



## UCITA “Bomb-Shelter” Legislation

### UCITA

The Uniform Computer Information Transactions Act (UCITA) is a uniform state law proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to standardize the rules for licensing all types of software transactions. By 2002 UCITA had been enacted in only two states (Maryland and Virginia). UCITA remains a controversial proposal because its provisions fundamentally favor the needs of software licensors and online access providers to the detriment of most end-users. For example, UCITA undermines consumer and privacy protections, permits licensors to disclose terms of a license after payment, prevents the transfer of software during mergers and acquisitions, allows software companies to avoid revealing known defects in their products, and authorizes remote shutdown of mission- critical software. For more information, go to ([www.affect.ucita.com](http://www.affect.ucita.com))

### Why does a state need “bomb-shelter” legislation?

UCITA “bomb-shelter” legislation shields its state’s citizens from UCITA laws enacted in other states. UCITA enables software licensors and online access providers to choose the law of any state to resolve disputes arising under a license or access contract, and to designate any state as the place where those disputes will be resolved. There is no requirement that the state whose law is selected have any relationship to the contracting parties or their transaction. Software companies and online access providers may thus designate a state that has enacted UCITA (i.e. Maryland or Virginia) in *choice of law* and *choice of forum* clauses in click-wrap licenses and other contracts. In this way, even in a state that does not enact UCITA, citizens may still be subject to UCITA unless there is “bomb-shelter” legislation to protect them from this result.

### How does “bomb-shelter legislation work?

A “bomb-shelter” provision is defensive legislation that provides greater certainty that residents of a state that rejects UCITA will not end up governed by it anyway. A “bomb-shelter” law voids a *choice of law* or *forum* provision in a computer information agreement (e.g., a software license or online access contract) if it results in the application of UCITA to the agreement. If the choice of law provision is voided, the applicable law would be the law of the state that enacted the “bomb shelter.” Without a “bomb-shelter” provision expensive litigation may be required to determine which state’s law applies. The “bomb shelter” has been enacted in Iowa (Iowa Code § 554D.104), North Carolina (N.C. Gen. Stat. § 66-329), and West Virginia (W. Va. Code § 55-8-15).

**AFFECT is a broad-based coalition of retail and manufacturing businesses, consumers, financial services institutions, technology professionals and libraries. AFFECT has been engaged in the policy debate about UCITA and has been active in every state where UCITA has been discussed.**

For text of “Bomb Shelter” Legislation, Over

## PROPOSED LEGISLATION

### **Title: Choice of law and forum for computer information agreements**

#### **SECTION 1. Definitions.** As used in this act:

(1) “Computer information agreement” means a contract or agreement that falls within the scope of the Uniform Computer Information Transactions Act, whether or not that act actually applies,

(2) “Uniform Computer Information Transactions Act” means the Uniform Computer Information Transactions Act as approved by the National Conference of Commissioners on Uniform State Laws and enacted in any jurisdiction, or any substantially similar law enacted in any jurisdiction, and

(3) “Party” means a party to a computer information agreement, and “[NAME OF STATE] party” means a party that is a resident of this state or has its principal place of business in this state.

**SECTION 2. Choice of law or forum – Voidable.** A provision in a computer information agreement that would result in application of the Uniform Computer Information Transactions Act to all or part of that agreement is voidable by any party [unless the Uniform Computer Information Transactions Act is subsequently enacted in this state]. If the provision is so voided, the agreement will be governed by the laws of this state if at least one party is a [NAME OF STATE] party. In an action based on a computer information agreement that does not contain a choice of law provision, any party may object to the application of the Uniform Computer Information Transactions Act to the agreement. If such an objection is made, the agreement will be governed by the laws of this state if at least one party is a [NAME OF STATE] party. A provision in a computer information agreement which specifies that litigation or another dispute resolution process is to occur in a state other than this state is voidable by any party, and the dispute resolution process will take place in this state if at least one party is a [NAME OF STATE] party.

**[SECTION 3. Exceptions.** The provisions of Section 2 will not apply to transactions where the law chosen bears a reasonable relation to the parties or their transaction and it is established by clear and convincing evidence that (a) both the choice of law and choice of forum provisions were specifically bargained for by the parties and (b) the contract’s provisions stating choice of law and choice of forum were the product of fully informed choice of both parties. Language to this effect in a written agreement is, without additional evidence, insufficient to satisfy this Section.]

**SECTION 3[4]. Fundamental policy.** The provisions of this act reflect the fundamental policy of [NAME OF STATE], and may not be varied by agreement of the parties.