfo.com/business-law/an-overview-of-the-uniform-commercial-code.html> (last visited Apr. 13, 2018).

138. *Id.*

139. Deanna Barmakian & Terri Saint-Amour, *Uniform Laws and Model Acts*, HARV. L. SCH. LIBR. (May 9, 2017, 10:58 AM), <https://guides.library.harvard.edu/unifmodelacts>.

140. *Id.*; *see* George A. Hisert, *Uniform Commercial Code: Does One Size Fit All?*, 28 LOY. L.A. L. REV. 219, 219 (1994) (“[O]ne of the basic precepts of federalism is the individual state’s ability to experiment with alternative solutions to problems commonly shared with other states and to address those which may not exist in other states.”).

141. *See Acts*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Acts.aspx> (last visited Apr. 13, 2018) (listing all of the completed acts by the Uniform Law Commission).

142. *See supra* note 137.

provisions.¹⁴³ In commenting, the original drafters stressed the point of the Uniform Commercial Code: “Uniformity throughout the American jurisdictions is one the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction.”¹⁴⁴ The Permanent Editorial Board for the UCC thoroughly disapproved of non-uniform revisions to states’ versions of the UCC, advocating for uniformity throughout state statutes regulating commercial transactions.¹⁴⁵ A crucial part of uniformity is looking toward other jurisdictions’ analyses when interpreting provisions of the UCC.¹⁴⁶ With the vast, intricate set of topics governed by the UCC, and the large amount of cases concerning good faith, some semblance of consistency is needed.¹⁴⁷

The official comments of the UCC suggest practical guidelines for the interpretation and application of UCC provisions to commercial transactions.¹⁴⁸ The 2003 revision to Article 1 sought to maintain clarity in the midst of shifting business practices and advancement of the law.¹⁴⁹ Of the many revisions, the change of good faith’s meaning under Section 1-201 to mean “honesty in fact and the observance of reasonable commercial standards of fair dealing” aligned with the definition of the previously amended Articles.¹⁵⁰ Furthermore, implementing the objective standard when measuring good faith substantially affects a court’s determination whether good faith exists in cases falling under the entire UCC, not just individual arti-

143. *UCC Article 1, General Provisions (2001) Summary*, UNIF. L. COMM’N, [http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%201,%20General%20Provisions%20\(2001\)](http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%201,%20General%20Provisions%20(2001)) (last visited Apr. 13, 2018).

144. U.C.C. general cmt. at 2 (2017). The Comment’s purpose was to “aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.” *Id.*

145. *Joint Committees: Permanent Editorial Board for the Uniform Commercial Code (PEB)*, AM. L. INST., <https://www.ali.org/about-ali/committees/joint-committees/> (last visited Apr. 13, 2018).

146. *Brooks v. Transamerica Fin. Advisors*, 57 So.3d 1153, 1159 (La. Ct. App. 2011).

147. Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviving a Revered Relic*, 80 ST. JOHN’S L. REV. 559, 561 (2006) (listing the number of cases from 1945 through 2004 in which the phrase “Implied Covenant of Good Faith” appeared); see also Keith A. Rowley, *The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1* (Aug. 15, 2011) (unpublished manuscript), <https://www.law.unlv.edu/faculty/rowley/RA1.081511.pdf> (describing how uniformity “levels the playing field” across jurisdictions).

148. Denise R. Boklach, *Commercial Transactions: U.C.C. Section 1-201(19) Good Faith—Is Now Time to Abandon the Pure Heart/Empty Head Test?*, 45 OKLA. L. REV. 647, 650 (1992); see also *Szabo v. Vinton Motors, Inc.* 630 F.2d 1, 4 (1st Cir. 1980) (rationalizing that the purpose of the official comments to the UCC is to promote uniform construction of the UCC).

149. See *supra* note 143. Article 1’s revision underwent several changes of a technical, non-substantive nature as well, such as the reordering and renumbering of sections and adding gender-neutral terminology. *Id.*

150. See *supra* note 143.

cles.¹⁵¹ Simply put, Article 1’s revisions finalized the UCC’s movement toward modernization.¹⁵²

Where there are deviations from the UCC, there should be a rebuttable presumption in favor of “uniformity for uniformity’s sake.”¹⁵³ Although those variations may not affect individual transactions, such variations inconvenience courts and lawyers who must stay informed of their existence and the implications of non-uniformity.¹⁵⁴ For instance, the drafting of documents or selection of governing law in multistate transactions would require attorneys to identify and compare each state’s definition, and then select the best option for their client—steps that are undoubtedly time-consuming.¹⁵⁵

Banking transactions are rarely ever limited to or regulated within the confines of one state, rather crossing state lines in a myriad of ways, and litigation from one dispute can very well arise in multiple jurisdictions.¹⁵⁶ Maryland remains one of the few number of states without Article 1’s definition of good faith.¹⁵⁷ Thus, the commercial standard by which Maryland banks conduct business should adhere to those other states for the sake of uniformity. By adopting Article 1 in full, Maryland’s definition of good faith will be in line with other jurisdictions and truly further the purpose of the UCC.

B. “A Pure Heart and an Empty Head”¹⁵⁸: Standing Alone, the Subjective Prong of Good Faith Remains Difficult to Determine and Triggers Confusing Interpretation

Since the implementation of the UCC, many cases have centered on the question of whether parties exercised good faith in a variety of transactions.¹⁵⁹ More recently, good faith theories have appeared in every stage of

151. *Why States Should Adopt UCC Article 1*, UNIF. L. COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCC%20Article%201> (last visited Apr. 13, 2018).

152. *Id.*

153. Hisert, *supra* note 140, at 226–27.

154. *Id.* at 227.

155. Robert Levine, *Good Faith Under the Uniform Commercial Code: Part 1*, BLOGSPOT (Apr. 30, 2015, 8:07 AM), <http://ucc-madeeasy.blogspot.com/2015/04/good-faith-under-uniform-commercial.html>.

156. Sparks, *supra* note 42, at 24 (explaining the ramifications of Maryland’s current law).

157. See *supra* text accompanying note 59.

158. *Me. Family Fed. Credit Union v. Sun Life Assurance Co. of Can.*, 727 A.2d 335, 340 (Me. 1999) (referring to the subjective standard of good faith as “the pure heart and empty head” standard); see also *Seinfeld v. Commercial Bank & Tr. Co.*, 405 So.2d 1039, 1042 (Fla. Dist. Ct. App.) (noting that the Florida version of the UCC “seem[s] to protect the objectively stupid so long as he is subjectively pure at heart.”).

159. See generally U.C.C. CASE DIG. (West, eds. 2009) (providing up-to-date coverage of all 50 states interpreting and applying the UCC).

the lending relationship, from loan negotiation to retaking collateral to extending lines of credit.¹⁶⁰ To determine the meaning of good faith, one must bear in mind the following considerations: (1) the specific language under Section 1-201; (2) additional language under applicable articles; and (3) official comments to the statute.¹⁶¹

How a court construes the meaning of good faith under the MUCC, and in other states with solely the subjective standard, can be seemingly arbitrary.¹⁶² Gauging “honesty in fact” is an “essentially subjective test which focuses on the state of mind of the person in question.”¹⁶³ Essentially, courts must ascertain the thought process of individuals, and often corporations as well, and whether they were truthful and behaved honestly, from their own perspective.¹⁶⁴ But how does one effectively prove a dishonest state of mind of an individual, let alone a business entity?

Prior to Revised Article 1, the UCC did not provide instructions to the courts on how to interpret this “white heart” test.¹⁶⁵ The ensuing confusion strips good faith of any practical meaning, rendering it nothing but an empty expression and diminishing its value where it is most needed.¹⁶⁶ The subjective standard is vague at best, functioning as “too limited to be taken seriously in the performance and enforcement context . . .”¹⁶⁷ Furthermore, the subjective standard provides no guidelines to a court for a bank’s behavior where its honest intent blurs the lines with negligence or lack of diligence. A single good faith definition will clarify confusion as to which standard applies in the multiple subjects that are governed by the UCC.¹⁶⁸ For example, Maryland courts would no longer need to differentiate between a merchant or a non-merchant to determine the relevant standard of good faith.¹⁶⁹

160. Paul Matthew Jones, *Good Faith Theories of Lender Liability*, 48 LA. L. REV. 1181, 1185–86 (1988).

161. Boklach, *supra* note 148, at 650.

162. *Id.* at 647 (stating “[i]n some respects, good faith is a bit like obscenity, i.e., the judge knows it when he sees it.” (referencing a quote by Justice Stewart in his attempt to define obscenity in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964))).

163. *Bowling Green, Inc. v. State St. Bank & Tr. Co.*, 425 F.2d 81, 85 (1st Cir. 2005); *Prenger v. Baker*, 542 N.W.2d 805, 808 (Iowa 1995) (“This definition has been universally interpreted to require a wholly subjective test examining what the party actually believed at the time of the transaction.”).

164. Rowley, *supra* note 147, at 4.

165. The subjective standard of good faith has been alternatively coined the “white heart” test. *Eldon’s Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 207 N.W.2d 282, 287 (Minn. 1973).

166. Steven J. Burton, *Good Faith in Articles 1 and 2 of the U.C.C.: The Practice View*, 35 WM. & MARY L. REV. 1533, 1535 (1994).

167. *Id.*

168. Boklach, *supra* note 148, at 676.

169. *Id.*

In order to serve its purpose, good faith “requires some objective standard tied to commercial reasonableness.”¹⁷⁰ Without such an objective standard, good faith has no logical meaning. There may be differing opinions as to what exactly reasonable commercial standards of fair dealing are, as even courts within the same district often reach different conclusions based on the particularized facts and evidence.¹⁷¹ There will always be potential barriers to predicting the outcome of cases.¹⁷² However, adding an objective component *should* only lead to more equitable outcomes.¹⁷³ Ultimately, the purely subjective standard does not account for the actions of a reasonable individual, and gives leeway to actions that are offensive but not definitively dishonest.¹⁷⁴ The standard also fails to consider how UCC transactions should embody fairness and commercial reasonableness.¹⁷⁵ It sensibly follows that commercial transactions falling underneath the MUCC should include objectivity; otherwise, there is no ascertainable benefit in having the standard at all.¹⁷⁶

C. Standing Alone, the Subjective Standard Tips the Balancing Scale of Justice in Favor of Banks, Leaving Lender Liability Unchecked

Lender liability cases typically involve a bank’s abuse of its institutional power over a borrower in order to protect its own interests.¹⁷⁷ Extending a good faith obligation to the lender-borrower relationship serves as an effective means of addressing the potential abusive practices of banks.¹⁷⁸ An alarming trend in cases decided solely under the subjective standard

170. E. Allen Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 671 (1963). *But see* Jones, *supra* note 160, at 1196 (“In an unstable industry, with a diverse group of lenders, a reasonable standard may be difficult to ascertain.”).

171. Boklach, *supra* note 148, at 686.

172. *Id.*

173. *Id.* *But see* JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 26-3, at 1089–90 (2d ed. 1980) (positing that the result of most cases would be the same under either good faith standard).

174. William H. Lawrence & Robert D. Wilson, *Good Faith in Calling Demand Notes and in Refusing to Extend Additional Financing*, 63 IND. L. J. 825, 833 (1988); *see* Farnsworth, *supra* note 170, at 672 (“Both common sense and tradition dictate an objective standard for good faith performance.”); *id.* at 674 (limiting the definition of good faith to honesty in fact alone left the concept “enfeebled”).

175. Lawrence & Wilson, *supra* note 174, at 833.

176. *Id.*

177. Kenneth J. Goldberg, *Lender Liability and Good Faith*, 68 B.U. L. REV. 653, 654 (1988). “[E]ven the most sophisticated borrower is subject to the discretionary judgment of a lender under many loan agreements, a situation in which the lender may potentially abuse its institutional power.” *Id.* at 665–66 (footnote omitted). *See generally* State Nat’l Bank of El Paso v. Farah Mfg. Co., 678 S.W.2d 661, 686 (Tex. App. 1984) (noting that the borrower established economic duress by showing that the lender implied that the loan would be called if a former CEO, disliked by the lender, resumed management of the borrower company).

178. Goldberg, *supra* note 177, at 657.

shows that banks were often not held accountable for their behavior if a court determined they acted with “honesty,” even where the consequences were detrimental.¹⁷⁹ Examples of banks violating their duty of good faith include: exercise of undue control over the borrower’s business; improper acceleration of a note and/or declaration of default; failure to provide advance notice of a default or termination of credit; creation of excuses to avoid extensions of credit or advances on funds; improper exercise of off-sets; adding additional loan conditions; improper foreclosure and disposition of collateral; and not providing reasonable notice to cure defaults.¹⁸⁰

From the beginning stages of drafting the UCC, advocates for the banking industry played a large role in its developments—particularly the Section on Corporation, Banking and Business Law of the American Bar Association.¹⁸¹ Without surprise, banking advocates have balked at the idea of incorporating the objective reasonableness standard—resistance that spans more than half a century.¹⁸² During the drafting and revision process, the concept of good faith (which included variations of an objective component) faced criticism for allegedly creating an impossible standard for brokers, banks, and similar institutions to observe at all times.¹⁸³ Thus, the standard was abandoned to alleviate concerns of business people and business lawyers alike.¹⁸⁴ Commentators believed that the “moralistic” nature of the concepts of “good” and “bad” faith have led to a “sue the bank” mentality, making banks a favorable target by plaintiffs during economic turmoil.¹⁸⁵ In recent times of nearly all states’ conformity with Article 1 of the UCC, there has been no clear explanation by Maryland’s banking advocates

179. See *supra* Part I.C.1.

180. Brian Mahany, *Bank’s Duty of Good Faith*, JUDGE LANG & KATERS & MAHANY L., https://www.lenderliabilitylawyer.com/video.php?article=brian-mahany-good-faith-lender_57 (last visited Apr. 13, 2018).

181. Walter D. Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW. 113, 113 (1951).

182. The 1951 ABA committee report, which objected to the objective standard of good faith, expressed concern that including such would require courts to invoke difficult considerations of usages of trade, customs, and practices. Walter D. Malcolm et al., *Report of Committee on the Proposed Commercial Code*, 6 BUS. LAW. 119, 128 (1951); see, e.g., Werner F. Ebke & James R. Griffin, *Lender Liability to Debtors: Toward a Conceptual Framework*, 40 SW. L. J. 775, 798 (1986) (asserting that duty of good faith “provides no objectively identifiable guidelines concerning the bounds of legally permissible conduct . . .” and it is “inconsistent with the basic notion of fairness that notice be given as to what activities are legally permitted or prohibited.”); Loeb H. Granoff, *Emerging Theories of Lender Liability: Flawed Application of Old Concepts*, 104 BANKING L. J. 492, 499 (1987) (stating that the obligation of good faith has been at times misused by borrowers “as a specious weapon for recovery”).

183. Malcolm et al., *supra* note 182, at 131.

184. *Id.* at 127.

185. See Mark Snyderman, *What’s So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. CHI. L. REV. 1335, 1337 (1988); Granoff, *supra* note 182, at 515.

as to why adding the objective definition is not in the best interest of commercial practices for all.¹⁸⁶

The subjective standard of good faith has faced substantial criticism in the creditor-debtor context, one being that the standard grants creditors excessive leeway that imposes a difficult burden of proof on the debtor.¹⁸⁷ As one judge adequately phrased this concern:

[A] purely subjective test is subject to arbitrary abuse. It would allow a creditor to be unreasonable and place the debtor in an unjust position since the creditor might at any time call the entire debt and require the debtor to prove the non-existent state of mind of the creditor. Thus, under this interpretation, the code would permit a creditor to destroy a viable contractual relationship without requiring him to justify his actions.¹⁸⁸

For example, where insecurity clauses are present, the subjective standard of honesty of fact is undoubtedly insufficient to balance the interests of both parties. “A declaration of insecurity is a unilateral decision made by the creditor which places a severe hardship upon the debtor. This hardship is unjust if the creditor’s decision is unreasonable or based upon mistaken facts which the creditor may honestly believe to be true.”¹⁸⁹ Professor Grant Gilmore, one of the original UCC drafters, warned against the use of insecurity clauses as a “charter of irresponsibility” for creditors.¹⁹⁰ Simply put, in a space where consumers enter commercial contracts with less bargaining power and control, the subjective definition can be problematic and is more advantageous to banks.¹⁹¹ Incorporating a commercially reasonable objective standard is a fairer standard for courts to enforce against all parties.¹⁹²

186. See *supra* text accompanying notes 84–86.

187. *Universal C.I.T. Credit Corp. v. Shepler*, 329 N.E.2d 620, 626 (Ind. Ct. App. 1975) (Garard, J., concurring); see also Goldberg, *supra* note 177, at 679 (arguing that the *K.M.C.* standard of good faith will deter malicious lender actions while a wholly subjective approach will not).

188. *Universal C.I.T. Credit Corp.*, 329 N.E.2d at 626 (footnotes omitted).

189. *Richards Eng’rs, Inc. v. Spanel*, 745 P.2d 1031, 1033 (Colo. App. 1987).

190. GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 1197 (1965).

191. Jones, *supra* note 160, at 1195. Another concern of the subjective test is how the borrower is also subjected to their lender’s risk adversity, an uncontrollable factor, by being forced to behave in a manner that will not alarm their lender. *Id.*; see also *Lending Liability Lawyers*, JUDGE, LANG & KATERS AND MAHANY L., <https://www.lenderliabilitylawyer.com> (last visited Apr. 13, 2018) (stating that banks have too much power and large businesses are at their mercy).

192. U.C.C. § 1-201(b)(20) cmt. 20 (2017) (“Although ‘fair dealing’ is a broad term that must be defined in context, it is clear that it is concerned with the fairness of conduct rather than the care with which an act is performed. This is an entirely different concept than whether a party exercised ordinary care in conducting a transaction.”). *But see* Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L. J. 619, 637 (1981) (arguing that the ambiguity of an expanded good faith definition would cause remedies to be administered arbitrarily and unevenly by courts).

Another concern is the possibility of contract drafters for banking entities, who have the freedom to create their own forms and terms, employing choice of law provisions that allow them to select Maryland law, which would reduce their level of accountability.¹⁹³ Forum shopping may also run rampant.¹⁹⁴ In most commercial contracts or transactions, consumers rarely have the ability to bargain either choice of law or the forum—provisions left to commercial entities' choosing.¹⁹⁵ In all, the very nature of a consumer's relationship with a bank is one of unequal power.

Maryland's banking industry and its advocates should not fear an abrupt change to the standard of good faith for three reasons. First, imposing an objective standard can be beneficial to individuals *and* banks by providing determinate procedures as a defense to any claims, preventing frivolous lawsuits.¹⁹⁶ The purpose of the UCC's requirement of good faith can be traced back to protecting parties' expectations of the agreement, and the objective standard can help courts frame the reasonableness of those expectations.¹⁹⁷ Second, guidelines exist to assist financial institutions with meeting the objective component of the good faith standard within the assorted topics covered by the UCC.¹⁹⁸ Third, incorporating the objective standard will not negate the subjective portion—a bank may still operate on subjective beliefs in its decisionmaking, but with an objective limitation that curtails improper actions by the bank.¹⁹⁹ The days of banks behaving with lit-

193. Sparks, *supra* note 42, at 24–25.

194. *Id.* at 25. Forum shopping is the practice of litigants selecting courts most likely to provide a favorable judgment by employing a forum selection clause, which courts tend to enforce when concerning commercial agreements. 17A AM. JUR. 2D Contracts § 253 (2018).

195. Marty Gould, *The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got It Right in Jane Doe v. Match.com*, 90 CHI.-KENT L. REV. 671, 699 (2015) (discussing how the forum-selection and choice of law clauses in contracts can cause the “wholesale displacement of state consumer protection laws”); *see also* James J. Healy, *Consumer Protection Choice of Law: European Lessons for the United States*, 19 DUKE J. COMP. & INT'L L. 535, 535 (2009) (pointing out how American courts do not always apply the public policy violation exception in consumer contracts, often leaving consumers unprotected).

196. Burton, *supra* note 166, at 1535. *But see* Snyderman, *supra* note 185, at 1338 (arguing that the objective portion of the good faith standard, in a lender liability context, “upset[s] the reasonable expectations of the parties and significantly limit[s] the flexibility available to lenders and borrowers in furtherance of commercial transactions.”).

197. Jones, *supra* note 160, at 1191.

198. Mark E. Wilson & Jeremy D. Kerman, *What is Good Faith? Subjective and Objective Standards for Banks Accepting Payment Orders*, A.B.A. BANKING L. COMM. J. (Mar. 2012), <http://apps.americanbar.org/buslaw/committees/CL130000pub/newsletter/201203/wilson-kerman.pdf> (pointing out that the Federal Financial Institution Examination Council established guidelines for meeting the objective component in regards to funds transfers, especially Internet schemes such as “phishing” frauds).

199. Jones, *supra* note 160, at 1196 (“Put another way, certain actions of the lender, such as foreclosing when fully secured and when the borrower was not in default, invade too far the expectations of the borrower.”). *But see* Farnsworth, *supra* note 170, at 672 (questioning the need for an objective test if a court, in attempting to evaluate the credibility of a claim, also considers the reasonableness or unreasonableness of the claim even under the honesty-in-fact test).

tle repercussions are long gone, and with lender liability continuously evolving, judges and juries are no longer privy to finding all actions of a bank as just and fair.²⁰⁰

D. Maryland as a Lone Wolf: Potential Theories as to Why Maryland Has Yet to Adopt Article 1

The Maryland legislature has never shied away from adopting parts of the UCC, embracing Article 1 (in-part) along with every other Article within the UCC. Why, then, has the Maryland legislature chosen to apply the two-prong standard of good faith to Title 2 only, effectively subjecting merchants to a different level of judicial scrutiny unlike most other jurisdictions? This question invokes a number of theories. Perhaps it was an unintentional oversight, as evidenced by the House Bill 700’s Fiscal and Policy Note.²⁰¹ The definition of good faith within the Fiscal and Policy Note’s analysis portion (which is meant to describe the proposed changes to any bill) did not differ from the definition found in the current law segment (which is meant to state the law as it stood prior to any amendments).²⁰² Perhaps this discrepancy was a drafting error, meaning that the legislature’s intention was to include the subjective-objective definition all along.

Another theory involves the challenging landscape of Maryland’s banking industry, still combating low interest rates, increased regulatory demands after the recession, and pressure from shareholders.²⁰³ As a state with many community-based banks, constant regulatory and legislative changes would require additional funding to accommodate additional training.²⁰⁴ Perhaps it is more beneficial to Maryland banks (and those who advocate for them) to avoid any changes to comply with the UCC while still undergoing a recovery process, if ever at all. Furthermore, Maryland, a state recently recognized as one of the most undesirable places to start a business, faces mounting pressure to become more business-friendly.²⁰⁵

200. See JUDGE, LANG & KATERS AND MAHANY L., *supra* note 191. *But see* Snyderman, *supra* note 185, at 1338 (“[Objective reasonableness] creates a needless presumption that allows judges and juries to substitute their conceptions of reasonableness and fairness for those of parties more knowledgeable about the realities of the market. The inconsistent application of the good faith doctrine to lending practices adds uncertainty and other costs to business transactions in abrogation of the fundamental purposes of commercial law.”).

201. See *supra* note 92 and accompanying text.

202. *Id.*

203. Carrie Wells, *The Number of Community Banks in Maryland is Shrinking*, BALT. SUN (Oct. 16, 2015, 9:08 PM), <http://www.baltimoresun.com/business/bs-bz-bank-mergers-20151016-story.html>.

204. *Id.*

205. Jeffrey Ferguson, Opinion, *Can Larry Hogan Keep Maryland Open for Business?*, WASH. POST (Feb. 19, 2016), https://www.washingtonpost.com/opinions/can-larry-hogan-keep-maryland-open-for-business/2016/02/19/32a56d90-cea1-11e5-88cd-753e80cd29ad_story.html?utm_term=.7531148f22dc; Jeff Jeffrey, *Md. Ranks Among Worst States*

Banks are businesses, and perhaps keeping Maryland's statutory standards as they are is a way to promote an "open for business" atmosphere that will deter businesses—even banks—from leaving the state and boost the confidence of business leaders.²⁰⁶

III. CONCLUSION

Maryland remains one of the few states that has not adopted amended Article 1 of the Uniform Commercial Code, maintaining the definition of good faith as "honesty in fact in the transaction or conduct concerned."²⁰⁷ As a result, the Maryland Uniform Commercial Code does not promote its intended purpose of uniformity in relation to other jurisdictions, specifically where commercial transactions frequently transcend state lines.²⁰⁸ If courts are to rely on the sole subjective definition of good faith, confusion and varying interpretations ensue due to the empty-headed and vague concept.²⁰⁹ Case law has shown, more often than not, that the subjective standard leaves room for dishonest practices amongst banks and weakens lender liability, leaving troubling circumstances for those affected.²¹⁰ The Maryland General Assembly should amend Title 1 to comply with Article 1's definition of good faith, adding in the objective standard of observance of reasonable commercial standards of fair dealing, as nearly all other states have done. Doing so will promote and uphold uniformity, provide a clearer standard for courts to enforce and for parties to measure, and ensure fairness amongst all parties involved in a banking relationship.

to *Start a New Business, Two Studies Find*, BALT. B. J. (July 6, 2017, 11:04 AM), <https://www.bizjournals.com/baltimore/news/2017/07/06/md-ranks-among-worst-states-to-start-a-new.html> (calculating Maryland's ranking by looking at the overall business environment, access to resources, and business costs).

206. Ferguson, *supra* note 205 (describing how government officials of Maryland are trying to improve its image and job climate); Jay Steinmetz, *Md. should look to Va. for business example*, BALT. SUN (Oct. 6, 2017, 1:20 PM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-1008-steinmetz-column-20171004-story.html> (describing how some measures proposed by Maryland legislators caused bad publicity and poisoned relations with the business community).

207. *See supra* Part I.B.2.

208. *See supra* Part II.A.

209. *See supra* Part II.B.

210. *See supra* Part II.C.