Chapter 55

Uniform Commercial Code

Article 1

General Provisions

Part 1

Short Title, Construction, Application and Subject Matter of the Act

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General Definitions and Principles of Interpretation

Part 1

SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT

§ 55-1-101. Short title.

This act [this chapter] shall be known and may be cited as Uniform Commercial Code.

History: 1953 Comp., § 50A-1-101, enacted by Laws 1961, ch. 96, § 1-101.

Compiler's notes. - Laws 1961, ch. 96, enacted New Mexico's version of the Uniform Commercial Code. The official comments set out here are taken from the 1972 Official Text of the U.C.C. Citations on the comments may be found within this compilation by prefacing the section number given with Chapter 55.

OFFICIAL COMMENT

ANNOTATION

Purpose of comments is to explain provisions of the code itself, in effect to promote uniformity of interpretation. Burchett v. Allied Concord Fin. Corp., 74 N.M. 575, 396 P.2d 186 (1964).

And comments deemed persuasive. - Official comments appearing as part of the Uniform Commercial Code are not direct authority for construction to be placed upon a section of the code, nevertheless they are persuasive and represent the opinion of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Burchett v. Allied Concord Fin. Corp., 74 N.M. 575, 396 P.2d 186 (1964).

The court recognizes official comments to the code as persuasive, but not controlling, authority. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Fixtures and the Uniform Commercial Code in New Mexico," see 4 Nat. Resources J. 109 (1964).

Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), commented on in 4 Nat. Resources J. 175 (1964).

For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision' " see 4 Nat. Resources J. 398 (1964).

For comment, "Assignments - Maker's Defenses Cut Off-Uniform Commercial Code § 9-206," see 5 Nat. Resources J. 408 (1965).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966), commented on in 8 Nat. Resources J. 169 (1968).

For comment, "Commercial Law-Uniform Commercial Code-Sale of Goods," see 8 Nat. Resources J. 176 (1968).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), commented on in 8 Nat. Resources J. 713 (1968).

For comment, "The Miller Act in New Mexico - Materialman's Right to Recover on Prime's Surety Bond in Public Works Contracts-Notice as Condition Precedent to Action," see 9 Nat. Resources J. 295 (1969).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For article, "Survey of New Mexico Law, 1982-83: Commercial Law," see 14 N.M.L. Rev. 45 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 42; 67 Am. Jur. 2d Sales § 1 et seq.; 69 Am. Jur. 2d Secured Transactions § 273.
82 C.J.S. Statutes § 221.

§ 55-1-102. Purposes; rules of construction; variation by agreement.

(1) This act [this chapter] shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes of [and] policies of this act are:

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under Subsection (3).

(5) In this act unless the context otherwise requires:

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

History: 1953 Comp., § 50A-1-102, enacted by Laws 1961, ch. 96, § 1-102.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 74, Uniform Sales Act; Section 57, Uniform Warehouse Receipts Act; Section 52, Uniform Bills of Lading Act; Section 19, Uniform Stock Transfer Act and Section 18, Uniform Trust Receipts Act.

Changes. Rephrased and new material added.

Purposes of changes.1. Subsections (1) and (2) are intended to make it clear that:

This act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the act requires that its interpretation and application be limited to its reason.

Courts have been careful to keep broad acts from being hampered in their effects by later acts of limited scope. Pacific Wool Growers v. Draper & Co., 158 Or. 1, 73 P.2d 1391 (1937), and compare Section 1-104. They have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act, Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co., 239 U.S. 520, 36 S. Ct. 194, 60 L. Ed. 417 (1916) (bona fide purchase policy of Uniform Warehouse Receipts Act extended to case not covered but of equivalent nature). They have done the same where reason and policy so required, even where the subject matter had been intentionally excluded from the act in general.

Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1934) (Uniform Sales Act change in seller's remedies applied to contract for sale of choses in action even though the general coverage of that act was intentionally limited to goods "other than things in action.") They have implemented a statutory policy with liberal and useful remedies not provided in the statutory text. They have disregarded a statutory limitation of remedy where the reason of the limitation did not apply. Fiterman v. J. N. Johnson & Co., 156 Minn. 201, 194 N.W. 399 (1923) (requirement of return of the goods as a condition to rescission for breach of warranty; also, partial rescission allowed). Nothing in this act stands in the way of the continuance of such action by the courts.

The act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

2. Subsection (3) states affirmatively at the outset that freedom of contract is a principle of the code: "the effect" of its provisions may be varied by "agreement." The meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement. But the code seeks to avoid the type of interference with evolutionary growth found in Manhattan Co. v. Morgan, 242 N.Y. 38, 150 N.E. 594 (1926). Thus private parties cannot make an instrument negotiable within the meaning of Article 3 except as provided in Section 3-104; nor can they change the meaning of such terms as "bona fide purchaser," "holder in due course," or "due negotiation," as used in this act. But an agreement can change the legal consequences which would otherwise flow from the provisions of the act. "Agreement" here includes the effect given to course of dealing, usage of trade and course of performance by Sections 1-201, 1-205 and 2-208; the effect of an agreement on the rights of third parties is left to specific provisions of this act and to supplementary principles applicable under the next section. The rights of third parties under Section 9-301 when a security interest is unperfected, for example, cannot be destroyed by a clause in the security agreement.

This principle of freedom of contract is subject to specific exceptions found elsewhere in the act and to the general exception stated here. The specific exceptions vary in explicitness: the statute of frauds found in Section 2-201, for example, does not explicitly preclude oral waiver of the requirement of a writing, but a fair reading denies enforcement to such a waiver as part of the "contract" made unenforceable; Section 9-501(3), on the other hand, is quite explicit. Under the exception for "the obligations of good faith, diligence, reasonableness and care prescribed by this act," provisions of the act prescribing such obligations are not to be disclaimed. However, the section also recognizes the prevailing practice of having agreements set forth standards by which due diligence is measured and explicitly provides that, in the absence of a showing that the standards manifestly are unreasonable, the agreement controls. In this connection, Section 1-205 incorporating into the agreement prior course of dealing and usages of trade is of particular importance.

3. Subsection (4) is intended to make it clear that, as a matter of drafting, words such as "unless otherwise agreed" have been used to avoid controversy as to whether the subject matter of a particular section does or does not fall within the exceptions to Subsection (3), but absence of such words contains no negative implication since under Subsection (3) the general and residual rule is that the effect of all provisions of the act may be varied by agreement.

4. Subsection (5) is modelled on 1 U.S.C. Section 1 and New York General Construction Law Sections 22 and 35.

ANNOTATION

Compiler's note. - Laws 1961, ch. 96, § 10-105, directs the compiler to retain article, part, section and subsection designations, heading, numbers, indentations and layout as used in Articles 1 to 9 of this act.

Applicability of former law. - It is evident that provisions of the code are not applicable as to transactions completed or entered into before the effective date of the code, but those transactions are governed by provisions of the former law even though repealed or amended by the code. 1961-62 Op. Att'y Gen. No. 62-12.

Variant meanings of "commercial paper". - "Commercial paper" in former 58-13-29H NMSA 1978 did not have a meaning identical to "commercial paper" under New Mexico's U.C.C.; although a document might have been commercial paper under both acts, the purposes of the two acts were not the same. State v. Sheets, 94 N.M. 356, 610 P.2d 760 (Ct. App. 1980).

Reasonableness of guaranty contracts. - Guaranty contracts according to which the creditor bank was not, as a prerequisite to the guarantors' liability, obliged to take any security, although it had a right to do so, no provision of which required the bank to perfect security taken or otherwise to deal with it in any particular way, and under which the guarantors waived their rights to subrogation and waived and released any claims to the security and to "any benefit of, and any right to participate in any security now or hereafter held by bank," while the bank was given the right to "waive and release" the security at any time without the waiver or release affecting the guarantors' obligation to pay, are not inherently unreasonable. American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975).

And interpretation by court. - Since 55-3-606 NMSA 1978 allows a surety to waive his defenses and this section allows parties by agreement to determine the standards by which performance of their good faith obligations are to be measured, a court may then interpret the provisions of the guaranty agreement to determine whether the guarantors should be relieved of liability under the general law of suretyship. American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975).

Law reviews. - For article, "Fixtures and the Uniform Commercial Code in New Mexico," see 4 Nat. Resources J. 109 (1964).

For comment, "Commercial Law-Uniform Commercial Code-Sale of Goods," see 8 Nat. Resources J. 176 (1968).

Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), commented on in 8 Nat. Resources J. 183 (1968).

For article, "Essential Attributes of Commercial Paper-Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 51; 69 Am. Jur. 2d Secured Transactions § 386.
Sufficiency of description of collateral in financing statement under U.C.C. §§ 9-110 and 9-402, 100 A.L.R.3d 10.
Sufficiency of secured party's signature on financing statement or security agreement under U.C.C. § 9-402, 100 A.L.R.3d 390.
Sufficiency of description of collateral in security agreement under U.C.C. §§ 9-110 and 9-203, 100 A.L.R.3d 940.
31 C.J.S. Estoppel §§ 55, 59, 86; 82 C.J.S. Statutes § 315.

§ 55-1-103. Supplementary general principles of law applicable.

Unless displaced by the particular provisions of this act [this chapter], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause, shall supplement its provisions.

History: 1953 Comp., § 50A-1-103, enacted by Laws 1961, ch. 96, § 1-103.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 2 and 73, Uniform Sales Act; Section 196, Uniform Negotiable Instruments Act; Section 56, Uniform Warehouse Receipts Act; Section 51, Uniform Bills of Lading Act; Section 18, Uniform Stock Transfer Act and Section 17, Uniform Trust Receipts Act.

Changes. Rephrased, the reference to "estoppel" and "validating" being new.

Purposes of changes.1. While this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this act, the principle has been stated in more detail and the phrasing enlarged to make it clear that the "validating", as well as the "invalidating" causes referred to in the prior uniform statutory provisions, are included here.

"Validating" as used here in conjunction with "invalidating" is not intended as a narrow word confined to original validation, but extends to cover any factor which at any time or in any manner renders or helps to render valid any right or transaction.

2. The general law of capacity is continued by express mention to make clear that Section 2 of the old Uniform Sales Act (omitted in this act as stating no matter not contained in the general law) is also consolidated in the present section. Hence, where a statute limits the capacity of a non-complying corporation to sue, this is equally applicable to contracts of sale to which such corporation is a party.

3. The listing given in this section is merely illustrative; no listing could be exhaustive. Nor is the fact that in some sections particular circumstances have led to express reference to other fields of law intended at any time to suggest the negation of the general application of the principles of this section.

ANNOTATION

Preservation of common-law principles. - This section does not preserve common-law principles in area thoroughly covered by U.C.C. simply because they are not expressly excluded. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

Under applicable equitable estoppel principles, the party estopped must know or have knowledge imputed to it of concealed material facts at the time of concealment; and the party asserting estoppel must not know the truth of the facts but must rely on the other's conduct to its detriment. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Applicability of pre-UCC contract law. - Under the Uniform Commercial Code, to the extent that the contract does not expressly regulate any matter relating to the exercise of such powers as options to purchase, the continuing pre-code contract law will supply the answer. Cranetex, Inc. v. Mountain Dev. Corp., 106 N.M. 5, 738 P.2d 123 (1987).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision' " see 4 Nat. Resources J. 398 (1964).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), commented on in 8 Nat. Resources J. 183 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 45, 382; 15A Am. Jur. 2d Commercial Code §§ 15, 68, 75; 17 Am. Jur. 2d Contracts §§ 16, 143, 151, 153.
Liability of parent for dental services to minor child, 7 A.L.R. 1070.
Civil liability of father for necessaries furnished to child taken from home by mother, 32 A.L.R. 1466.
Damages of infant on rescission of exchange of goods, 52 A.L.R.2d 1114.
82 C.J.S. Statutes §§ 363, 364.

§ 55-1-104. Construction against implicit repeal.

This act [this chapter] being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

History: 1953 Comp., § 50A-1-104, enacted by Laws 1961, ch. 96, § 1-104.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To express the policy that no act which bears evidence of carefully considered permanent regulative intention should lightly be regarded as impliedly repealed by subsequent legislation. This act, carefully integrated and intended as a uniform codification of permanent character covering an entire "field" of law, is to be regarded as particularly resistant to implied repeal. See Pacific Wool Growers v. Draper & Co., 158 Or. 1, 73 P.2d 1391 (1937).

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 51; 15A Am. Jur. 2d Commercial Code §§ 16, 25.
Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, 5 A.L.R.2d 1270.
82 C.J.S. Statutes § 291.

§ 55-1-105. Territorial application of the act; parties' power to choose applicable law.

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or such other state or nation shall govern their rights and duties. Failing such agreement this act [this chapter] applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this act 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:

Rights of creditors against sold goods. Section 2-402 [55-2-402 NMSA 1978].

Applicability of the article on bank deposits and collections. Section 4-102 [55-4-102 NMSA 1978].

Bulk transfers subject to the article on bulk transfers. Section 6-102 [55-6-102 NMSA 1978].

Applicability of the article on investment securities. Section 8-106 [55-8-106 NMSA 1978].

Perfection provisions of the article on secured transactions. Section 9-103 [55-9-103 NMSA 1978].

History: 1953 Comp., § 50A-1-105, enacted by Laws 1961, ch. 96, § 1-105; 1985, ch. 193, § 1.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the five sections listed in Subsection (2), and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S. Ct. 626, 71 L. Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a short hand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course, the act applies to any transaction which takes place in its entirety in a state which has enacted the act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are

contrary to the law under the code.

3. Where a transaction has significant contacts with a state which has enacted the act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the code in an analogous situation. Application of the code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare Global Commerce Corp. v. Clark-Babbitt Industries, Inc., 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the code, application of another law to some detail of performance because of an accident of geography may violate the commercial understanding of the parties.

4. The act does not attempt to prescribe choice-of-law rules for states which do not enact it, but this section does not prevent application of the act in a court of such a state. Common law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

5. Subsection (2) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

6. Section 9-103 should be consulted as to the rules for perfection of security interests and the effects of perfection and nonperfection.

ANNOTATION

The 1985 amendment deleted "of" following "the law either of this state or" near the middle of Subsection (1), substituted "Perfection provisions of the article" for "policy and scope of the article" and "Section 9-103" for "Sections 9-102 and 9-103" near the end of Subsection (2) and made minor grammatical changes.

Effective dates. - Laws 1985, ch. 193, § 38 makes the act effective on January 1, 1986.

Jurisdiction where significant performance occurs governs choice of law. - The law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. United Whsle. Liquor Co. v. Brown-Forman Distillers Corp., 108 N.M. 467, 775 P.2d 233 (1989).

Public policy considerations in applying out-of-state law. - When the choice of law rule leads to the law of another state and that law is different from the law of the forum, the forum may decline to apply the out-of-state law if it offends the public policy of New Mexico. United Whsle. Liquor Co. v. Brown-Forman Distillers Corp., 108 N.M. 467, 775 P.2d 233 (1989).

Determination of validity of contract executed in another state. - The validity of a contract executed in a sister state is determined according to the laws of that state, unless such construction conflicts with some settled policy of the forum state. Kapsa v. Botsford, 95 N.M. 625, 624 P.2d 1022 (Ct. App. 1981).

Probate of will in forum state not significant. - The fact that the will is being probated in the forum state is not significant in determining whether or not to use the forum's law to decide the question of the validity of the contractual claims against the estate. Kapsa v. Botsford, 95 N.M. 625, 624 P.2d 1022 (Ct. App. 1981).

Application of out-of-state liquor law. - Kentucky law and not the New Mexico Alcoholic Beverage Franchise Act applied to distributorship contracts, where the contracts bore a reasonable relation to the state of Kentucky and the choice of law provision therein did not violate some fundamental principle of justice. United Whsle. Liquor Co. v. Brown-Forman Distillers Corp., 108 N.M. 467, 775 P.2d 233 (1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 100; 15A Am. Jur. 2d Commercial Code §§ 11, 13, 44; 68 Am. Jur. 2d Secured Transactions §§ 15, 17, 20.
21 C.J.S. Courts § 204; 17 C.J.S. Contracts § 12.

§ 55-1-106. Remedies to be liberally administered.

(1) The remedies provided by this act [this chapter] shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law.

(2) Any right or obligation declared by this act is enforceable by action unless the provision declaring it specifies a different and limited effect.

History: 1953 Comp., § 50A-1-106, enacted by Laws 1961, ch. 96, § 1-106.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsection (1) - none; Subsection (2) - Section 72, Uniform Sales Act.

Changes. Reworded.

Purposes of changes and new matter. Subsection (1) is intended to effect three things:

1. First, to negate the unduly narrow or technical interpretation of some remedial provisions of prior legislation by providing that the remedies in this act are to be liberally administered to the end stated in the section. Second, to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the act elsewhere makes it clear that damages must be minimized. Cf. Sections 1-203, 2-706 (1) and 2-712 (2). The third purpose of Subsection (1) is to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more. Cf. Section 2-204(3).

2. Under Subsection (2) any right or obligation described in this act is enforceable by court action, even though no remedy may be expressly provided, unless a particular provision specifies a different and limited effect. Whether specific performance or other equitable relief is available is determined not by this section but by specific provisions and by supplementary principles. Cf. Sections 1-103 and 2-716.

3. "Consequential" or "special" damages and "penal" damages are not defined in terms in the code, but are used in the sense given them by the leading cases on the subject.

Cross references.Sections 1-103, 1-203, 2-204 (3), 2-701, 2-706 (1), 2-712 (2) and 2-716.

Definitional cross references."Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 24; 69 Am. Jur. 2d Secured Transactions §§ 245, 648, 651.
1A C.J.S. Actions §§ 10 to 17.

§ 55-1-107. Waiver or renunciation of claim or right after breach.

Any claim or right arising out of an alleged breach can be discharged in whole or in part

without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

History: 1953 Comp., § 50A-1-107, enacted by Laws 1961, ch. 96, § 1-107.

OFFICIAL COMMENT

Prior uniform statutory provision. Compare Section 1, Uniform Written Obligations Act and Sections 119 (3), 120 (2) and 122, Uniform Negotiable Instruments Law.

Purposes.This section makes consideration unnecessary to the effective renunciation or waiver of rights or claims arising out of an alleged breach of a commercial contract where such renunciation is in writing and signed and delivered by the aggrieved party. Its provisions, however, must be read in conjunction with the section imposing an obligation of good faith (Section 1-203). There may, of course, also be an oral renunciation or waiver sustained by consideration but subject to statute of frauds provisions and to the section of Article 2 on sales dealing with the modification of signed writings (Section 2-209). As is made express in the latter section this act fully recognizes the effectiveness of waiver and estoppel.

Cross references.Sections 1-203, 2-201 and 2-209. And see Section 2-719.

Definitional cross references."Aggrieved party". Section 1-201.

"Rights". Section 1-201.

"Signed". Section 1-201.

"Written". Section 1-201.

ANNOTATION

Law reviews. - Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), commented on in 8 Nat. Resources J. 183 (1968).

For article, "Essential Attributes of Commercial Paper-Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 382, 927, 934, 948 to 950; 28 Am. Jur. 2d Estoppel and Waiver § 162; 69 Am. Jur. 2d Secured Transactions §§ 539, 591, 624.
17A C.J.S. Contracts § 491.

§ 55-1-108. Severability.

If any provision or clause of this act [this chapter] or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

History: 1953 Comp., § 50A-1-108, enacted by Laws 1961, ch. 96, § 1-108.

OFFICIAL COMMENT

Definitional cross references."Person". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 51; 15A Am. Jur. 2d Commercial Code § 30.
82 C.J.S. Statutes § 92.

§ 55-1-109. Section captions.

Section captions are parts of this act [this chapter].

History: 1953 Comp., § 50A-1-109, enacted by Laws 1961, ch. 96, § 1-109.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To make explicit in all jurisdictions that section captions are a part of the text of this act and not mere surplusage.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 31.
82 C.J.S. Statutes § 350.

Part 2

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

§ 55-1-201. General definitions.

Subject to additional definitions contained in the subsequent articles of the Uniform Commercial Code [this chapter] which are applicable to specific articles or parts thereof

and unless the context otherwise requires, in that act:

(1) "action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined;

(2) "aggrieved party" means a party entitled to resort to a remedy;

(3) "agreement" means the bargain of the parties 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 Sections 55-1-205 and 55-2-208 NMSA 1978. Whether an agreement has legal consequences is determined by the provisions of the Uniform Commercial Code, if applicable; otherwise by the law of contracts (Section 55-1-103 NMSA 1978). (Compare "contract".);

(4) "bank" means any person engaged in the business of banking;

(5) "bearer" means the person in possession of an instrument, document of title or certificated security payable to bearer or indorsed in blank;

(6) "bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill;

(7) "branch" includes a separately incorporated foreign branch of a bank;

(8) "burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence;

(9) "buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security 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. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "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;

(10) "conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court;

(11) "contract" means the total legal obligation which results from the parties' agreement as affected by this act [this chapter] and any other applicable rules of law. (Compare "agreement".);

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

(13) "defendant" includes a person in the position of defendant in a cross-action or counterclaim;

(14) "delivery" with respect to instruments, documents of title, chattel paper or certificated securities means voluntary transfer of possession;

(15) "document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass;

(16) "fault" means wrongful act, omission or breach;

(17) "fungible" with respect to goods or securities [means goods or securities] of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this act to the extent that under a particular agreement or document unlike units are treated as equivalents;

(18) "genuine" means free of forgery or counterfeiting;

(19) "good faith" means honesty in fact in the conduct or transaction concerned;

(20) "holder" means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued or indorsed to him or to his order or to bearer or in blank;

(21) to "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit;

(22) "insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved;

(23) a person is "insolvent" who either has ceased to pay his debts in the ordinary

course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law;

(24) "money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency;

(25) a person has "notice" of a fact when:

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists. A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by the Uniform Commercial Code;

(26) a person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when:

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications;

(27) notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information;

(28) "organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest or any other legal or commercial entity;

(29) "party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within the Uniform Commercial Code;

(30) "person" includes an individual or an organization (see Section 55-1-102 NMSA 1978);

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

(32) "purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property;

(33) "purchaser" means a person who takes by purchase;

(34) "remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal;

(35) "representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate or any other person empowered to act for another;

(36) "rights" includes remedies;

(37) "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 55-2-401 NMSA 1978) 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 55, Article 9 NMSA 1978. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 55-2-401 NMSA 1978 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Chapter 55, Article 9 NMSA 1978. 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 55-2-326 NMSA 1978). Whether a lease is intended as security 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.

(38) "send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or

cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending;

(39) "signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing;

(40) "surety" includes guarantor;

(41) "telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission or the like;

(42) "term" means that portion of an agreement which relates to a particular matter;

(43) "unauthorized" signature or indorsement 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 55-3-303, 55-4-208 and 55-4-209 NMSA 1978) a person gives "value" for rights if he acquires them:

(a) 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; or

(b) as security for or in total or partial satisfaction of a pre-existing claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract;

(45) "warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire; and

(46) "written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

History: 1953 Comp., § 50A-1-201, enacted by Laws 1961, ch. 96, § 1-201; 1967, ch. 186, § 4; 1985, ch. 193, § 2; 1987, ch. 248, § 1.

OFFICIAL COMMENT

Prior uniform statutory provision, changes and new matter.1. "Action". See similar definitions in Section 191, Uniform Negotiable Instruments Law; Section 76, Uniform

Sales Act; Section 58, Uniform Warehouse Receipts Act and Section 53, Uniform Bills of Lading Act. The definition has been rephrased and enlarged.

2. "Aggrieved party". New.

3. "Agreement". New. As used in this act the word is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of this act to displace a stated rule of law.

4. "Bank". See Section 191, Uniform Negotiable Instruments Law.

5. "Bearer". From Section 191, Uniform Negotiable Instruments Law. The prior definition has been broadened.

6. "Bill of Lading". See similar definitions in Section 1, Uniform Bills of Lading Act. The definition has been enlarged to include freight forwarders' bills and bills issued by contract carriers as well as those issued by common carriers. The definition of airbill is new.

7. "Branch". New.

8. "Burden of establishing a fact". New.

9. "Buyer in ordinary course of business". From Section 1, Uniform Trust Receipts Act. The definition has been expanded to make clear the type of person protected. Its major significance lies in Section 2-403 and in the article on secured transactions (Article 9).

The reference to minerals and the like makes clear that a buyer in ordinary course buying minerals under the circumstances described takes free of a prior mortgage created by the sellers. See comment to Section 9-103.

A pawnbroker cannot be a buyer in ordinary course of business because the person from whom he buys goods (or acquires ownership after foreclosing an initial pledge) is typically an ordinary user and not a person engaged in selling goods of that kind.

10. "Conspicuous". New. This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it.

11. "Contract". New. But see Sections 3 and 71, Uniform Sales Act.

12. "Creditor". New.

13. "Defendant". From Section 76, Uniform Sales Act. Rephrased.

14. "Delivery". Section 76, Uniform Sales Act; Section 191, Uniform Negotiable Instruments Law; Section 58, Uniform Warehouse Receipts Act and Section 53, Uniform Bills of Lading Act.

15. "Document of title". From Section 76, Uniform Sales Act, but rephrased to eliminate certain ambiguities. Thus, by making it explicit that the obligation or designation of a third party as "bailee" is essential to a document of title, this definition clearly rejects any such result as obtained in Hixson v. Ward, 254 Ill. App. 505 (1929), which treated a conditional sales contract as a document of title. Also the definition is left open so that new types of documents may be included. It is unforeseeable what documents may one day serve the essential purpose now filled by warehouse receipts and bills of lading. Truck transport has already opened up problems which do not fit the patterns of practice resting upon the assumption that a draft can move through banking channels faster than the goods themselves can reach their destination. There lie ahead air transport and such probabilities as teletype transmission of what may some day be regarded commercially as "documents of title". The definition is stated in terms of the function of the documents with the intention that any document which gains commercial recognition as accomplishing the desired result shall be included within its scope. Fungible goods are adequately identified within the language of the definition by identification of the mass of which they are a part.

Dock warrants were within the Sales Act definition of document of title apparently for the purpose of recognizing a valid tender by means of such paper. In current commercial practice a dock warrant or receipt is a kind of interim certificate issued by steamship companies upon delivery of the goods at the dock, entitling a designated person to have issued to him at the company's office a bill of lading. The receipt itself is invariably nonnegotiable in form although it may indicate that a negotiable bill is to be forthcoming. Such a document is not within the general compass of the definition, although trade usage may in some cases entitle such paper to be treated as a document of title. If the dock receipt actually represents a storage obligation undertaken by the shipping company, then it is a warehouse receipt within this section regardless of the name given to the instrument.

The goods must be "described", but the description may be by marks or labels and may be qualified in such a way as to disclaim personal knowledge of the issuer regarding contents or condition. However, baggage and parcel checks and similar "tokens" of storage which identify stored goods only as those received in exchange for the token are not covered by this article.

The definition is broad enough to include an airway bill.

16. "Fault". From Section 76, Uniform Sales Act.

17. "Fungible". See Sections 5, 6 and 76, Uniform Sales Act and Section 58, Uniform Warehouse Receipts Act. Fungibility of goods "by agreement" has been added for clarity and accuracy. As to securities, see Section 8-107 and comment.

18. "Genuine". New.

19. "Good faith". See Section 76(2), Uniform Sales Act; Section 58(2), Uniform Warehouse Receipts Act; Section 53(2), Uniform Bills of Lading Act and Section 22(2), Uniform Stock Transfer Act. "Good faith", whenever it is used in the code, means at least what is here stated. In certain articles, by specific provision, additional requirements are made applicable. See, e.g., Secs. 2-103(1) (b), 7-404. To illustrate, in the article on sales, Section 2-103, good faith is expressly defined as including in the case of a merchant observance of reasonable commercial standards of fair dealing in the trade, so that throughout that article wherever a merchant appears in the case an inquiry into his observance of such standards is necessary to determine his good faith.

20. "Holder". See similar definitions in Section 191, Uniform Negotiable Instruments Law; Section 58, Uniform Warehouse Receipts Act and Section 53, Uniform Bills of Lading Act.

21. "Honor". New.

22. "Insolvency proceedings". New.

23. "Insolvent". Section 76 (3), Uniform Sales Act. The three tests of insolvency - "ceased to pay his debts in the ordinary course of business," "cannot pay his debts as they become due," and "insolvent within the meaning of the federal bankruptcy law" - are expressly set up as alternative tests and must be approached from a commercial standpoint.

24. "Money". Section 6(5), Uniform Negotiable Instruments Law. The test adopted is that of sanction of government, whether by authorization before issue or adoption afterward, which recognizes the circulating medium as a part of the official currency of that government. The narrow view that money is limited to legal tender is rejected.

25. "Notice". New. Compare N.I.L. Sec. 56. Under the definition a person has notice when he has received a notification of the fact in question. But by the last sentence the act leaves open the time and circumstances under which notice or notification may cease to be effective. Therefore such cases as Graham v. White-Phillips Co., 296 U.S. 27, 56 S. Ct. 21, 80 L.Ed. 20 (1935), are not overruled.

26. "Notifies". New. This is the word used when the essential fact is the proper dispatch of the notice, not its receipt. Compare "Send". When the essential fact is the other party's receipt of the notice, that is stated. The second sentence states when a notification is received.

27. New. This makes clear that reason to know, knowledge, or a notification, although "received" for instance by a clerk in Department A of an organization, is effective for a transaction conducted in Department B only from the time when it was or should have

been communicated to the individual conducting that transaction.

28. "Organization". This is the definition of every type of entity or association, excluding an individual, acting as such. Definitions of "person" were included in Section 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act and Section 1, Uniform Trust Receipts Act. The definition of "organization" given here includes a number of entities or associations not specifically mentioned in prior definition of "person", namely, government, governmental subdivision or agency, business trust, trust and estate.

29. "Party". New. Mention of a party includes, of course, a person acting through an agent. However, where an agent comes into opposition or contrast to his principal, particular account is taken of that situation.

30. "Person". See comment to definition of "Organization". The reference to Section 1-102 is to Subsection (5) of that section.

31. "Presumption". New.

32. "Purchase". Section 58, Uniform Warehouse Receipts Act; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act and Section 1, Uniform Trust Receipts Act. Rephrased.

33. "Purchaser". Section 58, Uniform Warehouse Receipts Act; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act and Section 1, Uniform Trust Receipts Act. Rephrased.

34. "Remedy". New. The purpose is to make it clear that both remedy and rights (as defined) include those remedial rights of "self help" which are among the most important bodies of rights under this act, remedial rights being those to which an aggrieved party can resort on his own motion.

35. "Representative". New.

36. "Rights". New. See comment to "Remedy".

37. "Security Interest". See Section 1, Uniform Trust Receipts Act. The present definition is elaborated, in view especially of the complete coverage of the subject in Article 9. Notice that in view of the article the term includes the interest of certain outright buyers of certain kinds of property. The last two sentences give guidance on the question whether reservation of title under a particular lease of personal property is or is not a security interest.

38. "Send". New. Compare "notifies".

39. "Signed". New. The inclusion of authentication in the definition of "signed" is to make clear that as the term is used in this act a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing.

40. "Surety". New.

41. "Telegram". New.

42. "Term". New.

43. "Unauthorized". New.

44. "Value". See Sections 25, 26, 27, 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 58, Uniform Warehouse Receipts Act; Section 22(1), Uniform Stock Transfer Act and Section 1, Uniform Trust Receipts Act. All the uniform acts in the commercial law field (except the Uniform Conditional Sales Act) have carried definitions of "value". All those definitions provided that value was any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a preexisting claim. Subsections (a), (b) and (d) in substance continue the definitions of "value" in the earlier acts. Subsection (c) makes explicit that "value" is also given in a third situation: where a buyer by taking delivery under a preexisting contract converts a contingent into a fixed obligation.

This definition is not applicable to Articles 3 and 4, but the express inclusion of immediately available credit as value follows the separate definitions in those articles. See Sections 4-208, 4-209, 3-303. A bank or other financing agency which in good faith makes advances against property held as collateral becomes a bona fide purchaser of that property even though provision may be made for charge-back in case of trouble. Checking credit is "immediately available" within the meaning of this section if the bank would be subject to an action for slander of credit in case checks drawn against the credit were dishonored, and when a charge-back is not discretionary with the bank, but may only be made when difficulties in collection arise in connection with the specific transaction involved.

45. "Warehouse receipt". See Section 76(1), Uniform Sales Act and Section 1, Uniform Warehouse Receipts Act. Receipts issued by a field warehouse are included, provided the warehouseman and the depositor of the goods are different persons.

46. "Written" or "writing". This is a broadening of the definition contained in Section 191 of the Uniform Negotiable Instruments Law.

ANNOTATION

I. General Consideration.
II. Contract.
III. Security Interest.
IV. Signed.
V. Written or Writing.
VI. Buyer in Ordinary Course of Business.
VII. Conspicuous.
VIII. Good Faith.
IX. Holder.

I. General Consideration.

The 1985 amendment added the second sentence in Subsection (9), deleted "means goods or securities" following "with respect to goods or securities" near the beginning of Subsection (17), substituted "buyer of accounts or chattel paper which is subject to Article 9" for "buyer of accounts, chattel paper or contract rights which is subject to Article 9" in the third sentence of Subsection (37), and made minor grammatical changes.

The 1987 amendment, effective June 19, 1987, substituted "the Uniform Commercial Code" for "this act" and NMSA citations for UCC citations at several places throughout the section, inserted "certificated" in Subsections (5), (14) and (20), and made minor stylistic changes throughout the section.

Effective dates. - Laws 1985, ch. 193, § 38 makes the act effective on January 1, 1986.

Compiler's notes. - The language inserted in brackets into Subsection (17) by the compiler was apparently inadvertently deleted by the 1985 amendment.

Law reviews. - For article, "Attachment in New Mexico-Part II," see 2 Nat. Resources J. 75 (1962).

For article, "New Mexico's Uniform Commercial Code: Who is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), commented on in 4 Nat. Resources J. 175 (1964).

For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision' " see 4 Nat. Resources J. 398 (1964).

For comment, "Assignments-Maker's Defenses Cut Off-Uniform Commercial Code § 9-206," see 5 Nat. Resources J. 408 (1965).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For comment on Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966), see 8 Nat. Resources J. 169 (1968).

For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For article, "Essential Attributes of Commercial Paper-Part I," see 1 N.M. L. Rev. 479 (1971).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M. L. Rev. 1 (1974).

For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M. L. Rev. 293 (1976).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 48, 49; 15A Am. Jur. 2d Commercial Code §§ 4, 27, 104, 115; 67 Am. Jur. 2d Sales §§ 10 to 69; 68 Am. Jur. 2d Secured Transactions §§ 4, 35; 69 Am. Jur. 2d Secured Transactions § 273.
Who is "buyer in ordinary course of business" under Uniform Commercial Code, 87 A.L.R.3d 11.
What constitutes "money" within meaning of Uniform Commercial Code, 40 A.L.R.4th 346.
82 C.J.S. Statutes § 315.

II. Contract.

Intent where written contract uncertain. - Where a written contract is uncertain or ambiguous, the intent of the parties may be ascertained by their language and conduct, the objects sought to be accomplished, and surrounding circumstances at the time of execution of the contract. Leonard v. Barnes, 75 N.M. 331, 404 P.2d 292 (1965).

Purchase order qualified as contract for sale of goods. State ex rel. Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc., 106 N.M. 539, 746 P.2d 645 (1987).

III. Security Interest.

When lease deemed security interest. - Where agreement provides that upon full payment of rentals lessee will become owner of property with no other or further consideration, this provision introduces an element under which an equity interest in the property is being created in lessee through payment of rentals. In accordance with the undisputed facts and language of the agreements the parties are deemed as a matter of law to have intended lease as one creating a security interest within the meaning of the code. Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970).

As intention of parties controls instrument. - Under general law, the character of the instrument is not to be determined by its form, but from the intention of the parties as shown by the contents of the instrument. Transamerica Leasing Corp. v. Bureau of Revenue, 80 N.M. 48, 450 P.2d 934 (Ct. App. 1969).

IV. Signed.

The requisites of an effective signature are liberal in scope. 1961-62 Op. Att'y Gen. No. 62-3.

Effect of lack of signature on purchase order. - Where purchase order was completely filled in with all relevant information regarding the backhoe to be purchased, including the full purchase price, approximate delivery date and purchaser's signature, the lack of the salesman's signature on the appropriate line did not negate present intention to authenticate the purchase order. Watson v. Tom Growney Equip., Inc., 104 N.M. 371, 721 P.2d 1302 (1986).

V. Written or Writing.

Making of instruments generally. - Instruments offered for filing are not required to be either made or written in ink or with an indelible pencil, but such may be either made or executed by lead pencil, or by any other methods of writing or execution. 1961-62 Op. Att'y Gen. No. 62-132.

VI. Buyer in Ordinary Course of Business.

The significance of being a buyer in the ordinary course of business is the acquisition of goods free of any outstanding claims from those who may be the true owners. Therefore, a buyer in the ordinary course of business is a privileged status that is conferred upon a purchaser, even against the true owners, if he meets the requirements of Paragraphs (9) and (19) of this section. Hunick v. Orona, 99 N.M. 306, 657 P.2d 633 (1983).

VII. Conspicuous.

When language on reverse of form is conspicuous. - Language which refers the reader to conditions or provisions on the reverse side of a form suffices to make the language referred to conspicuous. Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982).

VIII. Good Faith.

Elements of "good faith". - Nothing in the definition of "good faith" suggests that in addition to being honest, the creditor must exercise due care or reasonable commercial standards or lack of negligence to be in good faith. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978) (specially concurring opinion).

"Good faith" usually question of fact. - "Good faith" is not generally a question of law, but is usually a question of fact. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

IX. Holder.

Payee in possession of instrument. - A negotiable instrument payee is always a holder if the payee has the instrument in his possession, since the payee is the person to whom the instrument was issued. Edwards v. Mesch, 107 N.M. 704, 763 P.2d 1169 (1988).

Where issued cashier's check, bank not holder in due course upon subsequent presentment. - In issuing a cashier's check, a bank acts as both drawer and drawee, since a cashier's check constitutes a draft drawn by the bank upon itself, and upon the subsequent presentment of the check, the bank is not a holder in due course. Casarez v. Garcia, 99 N.M. 508, 660 P.2d 598 (Ct. App. 1983).

§ 55-1-202. Prima facie evidence by third-party documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

History: 1953 Comp., § 50A-1-202, enacted by Laws 1961, ch. 96, § 1-202.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is designed to supply judicial recognition for documents which have traditionally been relied upon as trustworthy by commercial men.

2. This section is concerned only with documents which have been given a preferred status by the parties themselves who have required their procurement in the agreement and for this reason the applicability of the section is limited to actions arising out of the contract which authorized or required the document. The documents listed are intended to be illustrative and not all inclusive.

3. The provisions of this section go no further than establishing the documents in question as prima facie evidence and leave to the court the ultimate determination of the facts where the accuracy or authenticity of the documents is questioned. In this connection the section calls for a commercially reasonable interpretation.

Definitional cross references."Bill of lading". Section 1-201.

"Contract". Section 1-201.

"Genuine". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 33. 32 C.J.S. Evidence § 733.

§ 55-1-203. Obligation of good faith.

Every contract or duty within this act [this chapter] imposes an obligation of good faith in its performance or enforcement.

History: 1953 Comp., § 50A-1-203, enacted by Laws 1961, ch. 96, § 1-203.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section sets forth a basic principle running throughout this act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. Particular applications of this general principle appear in specific provisions of the act such as the option to accelerate at will (Section 1-208), the right to cure a defective delivery of goods (Section 2-508), the duty of a merchant buyer who has rejected goods to effect salvage operations (Section 2-603), substituted performance (Section 2-614) and failure of presupposed conditions (Section 2-615). The concept, however, is broader than any of these illustrations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this act. It is further implemented by Section 1-205 on course of dealing and usage of trade.

It is to be noted that under the sales article definition of good faith (Section 2-103), contracts made by a merchant have incorporated in them the explicit standard not only of honesty in fact (Section 1-201), but also of observance by the merchant of reasonable commercial standards of fair dealing in the trade.

Cross references.Sections 1-201; 1-205; 1-208; 2-103; 2-508; 2-603; 2-614 and 2-615.

Definitional cross references."Contract". Section 1-201.

"Good faith". Sections 1-201 and 2-103.

ANNOTATION

Duty imposed on creditor under Subsection (1)(b) encompasses the good faith obligation to exercise reasonable means to protect the rights of guarantors, including timely perfecting of the security interest. American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975).

But negligence not deemed bad faith. - Although its omissions were negligent, creditor bank was not shown to have acted in bad faith where it believed, though mistakenly, that the security interest in the liquor license had been properly perfected when it was

filed with the alcoholic beverage control department. American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975).

When motivation behind cancelling contract immaterial. - The motivation of a party in cancelling a contract which by its terms is terminable at will by either party is immaterial. Smith v. Price's Creameries, 98 N.M. 541, 650 P.2d 825 (1982).

Law reviews. - For comment, "Commercial Law-Uniform Commercial Code-Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 26; 17 Am. Jur. 2d Contracts § 256; 69 Am. Jur. 2d Secured Transactions §§ 222, 286, 382, 628, 650.
Sufficiency of designation of debtor or secured party in security agreement of financing statement under UCC § 9-402, 99 A.L.R.3d 478.
Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 A.L.R.3d 1194.
17A C.J.S. Contracts § 494.

§ 55-1-204. Time; reasonable time; "seasonably."

(1) Whenever this act [this chapter] requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

History: 1953 Comp., § 50A-1-204, enacted by Laws 1961, ch. 96, § 1-204.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) recognizes that nothing is stronger evidence of a reasonable time than the fixing of such time by a fair agreement between the parties. However, provision is made for disregarding a clause which whether by inadvertence or overreaching fixes a time so unreasonable that it amounts to eliminating all remedy under the contract. The parties are not required to fix the most reasonable time but may fix any time which is not obviously unfair as judged by the time of contracting.

2. Under the section, the agreement which fixes the time need not be part of the main agreement, but may occur separately. Notice also that under the definition of "agreement" (Section 1-201) the circumstances of the transaction, including course of dealing or usages of trade or course of performance may be material. On the question what is a reasonable time these matters will often be important.

Definitional cross reference."Agreement". Section 1-201.

ANNOTATION

Reasonable to require loss claims to be made within two days. - In general, a contract provision requiring claims of loss to be made within two days of delivery is reasonable, lawful and not unconscionable. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Lessee held to have acted reasonably. - Where lessee wrote assigner of leases before the expiration of either lease, the manner in which lessee notified assignee of its election to purchase certain cranes and the presentment of full payment in fewer than 30 days from expiration of the leases, were acts done in a reasonable fashion, and certainly within a reasonable time, as required by the Uniform Commercial Code. Cranetex, Inc. v. Mountain Dev. Corp., 106 N.M. 5, 738 P.2d 123 (1987).

Law reviews. - For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M. L. Rev. 367 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 888. 86 C.J.S. Time § 8.

§ 55-1-205. Course of dealing and usage of trade.

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a

written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement, except that no security interest in farm products shall be considered waived by the secured party by any course of dealing between the parties or by any trade usage.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but, when such construction is unreasonable, express terms control both course of dealing and usage of trade, and course of dealing controls usage of trade. A security interest in farm products shall not be considered waived by the secured party by any course of dealing between the parties or by any trade usage.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

History: 1953 Comp., § 50A-1-205, enacted by Laws 1961, ch. 96, § 1-205; 1968, ch. 12, § 1.

OFFICIAL COMMENT

Prior uniform statutory provision. No such general provision but see Sections 9(1), 15(5), 18(2) and 71, Uniform Sales Act.

Purposes. This section makes it clear that:

1. This act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

2. Course of dealing under Subsection (1) is restricted, literally, to a sequence of conduct between the parties previous to the agreement. However, the provisions of the act on course of performance make it clear that a sequence of conduct after or under the agreement may have equivalent meaning. (Section 2-208.)

3. "Course of dealing" may enter the agreement either by explicit provisions of the agreement or by tacit recognition.

4. This act deals with "usage of trade" as a factor in reaching the commercial meaning of the agreement which the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. By adopting in this context the term "usage of trade" this act expresses its intent to reject those cases which see evidence of "custom" as representing an effort to displace or negate "established rules of law". A distinction is to be drawn between mandatory rules of law such as the statute of frauds provisions of Article 2 on sales whose very office is to control and restrict the actions of the parties, and which cannot be abrogated by agreement, or by a usage of trade, and those rules of law (such as those in Part 3 of Article 2 on sales) which fill in points which the parties have not considered and in fact agreed upon. The latter rules hold "unless otherwise agreed" but yield to the contrary agreement of the parties. Part of the agreement of the parties to which such rules yield is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.

5. A usage of trade under Subsection (2) must have the "regularity of observance" specified. The ancient English tests for "custom" are abandoned in this connection. Therefore, it is not required that a usage of trade be "ancient or immemorial", "universal" or the like. Under the requirement of Subsection (2) full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes.

6. The policy of this act controlling explicit unconscionable contracts and clauses (Sections 1-203 and 2-302) applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be "reasonable". However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

7. Subsection (3), giving the prescribed effect to usages of which the parties "are or should be aware", reinforces the provision of Subsection (2) requiring not universality but only the described "regularity of observance" of the practice or method. This subsection also reinforces the point of Subsection (2) that such usages may be either general to trade or particular to a special branch of trade.

8. Although the terms in which this act defines "agreement" include the elements of course dealing and usage of trade, the fact that express reference is made in some sections to those elements is not to be construed as carrying a contrary intent or

implication elsewhere. Compare Section 1-102(4).

9. In cases of a well established line of usage varying from the general rules of this act where the precise amount of the variation has not been worked out into a single standard, the party relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established. In case a dominant pattern has been fairly evidenced, the party relying on the usage is entitled under this section to go to the trier of fact on the question of whether such dominant pattern has been incorporated into the agreement.

10. Subsection (6) is intended to insure that this act's liberal recognition of the needs of commerce in regard to usage of trade shall not be made into an instrument of abuse.

Cross references.Point 1: Sections 1-203, 2-104 and 2-202.

Point 2: Section 2-208.

Point 4: Section 2-201 and Part 3 of Article 2.

Point 6: Sections 1-203 and 2-302.

Point 8: Sections 1-102 and 1-201.

Point 9: Section 2-204(3).

Definitional cross references."Agreement". Section 1-201.

"Contract". Section 1-201.

"Party". Section 1-201.

"Term". Section 1-201.

ANNOTATION

I. General Consideration.
II. Course Of Dealing.
III. Usage Of Trade.
IV. Modification Of Agreement.

I. General Consideration.

Cross-references. - As to applicability of supplementary general principles, see 55-1-103 NMSA 1978.

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 39, 63; 15A Am. Jur. 2d Commercial Code §§ 3, 28, 52; 68 Am. Jur. 2d Secured Transactions § 35; 69 Am. Jur. 2d Secured Transactions §§ 581, 619.
17A C.J.S. Contracts § 325; 25 C.J.S. Customs and Usages §§ 1, 14.

II. Course Of Dealing.

Establishes existence and terms of contract. - The course of conduct of the parties may not only establish the existence of a contract, but the terms as well. Terrel v. Duke City Lumber Co., 86 N.M. 405, 524 P.2d 1021 (Ct. App. 1974), rev'd on other grounds, 86 N.M. 299, 540 P.2d 229 (1975).

Where handbook controls contract. - Where undisputed evidence shows course of conduct that made handbook part of plaintiff's contract, handbook was treated as controlling the relationship between the university administration and its faculty, and failure of the university administration to follow procedures outlined therein constituted a breach of contract by the university. Hillis v. Meister, 82 N.M. 474, 483 P.2d 1314 (Ct. App. 1971).

Where the jury found that there was one continuing contract, not separate loans, then the furnishing of working capital may constitute a course of conduct. Terrel v. Duke City Lumber Co., 86 N.M. 405, 524 P.2d 1021 (Ct. App. 1974), rev'd on other grounds, 88 N.M. 299, 540 P.2d 229 (1975).

Terms of written contract may carry over into substantially identical oral contract. - Where, after a written contract is terminated, an oral contract is entered into, and where there is a course of dealing for a number of years under the oral contract, which is identical in all respects other than to whom payment would be made, the provisions of which are fully known to and understood by the buyer, who has the obligation to give timely notice or waive any and all claims, the terms of the written contract carry over into the oral arrangement. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Express terms control where irreconcilable with course of dealing. - Where the express terms of a contract cannot be reconciled with an established course of dealing, the express terms control. Celebrity, Inc. v. Kemper, 96 N.M. 508, 632 P.2d 743 (1981).

III. Usage Of Trade.

Use to determine meaning of contract. - It is proper for a trial court, having found an ambiguity to exist, to consider evidence relating to custom and usage of trade, in determining the meaning to be given a contract. Major v. Bishop, 462 F.2d 1277 (10th Cir. 1972).

IV. Modification Of Agreement.

Consent by implication. - Consent can be established by implication arising from a course of conduct as well as by express words, and implied consent to a sale of collateral can operate as a waiver of a lien or security interest in farm products, even where security agreement prohibited such sale without express written consent of secured party. Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967) (decided prior to 1968 amendment which added the exception clause at the end of Subsection (3) and added the second sentence to Subsection (4)).

Law reviews. - Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), commented on in 8 Nat. Resources J. 183 (1968).

§ 55-1-206. Statute of frauds for kinds of personal property not otherwise covered.

(1) Except in the cases described in Subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars [($5,000)] in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter and is signed by the party against whom enforcement is sought or by his authorized agent.

(2) Subsection (1) of this section does not apply to contracts for the sale of goods (Section 2-201 [55-2-201 NMSA 1978]) nor of securities (Section 8-319 [55-8-319 NMSA 1978]) nor to security agreements (Section 9-203 [55-9-203 NMSA 1978]).

History: 1953 Comp., § 50A-1-206, enacted by Laws 1961, ch. 96, § 1-206.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 4, Uniform Sales Act (which was based on Section 17 of the Statute of 29 Charles II).

Changes. Completely rewritten by this and other sections.

Purposes. To fill the gap left by the statute of frauds provisions for goods (Section 2-201), securities (Section 2-319) and security interests (Section 9-203). The Uniform Sales Act covered the sale of "choses in action"; the principal gap relates to sale of the "general intangibles" defined in Article 9 (Section 9-106) and to transactions excluded from Article 9 by Section 9-104. Typical are the sale of bilateral contracts, royalty rights or the like. The informality normal to such transactions is recognized by lifting the limit for oral transactions to $5,000. In such transactions there is often no standard of practice by which to judge, and values can rise or drop without warning; troubling abuses are avoided when the dollar limit is exceeded by requiring that the subject-matter be reasonably identified in a signed writing which indicates that a contract for sale has been made at a defined or stated price.

Definitional cross references."Action". Section 1-201.

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Sale". Section 2-106.

"Signed". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Statute of frauds has no application where there has been a full and complete performance of the contract by one of the contracting parties, and the party so performing may sue on the contract in a court of law, particularly where the agreement has been completely performed as to the part thereof which comes within the provisions of the statute, and the part remaining to be performed is merely the payment of money. Boggs v. Anderson, 72 N.M. 136, 381 P.2d 419 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 37, 114; 69 Am. Jur. 2d Secured Transactions § 445; 72 Am. Jur. 2d Statute of Frauds §

130.
37 C.J.S. Frauds, Statute of § 138.

§ 55-1-207. Performance or acceptance under reservation of rights.

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.

History: 1953 Comp., § 50A-1-207, enacted by Laws 1961, ch. 96, § 1-207.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance or payment "without prejudice," "under protest," "under reserve," "with reservation of all our rights" and the like. All of these phrases completely reserve all rights within the meaning of this section. The section therefore contemplates that limited as well as general reservations and acceptance by a party may be made "subject to satisfaction of our purchaser," "subject to acceptance by our customers" or the like.

2. This section does not add any new requirement of language of reservation where not already required by law, but merely provides a specific measure on which a party can rely as he makes or concurs in any interim adjustment in the course of performance. It does not affect or impair the provisions of this act such as those under which the buyer's remedies for defect survive acceptance without being expressly claimed if notice of the defects is given within a reasonable time. Nor does it disturb the policy of those cases which restrict the effect of a waiver of a defect to reasonable limits under the circumstances, even though no such reservation is expressed.

The section is not addressed to the creation or loss of remedies in the ordinary course of performance but rather to a method of procedure where one party is claiming as of right something which the other feels to be unwarranted.

Cross reference.Section 2-607.

Definitional cross references."Party". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Law reviews. - For comment, "Commercial Law-Uniform Commercial Code-Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 34; 17 Am. Jur. 2d Contracts § 390.
Application of U.C.C. § 1-207 to avoid discharge of disputed claim upon qualified acceptance of check tendered as payment in full, 37 A.L.R.4th 358.
17A C.J.S. Contracts §§ 491, 506, 514; 31 C.J.S. Estoppel § 113.

§ 55-1-208. Option to accelerate at will.

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

History: 1953 Comp., § 50A-1-208, enacted by Laws 1961, ch. 96, § 1-208.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The increased use of acceleration clauses either in the case of sales on credit or in time paper or in security transactions has led to some confusion in the cases as to the effect to be given to a clause which seemingly grants the power of an acceleration at the whim and caprice of one party. This section is intended to make clear that despite language which can be so construed and which further might be held to make the agreement void as against public policy or to make the contract illusory or too indefinite for enforcement, the lause means that the option is to be exercised only in the good faith belief that the prospect of payment or performance is impaired.

Obviously this section has no application to demand instruments or obligations whose very nature permits call at any time with or without reason. This section applies only to an agreement or to paper which in the first instance is payable at a future date.

Definitional cross references."Burden of establishing". Section 1-201.

"Good faith". Section 1-201.

"Party". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Compiler's note. - New Mexico did not adopt 1-209 of the U.C.C., added in 1968, relating to subordination of obligations.

This section has dual elements of whether (1) a reasonable man would have accelerated the debt under the circumstances, and (2) whether the creditor acted in good faith. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978) (specially concurring opinion).

Need for good faith. - The holder of a note may accelerate payment only if he, in good faith, believes that the prospect of payment is impaired. The burden, however, of establishing lack of good faith is on the party against whom the power has been exercised. Merchant v. Worley, 79 N.M. 771, 449 P.2d 787 (Ct. App. 1969).

Elements of "good faith". - Nothing in the definition of "good faith" suggests that in addition to being honest, the creditor must exercise due care or reasonable commercial standards or lack of negligence to be in good faith. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978) (specially concurring opinion).

Use of expert opinion to assist trier of fact in determining "good faith". - By using a "good faith belief" doctrine, the main problem to solve is how a trier of fact can obtain knowledge of the minds of others, as this knowledge can only be obtained from perceptible manifestations in speech, conduct and behavior of a person, or reasonable inferences to be drawn therefrom, and it is foreseeable that an expert opinion may be necessary to assist the trier of the fact. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978) (specially concurring opinion).

Default clauses conditioned upon occurrence within debtor's control distinguishable. - Whether the acceleration of the balance due on a note is predicated on "good faith" depends on this section, which deals with what are referred to as "at will" or "when he deems himself insecure" creditor option clauses. However, those clauses are distinguishable from default-type clauses where the right to accelerate is conditioned upon the occurrence of a condition which is within the control of the debtor. Brummund v. First Nat'l Bank, 99 N.M. 221, 656 P.2d 884 (1983).

Application of burden of proof. - The burden of proof set out in this section applies to a directed verdict and not to a motion on summary judgment. The burden of proof applies to the quantum of evidence and sufficiency of proof as to the lack of good faith after all the evidence is before the court. McKay v. Farmers & Stockmens Bank, 92 N.M. 181, 585 P.2d 325 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Law reviews. - For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 186; 15A Am. Jur. 2d Commercial Code § 35; 69 Am. Jur. 2d Secured Transactions §§ 257, 323 to 325, 327, 567, 590.
Provision for acceleration on death as affecting instrument's character and validity as a contract, 1 A.L.R.2d 1206.
What is essential to exercise of option to accelerate maturity of bill or note, 5 A.L.R.2d 968.
17 C.J.S. Contracts § 358.

Article 2

Sales

Part 1

Short Title, General Construction and Subject Matter

Sec.
55-2-101. Short title.
55-2-102. Scope; certain security and other transactions excluded from this article.
55-2-103. Definitions and index of definitions.
55-2-104. Definitions: "merchant"; "between merchants"; "financing agency."
55-2-105. Definitions: transferability; "goods"; "future" goods; "lot"; "commercial unit."
55-2-106. Definitions: "contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation."
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Part 2

Form, Formation and Readjustment of Contract

55-2-201. Formal requirements; statute of frauds.
55-2-202. Final written expression; parol or extrinsic evidence.
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Part 3

General Obligation and Construction of Contract

Part 4

Title, Creditors And Good Faith Purchasers

Part 5

Performance

Part 6

Breach, Repudiation And Excuse

Part 7

Remedies

Part 1

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

§ 55-2-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code-Sales.

History: 1953 Comp., § 50A-2-101, enacted by Laws 1961, ch. 96, § 2-101.

OFFICIAL COMMENT

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 64 Am. Jur. 2d Public Works and Contracts § 18; 67 Am. Jur. 2d Sales § 1 et seq.
Applicability of U.C.C. Article 2 to mixed contracts for sale of goods and services, 5

A.L.R.4th 501.
82 C.J.S. Statutes § 221.

§ 55-2-102. Scope; certain security and other transactions excluded from this article.

Unless the context otherwise requires, this article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or [a] present sale is intended to operate only as a security transaction nor does this article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

History: 1953 Comp., § 50A-2-102, enacted by Laws 1961, ch. 96, § 2-102.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 75, Uniform Sales Act.

Changes. Section 75 has been rephrased.

Purposes of changes and new matter. To make it clear that:

The article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions. "Security transaction" is used in the same sense as in the article on secured transactions (Article 9).

Cross reference.Article 9.

Definitional cross references."Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Present sale". Section 2-106.

"Sale". Section 2-106.

ANNOTATION

Scope of article. - Court can find nothing in the pertinent code provisions or comments to indicate that it is not to apply to all sales of goods. Foster v. Colorado Radio Corp. 381 F.2d 222 (10th Cir. 1967).

Sale of crude oil by the producers is a sale of goods, and is thus governed by Article 2 of the code. Amoco Pipeline Co. v. Admiral Crude Oil Corp. 490 F.2d 114 (10th Cir.

1974).

A business may be sold in which all the assets aside from goodwill would be goods, and nonapplication of the code to the sale of goods in such a case is contrary to the intention of the drafters. Foster v. Colorado Radio Corp. 381 F.2d 222 (10th Cir. 1967).

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," see 8 Nat. Resources J. 176 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 8, 94, 105; 69 Am. Jur. 2d Secured Transactions § 289.
Validity and mutuality of agreement to buy where there is no express agreement to sell, 60 A.L.R. 215.
Violation of statute as to form of, or terms to be included in, conditional sale contract, as invalidating entire transaction or merely its effect to reserve title in vendor, 144 A.L.R. 1103.
Use of conditional sale contract to secure debt in addition to the purchase price, 148 A.L.R. 346.
Conflict of laws as to conditional sale of chattels, 148 A.L.R. 375; 13 A.L.R.2d 1312.
What amounts to conditional sale, 175 A.L.R. 1366.
Title to unknown valuables secreted in articles sold, 4 A.L.R.2d 318.
Sufficiency of notice of claim for damages for breach of warranty, 53 A.L.R.2d 271.
Applicability of Uniform Sales Act and Uniform Commercial Code to contract between grower of vegetable or fruit crops and purchasing processor, packer or canner, 87 A.L.R.2d 739.
What constitutes a transaction, a contract for sale, or a sale within the scope of UCC Article 2, 4 A.L.R.4th 85.
Applicability of UCC Article 2 to mixed contracts for sale of goods and services, 5 A.L.R.4th 501.
77 C.J.S. Sales § 1.

§ 55-2-103. Definitions and index of definitions.

(1) In this article unless the context otherwise requires:

(a) "buyer" means a person who buys or contracts to buy goods;

(b) "good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade;

(c) "receipt" of goods means taking physical possession of them;

(d) "seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this article or to specified parts thereof, and the sections

in which they appear are:

"acceptance." Section 2-606 [55-2-606 NMSA 1978];

"banker's credit." Section 2-325 [55-2-325 NMSA 1978];

"between merchants." Section 2-104 [55-2-104 NMSA 1978];

"cancellation." Section 2-106 (4) [55-2-106 NMSA 1978];

"commercial unit." Section 2-105 [55-2-105 NMSA 1978];

"confirmed credit." Section 2-325 [55-2-325 NMSA 1978];

"conforming to contract." Section 2-106 [55-2-106 NMSA 1978];

"contract for sale." Section 2-106 [55-2-106 NMSA 1978];

"cover." Section 2-712 [55-2-712 NMSA 1978];

"entrusting." Section 2-403 [55-2-403 NMSA 1978];

"financing agency." Section 2-104 [55-2-104 NMSA 1978];

"future goods." Section 2-105 [55-2-105 NMSA 1978];

"goods." Section 2-105 [55-2-105 NMSA 1978];

"identification." Section 2-501 [55-2-501 NMSA 1978];

"installment contract." Section 2-612 [55-2-612 NMSA 1978];

"letter of credit." Section 2-325 [55-2-325 NMSA 1978];

"lot." Section 2-105 [55-2-105 NMSA 1978];

"merchant." Section 2-104 [55-2-104 NMSA 1978];

"overseas." Section 2-323 [55-2-323 NMSA 1978];

"person in position of a seller." Section 2-707 [55-2-707 NMSA 1978];

"present sale." Section 2-106 [55-2-106 NMSA 1978];

"sale." Section 2-106 [55-2-106 NMSA 1978];

"sale on approval." Section 2-326 [55-2-326 NMSA 1978];

"sale or return." Section 2-326 [55-2-326 NMSA 1978];

"termination." Section 2-106 [55-2-106 NMSA 1978].

(3) The following definitions in other articles apply to this article:

"check." Section 3-104 [55-3-104 NMSA 1978];

"consignee." Section 7-102 [55-7-102 NMSA 1978];

"consignor." Section 7-102 [55-7-102 NMSA 1978];

"consumer goods." Section 9-109 [55-9-109 NMSA 1978];

"dishonor." Section 3-507 [55-3-507 NMSA 1978];

"draft." Section 3-104 [55-3-104 NMSA 1978].

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

History: 1953 Comp., § 50A-2-103, enacted by Laws 1961, ch. 96, § 2-103.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsection (1): Section 76, Uniform Sales Act.

Changes.The definitions of "buyer" and "seller" have been slightly rephrased, the reference in Section 76 of the prior act to "any legal successor in interest of such person" being omitted. The definition of "receipt" is new.

Purposes of changes and new matter.1. The phrase "any legal successor in interest of such person" has been eliminated since Section 2-210 of this article, which limits some types of delegation of performance on assignment of a sales contract, makes it clear that not every such successor can be safely included in the definition. In every ordinary case, however, such successors are as of course included.

2. "Receipt" must be distinguished from delivery particularly in regard to the problems arising out of shipment of goods, whether or not the contract calls for making delivery by way of documents of title, since the seller may frequently fulfill his obligations to "deliver" even though the buyer may never "receive" the goods. Delivery with respect to documents of title is defined in Article 1 and requires transfer of physical delivery. Otherwise the many divergent incidents of delivery are handled incident by incident.

Cross references.Point 1: See Section 2-210 and Comment thereon.

Point 2: Section 1-201.

Definitional cross reference."Person". Section 1-201.

ANNOTATION

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 39. 77 C.J.S. Sales § 1; 82 C.J.S. Statutes § 315.

§ 55-2-104. Definitions: "merchant"; "between merchants"; "financing agency."

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for

collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2-707 [55-2-707 NMSA 1978]).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

History: 1953 Comp., § 50A-2-104, enacted by Laws 1961, ch. 96, § 2-104.

OFFICIAL COMMENT

Prior uniform statutory provision. None. But see Sections 15(2), (5), 16(c), 45(2) and 71, Uniform Sales Act, and Sections 35 and 37, Uniform Bills of Lading Act for examples of the policy expressly provided for in this article.

Purposes.1. This article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. It thus adopts a policy of expressly stating rules applicable "between merchants" and "as against a merchant", wherever they are needed instead of making them depend upon the circumstances of each case as in the statutes cited above. This section lays the foundation of this policy by defining those who are to be regarded as professionals or "merchants" and by stating when a transaction is deemed to be "between merchants".

2. The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

The special provisions as to merchants appear only in this article and they are of three kinds. Sections 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . ." since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants". But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant.

On the other hand, in Section 2-314 on the warranty of merchantability, such warranty is

implied only "if the seller is a merchant with respect to goods of that kind". Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods. The exception in Section 2-402(2) for retention of possession by a merchant-seller falls in the same class; as does Section 2-403(2) on entrusting of possession to a merchant "who deals in goods of that kind."

A third group of sections includes 2-103(1) (b), which provides that in the case of a merchant "good faith" includes observance of reasonable commercial standards of fair dealing in the trade; 2-327(1) (c), 2-603 and 2-605, dealing with responsibilities of merchant buyers to follow seller's instructions, etc.; 2-509 on risk of loss, and 2-609 on adequate assurance of performance. This group of sections applies to persons who are merchants under either the "practices" or the "goods" aspect of the definition of merchant.

3. The "or to whom such knowledge or skill may be attributed by his employment of an agent or broker . . ." clause of the definition of merchant means that even persons such as universities, for example, can come within the definition of merchant if they have regular purchasing departments or business personnel who are familiar with business practices and who are equipped to take any action required.

Cross references.Point 1: See Sections 1-102 and 1-203.

Point 2: See Sections 2-314, 2-315 and 2-320 to 2-325, of this article, and article 9.

Definitional cross references."Bank". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Goods". Section 2-105.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Rancher deemed merchant. - Rancher, who is a trader, buying and selling and acting as agent for sales of cow and calf units, as well as steers, heifers, feeders and other "goods," is a merchant under this section. Fear Ranches, Inc. v. Berry, 470 F.2d 905 (10th Cir. 1972).

But not on first sale. - Rancher, who had theretofore sold all cattle he raised or fed to packers, was not a merchant in first sale to a nonpacker. Fear Ranches, Inc. v. Berry, 470 F.2d 905 (10th Cir. 1972).

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Farmers as "merchants" within provisions of U.C.C. Article 2 dealing with sales, 95 A.L.R.3d 484.
77 C.J.S. Sales § 1; 82 C.J.S. Statutes § 315.

§ 55-2-105. Definitions: transferability; "goods"; "future" goods; "lot"; "commercial unit."

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107 [55-2-107 NMSA 1978]).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale 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 an assortment of sizes) or a quantity (as a bale, gross or carload) or any other unit treated in use or in the relevant market as a single whole.

History: 1953 Comp., § 50A-2-105, enacted by Laws 1961, ch. 96, § 2-105.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsections (1), (2), (3) and (4) - Sections 5, 6 and 76, Uniform Sales Act; Subsections (5) and (6) - none.

Changes. Rewritten.

Purposes of changes and new matter.1. Subsection (1) on "goods": The phraseology of the prior uniform statutory provision has been changed so that:

The definition of goods is based on the concept of movability and the term "chattels personal" is not used. It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.

Growing crops are included within the definition of goods since they are frequently intended for sale. The concept of "industrial" growing crops has been abandoned, for under modern practices fruit, perennial hay, nursery stock and the like must be brought within the scope of this article. The young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period of gestation of domestic animals is such that the provisions of the section on identification can apply as in the case of crops to be planted. The reason of this definition also leads to the inclusion of a wool crop or the like as "goods" subject to identification under this article.

The exclusion of "money in which the price is to be paid" from the definition of goods does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.

As to contracts to sell timber, minerals or structures to be removed from the land Section 2-107(1) (Goods to be severed from Realty: recording) controls.

The use of the word "fixtures" is avoided in view of the diversity of definitions of that term. This article in including within its scope "things attached to realty" adds the further test that they must be capable of severance without material harm thereto. As between the parties any identified things which fall within that definition become "goods" upon the

making of the contract for sale.

"Investment securities" are expressly excluded from the coverage of this article. It is not intended by this exclusion, however, to prevent the application of a particular section of this article by analogy to securities (as was done with the Original Sales Act in Agar v. Orda, 264 N.Y. 248, 190 N.E. 479, 99 A.L.R. 269 (1934)) when the reason of that section makes such application sensible and the situation involved is not covered by the article of this act dealing specifically with such securities (Article 8).

2. References to the fact that a contract for sale can extend to future or contingent goods and that ownership in common follows the sale of a part interest have been omitted here as obvious without need for expression; hence no inference to negate these principles should be drawn from their omission.

3. Subsection (4) does not touch the question of how far an appropriation of a bulk of fungible goods may or may not satisfy the contract for sale.

4. Subsections (5) and (6) on "lot" and "commercial unit" are introduced to aid in the phrasing of later sections.

5. The question of when an identification of goods takes place is determined by the provisions of Section 2-501 and all that this section says is what kinds of goods may be the subject of a sale.

Cross references.Point 1: Sections 2-107, 2-201, 2-501 and Article 8.

Point 5: Section 2-501.

See also Section 1-201.

Definitional cross references."Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Fungible". Section 1-201.

"Money". Section 1-201.

"Present sale". Section 2-106.

"Sale". Section 2-106.

"Seller". Section 2-103.

ANNOTATION

A sale of ski lifts is a sale of goods as defined by this section. Riblet Tramway Co. v. Monte Verde Corp. 453 F.2d 313 (10th Cir. 1972).

Sale of crude oil by producers is a sale of goods, and is governed by Article 2 of the code. Amoco Pipeline Co. v. Admiral Crude Oil Corp. 490 F.2d 114 (10th Cir. 1974).

But not immovables. - Radio license, goodwill, real estate, studios and transmission equipment are not movables and hence not "goods" within the meaning of this section. Foster v. Colorado Radio Corp. 381 F.2d 222 (10th Cir. 1967).

The term "goods" includes livestock, since they are frequently intended for commercial sale. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Boat is considered "goods" within this chapter. Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," see 8 Nat. Resources J. 176 (1968).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Mutuality and enforceability of contracts to furnish another with his needs, wants, desires, requirements, etc., of certain commodities, 14 A.L.R. 1300; 26 A.L.R. 2d 1139.
Substantial performance of contract for manufacture or sale of article, 19 A.L.R. 815.
Validity and construction of contract for sale of season's output, 23 A.L.R. 574.
Seller's estoppel to deny existence of property sold, 40 A.L.R. 382.
Contract of sale which calls for a definite quantity but leaves a quality, grade or assortment optional with one of the parties as subject to objection of indefiniteness, 105 A.L.R. 1283.
Construction and effect of contract for sale of commodity or goods where quantity is described as "about" or "more or less" than an amount specified, 58 A.L.R. 2d 377.
What constitutes "goods" within the scope of UCC Article 2, 4 A.L.R.4th 912.
Applicability of UCC Article 2 to mixed contracts for sale of goods and services, 5 A.L.R.4th 501.
Conveyance of land as including mature but unharvested crops, 51 A.L.R.4th 1263.
77 C.J.S. Sales §§ 1, 13; 82 C.J.S. Statutes § 315.

§ 55-2-106. Definitions: "contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation."

(1) In this article unless the context otherwise requires "contract" and "agreement" are

limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2-401 [55-2-401 NMSA 1978]). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

History: 1953 Comp., § 50A-2-106, enacted by Laws 1961, ch. 96, § 2-106.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsection (1) - Section 1 (1) and (2), Uniform Sales Act; Subsection (2) - none, but subsection generally continues policy of Sections 11, 44 and 69, Uniform Sales Act; Subsections (3) and (4) - none.

Changes. Completely rewritten.

Purposes of changes and new matter.1. Subsection (1): "Contract for sale" is used as a general concept throughout this article, but the rights of the parties do not vary according to whether the transaction is a present sale or a contract to sell unless the article expressly so provides.

2. Subsection (2): It is in general intended to continue the policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance. However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer's part by the provisions of Section 2-508 on seller's cure of improper tender or delivery. Moreover usage of trade frequently permits commercial leeways in performance and the language of the agreement itself must be read in the light of such custom or usage and also, prior course of dealing, and in a long term contract, the course of performance.

3. Subsections (3) and (4): These subsections are intended to make clear the distinction carried forward throughout this article between termination and cancellation.

Cross references.Point 2: Sections 1-203, 1-205, 2-208 and 2-508.

Definitional cross references."Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

A sale implies seller's ownership of the thing sold as well as the passing of title therein to the buyer. Valdez v. Garcia, 79 N.M. 500, 445 P.2d 103 (Ct. App.), cert. denied, 79 N.M. 449, 444 P.2d 776 (1968).

Agreement, that discount on merchandise applicable for certain time, not contract for sale. - An agreement requiring that a certain number of computers must be purchased by a certain time in order for a discount to apply was not a contract for sale, where no title was passed for a price and there was no requirement to purchase even one computer. Data Gen. Corp. v. Communications Diversified, Inc., 105 N.M. 59, 728 P.2d 469 (1986).

Continued liability on purchase agreement. - Where the purchase agreement was not an executory document, failure to make any of the subsequent payments after the deposit does not render it executory and appellant is still liable for the appropriate tax. Garfield Mines Ltd. v. O'Cheskey, 85 N.M. 547, 514 P.2d 304 (Ct. App. 1973).

Reasonable to require loss claims to be made within two days. - In general, a contract provision requiring claims of loss to be made within two days of delivery is reasonable, lawful and not unconscionable. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Distributorship agreements. - The purpose of distributorship agreements is to provide a contract for the sale of a product from a manufacturer at wholesale prices that is to be marketed in a specific area by the distributor. As such, a distributorship agreement should be subject to the provisions of the UCC. United Whsle. Liquor Co. v. Brown-Forman Distillers Corp., 108 N.M. 467, 775 P.2d 233 (1989).

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 39, 73, 90, 113, 114; 68 Am. Jur. 2d Secured Transactions § 8.
Validity and construction of contract for sale of season's output, 1 A.L.R. 1392; 9 A.L.R. 276; 23 A.L.R. 574.
Contract for sale of goods as entire or divisible, 2 A.L.R. 643.
Divisibility of contract for the sale of an outfit, plant or machinery, 4 A.L.R. 1442.
Passing of title to personal property under a contract of sale, as affected by fact that contract covers both real and personal property, 117 A.L.R. 395.
What constitutes a transaction, a contract for sale, or a sale within the scope of UCC Article 2, 4 A.L.R.4th 85.
Applicability of UCC Article 2 to mixed contracts for sale of goods and services, 5 A.L.R.4th 501.
77 C.J.S. Sales § 2.

§ 55-2-107. Goods to be severed from realty; recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in Subsection (1) or of timber to be cut is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

History: 1953 Comp., § 50A-2-107, enacted by Laws 1961, ch. 96, § 2-107; 1985, ch. 193, § 3.

OFFICIAL COMMENT

Prior uniform statutory provision. See Section 76, Uniform Sales Act on prior policy and Section 7, Uniform Conditional Sales Act.

2. Subsection (2). "Things attached" to the realty which can be severed without material harm are goods within this article regardless of who is to effect the severance. The word "fixtures" has been avoided because of the diverse definitions of this term, the test of "severance without material harm" being substituted.

The provision in Subsection (3) for recording such contracts is within the purview of this article since it is a means of preserving the buyer's rights under the contract of sale.

3. The security phases of things attached to or to become attached to realty are dealt with in the article on secured transactions (Article 9) and it is to be noted that the definition of goods in that article differs from the definition of goods in this article.

However, both articles treat as goods growing crops and also timber to be cut under a contract of severance.

Cross references.Point 1: Section 2-201.

Point 2: Section 2-105.

Point 3: Articles 9 and 9-105.

Definitional cross references."Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Present sale". Section 2-106.

"Rights". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

The 1985 amendment deleted "timber," preceding "minerals" and inserted "(including oil and gas)" near the beginning of Subsection (1), inserted "or of timber to be cut" following "Subsection (1)" near the middle of Subsection (2), and made minor grammatical changes.

Effective dates. - Laws 1985, ch. 193, § 38 makes the act effective on January 1, 1986.

Immovables not "goods". - Radio license, goodwill, real estate, studios and transmission equipment are not movables and hence not "goods" within the meaning of this section. Foster v. Colorado Radio Corp. 381 F.2d 222 (10th Cir. 1967).

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," see 8 Nat. Resources J. 176 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 141, 150, 163; 72 Am. Jur. 2d Statute of Frauds § 143.
What constitutes "goods" within the scope of UCC Article 2, 4 A.L.R.4th 912.
77 C.J.S. Sales § 13.

Part 2

FORM, FORMATION AND READJUSTMENT OF CONTRACT

§ 55-2-201. Formal requirements; statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in conformation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which 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 for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or

otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-606 [55-2-606 NMSA 1978]).

History: 1953 Comp., § 50A-2-201, enacted by Laws 1961, ch. 96, § 2-201.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 4, Uniform Sales Act (which was based on Section 17 of the Statute of 29 Charles II).

Changes. Completely rephrased; restricted to sale of goods. See also Sections 1-206, 8-319 and 9-203.

Purposes of changes. The changed phraseology of this section is intended to make it clear that:

1. The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term even where the parties have contracted on the basis of a published price list. In many valid contracts for sale the parties do not mention the price in express terms, the buyer being bound to pay and the seller to accept a reasonable price which the trier of the fact may well be trusted to determine. Again, frequently the price is not mentioned since the parties have based their agreement on a price list or catalogue known to both of them and this list serves as an efficient safeguard against perjury. Finally, "market" prices and valuations that are current in the vicinity constitute a similar check. Thus if the price is not stated in the memorandum it can normally be supplied without danger of fraud. Of course if the "price" consists of goods rather than money the quantity of goods must be stated.

Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be "signed", a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

2. "Partial performance" as a substitute for the required memorandum can validate the

contract only for the goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods. The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.

Part performance by the buyer requires the delivery of something by him that is accepted by the seller as such performance. Thus, part payment may be made by money or check, accepted by the seller. If the agreed price consists of goods or services, then they must also have been delivered and accepted.

3. Between merchants, failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under Subsection (2) and is sufficient against both parties under Subsection (1). The only effect, however, is to take away from the party who fails to answer the defense of the statute of frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected. Compare the effect of a failure to reply under Section 2-207.

4. Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract. For example, a buyer who takes possession of goods as provided in an oral contract which the seller has not meanwhile repudiated, is not a trespasser. Nor would the statute of frauds provisions of this section be a defense to a third person who wrongfully induces a party to refuse to perform an oral contract, even though the injured party cannot maintain an action for damages against the party so refusing to perform.

5. The requirement of "signing" is discussed in the comment to Section 1-201.

6. It is not necessary that the writing be delivered to anybody. It need not be signed or authenticated by both parties but it is, of course, not sufficient against one who has not signed it. Prior to a dispute no one can determine which party's signing of the memorandum may be necessary but from the time of contracting each party should be aware that to him it is signing by the other which is important.

7. If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection against fraud. Under this section it is no longer possible to admit the contract in court and still treat the statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against

him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

Cross references.See Sections 1-201, 2-202, 2-207, 2-209 and 2-304.

Definitional cross references."Action". Section 1-201.

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Notice". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Sale". Section 2-106.

"Seller". Section 2-103.

ANNOTATION

Statute of frauds generally. - A promise to discharge a debt, made to a debtor for adequate consideration by one not liable for the existing debt, is not a promise to answer for the debt of another within the meaning of the statute of frauds. Banes Agency v. Chino, 60 N.M. 297, 291 P.2d 328 (1955) (decided under former law).

Terms of written contract may carry over into substantially identical oral contract. - Where, after a written contract is terminated, an oral contract is entered into, and where there is a course of dealing for a number of years under the oral contract, which is identical in all respects other than to whom payment would be made, the provisions of which are fully known to and understood by the buyer, who has the obligation to give timely notice or waive any and all claims, the terms of the written contract carry over into the oral arrangement. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 29, 115; 67 Am. Jur. 2d Sales §§ 30, 102 to 139, 180 to 207; 72 Am. Jur. 2d Statute of Frauds §§ 129 to 131, 138, 140, 143, 146, 147, 285, 295, 301, 340, 342, 343, 366; 73 Am. Jur. 2d Statute of Frauds §§ 513, 574, 589.
Contract for sale of goods as entire or divisible, 2 A.L.R. 643.
When goods remaining in custody of seller or some third person deemed received by buyer within exception to statute, 4 A.L.R. 902.
Divisibility of contract for the sale of an outfit, plant or machinery, 4 A.L.R. 1442.
Trade custom or usage to explain or supply essential terms in writing required by statute of frauds (or Sales Act) in sale of goods, 29 A.L.R. 1218.
Mutuality and enforceability of an agreement upon the sale of goods, to give the purchaser an option or the exclusive sale of similar goods without a corresponding obligation on his part, 45 A.L.R. 1197.
Oral contract to enter into written contract as within statute of frauds, 58 A.L.R. 1015.
Contracts relating to corporate stock as within provisions of statute of frauds dealing with sales of goods, etc., 59 A.L.R. 597.
Doctrine of part performance as sustaining action at law based on contract within statute of frauds, 59 A.L.R. 1305.
Necessity and sufficiency of statement in writing of consideration or price for sale of goods or choses in action in order to satisfy statute of frauds, 59 A.L.R. 1422.
Sufficiency of identification of vendor or purchaser in memorandum, 70 A.L.R. 196.
Failure to comply with statute of frauds as to part of a contract within the statute as affecting the enforceability of another part not covered by the statute, 71 A.L.R. 479.
Reformation of memorandum relied upon to take an oral contract out of the statute of frauds, 73 A.L.R. 99.
Extrinsic writing referred to in written agreement as part thereof for purposes of statute of frauds, 73 A.L.R. 1383.
Effect of statute of frauds on right to modify by parol agreement required to be in writing, 80 A.L.R. 539; 118 A.L.R. 1511.
Necessity that each of several papers constituting contract be signed by party to be charged, 85 A.L.R. 1184.
Admission of contract by defendant as affecting sufficiency of acts relied on to constitute part performance under statute of frauds, 90 A.L.R. 231.
Dealings between seller and buyer after latter's knowledge of former's fraud as waiver of claim for damages on account of fraud, 106 A.L.R. 172.
Construction and application of Uniform Sales Act, other than Section 4 relating to statute of frauds, as regards distinction between contract of sale and contract for work or labor, 111 A.L.R. 341.
Acceptance satisfying statute where purchaser in possession at time of sale, 111 A.L.R. 1312.
Writing between one of the parties to a contract and his agent or a third person as satisfying statute of frauds, 112 A.L.R. 490.
Place of signature on memorandum to satisfy statute of frauds, 112 A.L.R. 937.

Acceptance which will take oral sale or contract for sale out of statute of frauds as affected by cancellation of order or repudiation of contract before goods were shipped or delivered to buyer, 113 A.L.R. 810.
Relation between doctrines of estoppel and part performance as basis of enforcement of contract not conforming to the statute of frauds, 117 A.L.R. 939.
Statute of frauds as applied to agreements of repurchase or repayment on sale of corporate stock or other personal property, 121 A.L.R. 312.
Public record as satisfying requirement of statute of frauds as to written contract or memorandum, 127 A.L.R. 236.
Terms "bags," "bales," "cars" or other terms indefinite as to quantity or weight as satisfying statute of frauds, 129 A.L.R. 1230.
Money in possession of seller before contract was made as part payment, 131 A.L.R. 1252; 170 A.L.R. 245.
Check or note as memorandum satisfying statute of frauds, 153 A.L.R. 1112.
Contract to fill in land as one for sale of goods within statute of frauds, 161 A.L.R. 1158.
Printed, stamped or typewritten name as satisfying requirement of statute of frauds as regards signature, 171 A.L.R. 334.
Oral contracts of sale not to be performed within a year as taken out of statute of frauds by performance, 6 A.L.R. 2d 1108.
Check as payment within contemplation of statute of frauds, 8 A.L.R.2d 251.
Sale of contractual rights; defect in written record as ground for avoiding sale, 10 A.L.R.2d 728.
Undelivered lease or contract (other than for sale of land), or undelivered memorandum thereof, as satisfying statute of frauds, 12 A.L.R.2d 508.
Agency to purchase personal property for another as within statute of frauds, 20 A.L.R.2d 1140.
Construction and effect of exception making the statute of frauds provision inapplicable where goods are manufactured by seller for buyer, 25 A.L.R.2d 672.
Construction and effect of contract for sale of commodity to fill buyer's requirements, 26 A.L.R.2d 1099.
Statute of frauds as applicable to seller's oral warranty as to quality or condition of chattel, 40 A.L.R.2d 760.
Recovery, on theory of quasi contract, unjust enrichment or restitution, of money paid in reliance upon unenforceable promise to accept a bill of exchange or draft, 81 A.L.R.2d 587.
Buyer's note as payment within contemplation of statute of frauds, 81 A.L.R.2d 1355.
Contract which violates statute of frauds as evidence of value in action not based on the contract, 21 A.L.R.3d 9.
Statute of frauds and conflict of laws, 47 A.L.R.3d 137.
Construction and application of U.C.C. § 2-201(3)(b) rendering contract of sale enforceable notwithstanding statute of frauds, to extent it is admitted in pleading, testimony, or otherwise in court, 88 A.L.R.3d 416.
Liability for interference with invalid or unenforceable contract, 96 A.L.R.3d 1294.
Construction and application of UCC § 2-201(3)(c) rendering contract of sale enforceable notwith- standing statute of frauds with respect to goods for which payment has been made and accepted or which have been received and accepted, 97 A.L.R.3d

908.
Promissory estoppel as basis for avoidance of U.C.C. statute of frauds (U.C.C. § 2-201), 29 A.L.R.4th 1006.
Sales: "specially manufactured goods" statute of frauds exception in UCC § 2-201(3)(a), 45 A.L.R.4th 1126.
37 C.J.S. Frauds, Statute of § 138.

§ 55-2-202. 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:

(a) by course of dealing or usage of trade (Section 1-205 [55-1-205 NMSA 1978]) or by course of performance (Section 2-208 [55-2-208 NMSA 1978]); and

(b) 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.

History: 1953 Comp., § 50A-2-202, enacted by Laws 1961, ch. 96, § 2-202.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section definitely rejects:

(a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

(b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and

(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in Paragraph (a) is an original determination by the court that the language used is ambiguous.

2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the

course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

3. Under Paragraph (b), consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

Cross references.Point 3: Sections 1-205, 2-207, 2-302 and 2-316.

Definitional cross references."Agreed" and "agreement". Section 1-201.

"Course of dealing". Section 1-205.

"Parties". Section 1-201.

"Term". Section 1-201.

"Usage of trade". Section 1-205.

"Written" and "writing". Section 1-201.

ANNOTATION

Parol evidence rule applicable to bills and notes. - The parol evidence rule applicable to written contracts generally is also applicable to bills and notes. Farmington Nat'l Bank v. Basin Plastics, Inc., 94 N.M. 668, 615 P.2d 985 (1980).

Parol evidence may be admitted to explain, qualify, add to or subtract from agreement. Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Parol evidence inadmissible to change basic meaning of contract. - Parol evidence is not admissible when it would change the basic meaning of the contract and produce an agreement wholly different from, and wholly inconsistent with, the written agreement and would tend to distort the expressly stated written understanding of the parties. State ex rel. Nichols v. Safeco Ins. Co. of Am., 100 N.M. 440, 671 P.2d 1151 (Ct. App. 1983); Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Usage of trade inadmissible where contract clear. - Where the written contract terms leave no room for a contrary construction consistent with the claimed usage of trade, the trial court correctly denies an offer of proof as to the usage of trade. State ex rel. Nichols v. Safeco Ins. Co. of Am., 100 N.M. 440, 671 P.2d 1151 (Ct. App. 1983).

Contract provision may preclude action for pre-contract negligent misrepresentation. - Commercial purchaser of a computer system may not maintain an action in tort against the seller for pre-contract negligent misrepresentations regarding the system's capacity to perform specific functions, where the subsequently executed written sales contract contains an effective integration clause, and an effective provision disclaiming all prior representations and all warranties, express or implied, not contained in the contract, where there is no indication or claim that the transaction was not undertaken at arm's length or freely entered into by two commercial entities. Rio Grande Jewelers Supply, Inc. v. Data Gen. Corp., 101 N.M. 798, 689 P.2d 1269 (1984).

Terms of written contract may carry over into substantially identical oral contract. - Where, after a written contract is terminated, an oral contract is entered into, and where there is a course of dealing for a number of years under the oral contract, which is identical in all respects other than to whom payment would be made, the provisions of which are fully known to and understood by the buyer, who has the obligation to give timely notice or waive any and all claims, the terms of the written contract carry over into the oral arrangement. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Alternate financing agreement waived need for written contract modification. - Where a boat buyer's agreement with a bank concerning alternate financing was conduct waiving the need for a written contract modification, the financing terms agreed upon between the buyer and the bank became a part of the contract, and the contract was supplemented in a commercially reasonable manner. Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 73; 68 Am. Jur. 2d Secured Transactions §§ 91, 111; 69 Am. Jur. 2d Secured Transactions § 275; 72 Am. Jur. 2d Statute of Frauds §§ 138, 297, 343.
Affirmations or representations made after the sale is closed as basis of warranty under UCC § 2-313(1)(a), 47 A.L.R.4th 200.
32A C.J.S. Evidence §§ 896, 910.

§ 55-2-203. Seals inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing [of] a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

History: 1953 Comp., § 50A-2-203, enacted by Laws 1961, ch. 96, § 2-203.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 3, Uniform Sales Act.

Changes. Portion pertaining to "seals" rewritten.

Purposes of changes.1. This section makes it clear that every effect of the seal which relates to "sealed instruments" as such is wiped out insofar as contracts for sale are concerned. However, the substantial effects of a seal, except extension of the period of limitations, may be had by appropriate drafting as in the case of firm offers (see Section 2-205).

2. This section leaves untouched any aspects of a seal which relate merely to signatures or to authentication of execution and the like. Thus, a statute providing that a purported signature gives prima facie evidence of its own authenticity or that a signature gives prima facie evidence of consideration is still applicable to sales transactions even though a seal may be held to be a signature within the meaning of such a statute. Similarly, the authorized affixing of a corporate seal bearing the corporate name to a contractual writing purporting to be made by the corporation may have effect as a signature without any reference to the law of sealed instruments.

Cross reference.Point 1: Section 2-205.

Definitional cross references."Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Writing". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 17 Am. Jur. 2d Contracts §§ 36, 67, 85; 67 Am. Jur. 2d Seals § 1 et seq; 69 Am. Jur. 2d Secured Transactions § 282.
77 C.J.S. Sales § 1; 79 C.J.S. Seals §§ 1, 2.

§ 55-2-204. Formation in general.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

History: 1953 Comp., § 50A-2-204, enacted by Laws 1961, ch. 96, § 2-204.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 1 and 3, Uniform Sales Act.

Changes. Completely rewritten by this and other sections of this article.

Purposes of changes.Subsection (1) continues without change the basic policy of recognizing any manner of expression of agreement, oral, written or otherwise. The legal effect of such an agreement is, of course, qualified by other provisions of this article.

Under Subsection (1) appropriate conduct by the parties may be sufficient to establish an agreement. Subsection (2) is directed primarily to the situation where the interchanged correspondence does not disclose the exact point at which the deal was closed, but the actions of the parties indicate that a binding obligation has been undertaken.

Subsection (3) states the principle as to "open terms" underlying later sections of the article. If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are intended to be applied, this act making provision elsewhere for missing terms needed for performance, open price, remedies and the like.

The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions.

Cross references.Subsection (1): Sections 1-103, 2-201 and 2-302.

Subsection (2): Sections 2-205 to 2-209.

Subsection (3): See Part 3.

Definitional cross references."Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Guaranty § 38.
Validity and construction of contract for sale of season's output, 1 A.L.R. 1392; 9 A.L.R. 276; 23 A.L.R. 574.
Contract for sale of goods as entire or divisible, 2 A.L.R. 643.
Divisibility of contract for sale of an outfit, plant or machinery, 4 A.L.R. 1442.
Contract for sale of commodity to extent of buyer's requirements, 7 A.L.R. 498; 26 A.L.R. 2d 1099.
Sale agreement fixing price at retail less specified percent as indefinite, 57 A.L.R. 747.
Contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than the amount specified, 58 A.L.R. 2d 377.
77 C.J.S. Sales § 24.

§ 55-2-205. Firm offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that 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 such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

History: 1953 Comp., § 50A-2-205, enacted by Laws 1961, ch. 96, § 2-205.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 1 and 3, Uniform Sales Act.

Changes. Completely rewritten by this and other sections of this article.

Purposes of changes.1. This section is intended to modify the former rule which required that "firm offers" be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings.

2. The primary purpose of this section is to give effect to the deliberate intention of a merchant to make a current firm offer binding. The deliberation is shown in the case of an individualized document by the merchant's signature to the offer, and in the case of an offer included on a form supplied by the other party to the transaction by the separate signing of the particular clause which contains the offer. "Signed" here also

includes authentication but the reasonableness of the authentication herein allowed must be determined in the light of the purpose of the section. The circumstances surrounding the signing may justify something less than a formal signature or initialing but typically the kind of authentication involved here would consist of a minimum of initialing of the clause involved. A handwritten memorandum on the writer's letterhead purporting in its terms to "confirm" a firm offer already made would be enough to satisfy this section, although not subscribed, since under the circumstances it could not be considered a memorandum of mere negotiation and it would adequately show its own authenticity. Similarly, an authorized telegram will suffice, and this is true even though the original draft contained only a typewritten signature. However, despite settled courses of dealing or usages of the trade whereby firm offers are made by oral communication and relied upon without more evidence, such offers remain revocable under this article since authentication by a writing is the essence of this section.

3. This section is intended to apply to current "firm" offers and not to long term options, and an outside time limit of three months during which such offers remain irrevocable has been set. The three month period during which firm offers remain irrevocable under this section need not be stated by days or by date. If the offer states that it is "guaranteed" or "firm" until the happening of a contingency which will occur within the three month period, it will remain irrevocable until that event. A promise made for a longer period will operate under this section to bind the offeror only for the first three months of the period but may of course be renewed. If supported by consideration it may continue for as long as the parties specify. This section deals only with the offer which is not supported by consideration.

4. Protection is afforded against the inadvertent signing of a firm offer when contained in a form prepared by the offeree by requiring that such a clause be separately authenticated. If the offer clause is called to the offeror's attention and he separately authenticates it, he will be bound; Section 2-302 may operate, however, to prevent an unconscionable result which otherwise would flow from other terms appearing in the form.

5. Safeguards are provided to offer relief in the case of material mistake by virtue of the requirement of good faith and the general law of mistake.

Cross references.Point 1: Section 1-102.

Point 2: Section 1-102.

Point 3: Section 2-201.

Point 5: Section 2-302.

Definitional cross references."Goods". Section 2-105.

"Merchant". Section 2-104.

"Signed". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 C.J.S. Sales §§ 26, 27, 30.

§ 55-2-206. Offer and acceptance in formation of contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances:

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where 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.

History: 1953 Comp., § 50A-2-206, enacted by Laws 1961, ch. 96, § 2-206.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 1 and 3, Uniform Sales Act.

Changes. Completely rewritten in this and other sections of this article.

Purposes of changes. To make it clear that:

1. Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite clear that it will not be acceptable. Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are rejected and a criterion that the acceptance, be "in any manner and by any medium reasonable under the circumstances," is substituted. This section is intended to remain flexible and its applicability to be enlarged as new media of

communication develop or as the more time-saving present day media come into general use.

2. Either shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment. In accordance with ordinary commercial understanding the section interprets an order looking to current shipment as allowing acceptance either by actual shipment or by a prompt promise to ship and rejects the artificial theory that only a single mode of acceptance is normally envisaged by an offer. This is true even though the language of the offer happens to be "ship at once" or the like. "Shipment" is here used in the same sense as in Section 2-504; it does not include the beginning of delivery by the seller's own truck or by messenger. But loading on the seller's own truck might be a beginning of performance under Subsection (2).

3. The beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror. Such a beginning of performance must unambiguously express the offeree's intention to engage himself. For the protection of both parties it is essential that notice follow in due course to constitute acceptance. Nothing in this section however bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer, or at the offeror's option, final effect in constituting acceptance.

4. Subsection (1)(b) deals with the situation where a shipment made following an order is shown by a notification of shipment to be referable to that order but has a defect. Such a non-conforming shipment is normally to be understood as intended to close the bargain, even though it proves to have been at the same time a breach. However, the seller by stating that the shipment is non-conforming and is offered only as an accommodation to the buyer keeps the shipment or notification from operating as an acceptance.

Definitional cross references."Buyer". Section 2-103.

"Conforming". Section 1-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

ANNOTATION

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," see 8 Nat. Resources J. 176 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Guaranty § 5.
Acceptance of offer with condition which law would imply, 1 A.L.R. 1508.
Acknowledging receipt of order for goods as an acceptance completing the contract, 10 A.L.R. 683.
Acting on order for goods as an acceptance thereof, 29 A.L.R. 1352.
Reward for disproving commercial claim, 96 A.L.R.3d 907.
77 C.J.S. Sales § 24.

§ 55-2-207. Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act [this chapter].

History: 1953 Comp., § 50A-2-207, enacted by Laws 1961, ch. 96, § 2-207.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 1 and 3, Uniform Sales Act.

Changes. Completely rewritten by this and other sections of this article.

Purposes of changes.1. This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds

further minor suggestions or proposals such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed" or the like. A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called "acknowledgment") forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction. [Comment 1 was amended in 1966.]

2. Under this article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within Subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms. [Comment 2 was amended in 1966.]

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of Subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

4. Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due and a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

5. Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for and a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719).

6. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in Subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this act, including Subsection (2). The written confirmation is also subject to Section 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement. [Comment 6 was amended in 1966.]

7. In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and Subsection (3) furnishes the governing rule. [Comment 7 was added in 1966.]

Cross references.See generally Section 2-302.

Point 5: Sections 2-513, 2-602, 2-607, 2-609, 2-612, 2-614, 2-615, 2-616, 2-718 and 2-719.

Point 6: Sections 1-102 and 2-104.

Definitional cross references."Between merchants". Section 2-104.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seasonably". Section 1-204.

"Send". Section 1-201.

"Term". Section 1-201.

"Written". Section 1-201.

ANNOTATION

Contract can be modified by conduct of parties once its existence is established. Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Alternative financing agreement waived need for written contract modification. - Where a boat buyer's agreement with a bank concerning alternate financing was conduct waiving the need for a written contract modification, the financing terms agreed upon between the buyer and the bank became a part of the contract, and the contract was supplemented in a commercially reasonable manner. Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," see 8 Nat. Resources J. 176 (1968).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - What constitutes acceptance "expressly made conditional" converting it to rejection and counteroffer under UCC § 2-207(1), 22 A.L.R.4th 939.
77 C.J.S. Sales § 29.

§ 55-2-208. Course of performance or practical construction.

(1) Where the contract for sale 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 shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205 [55-1-205 NMSA 1978]).

(3) Subject to the provisions of the next section [55-2-209 NMSA 1978] on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

History: 1953 Comp., § 50A-2-208, enacted by Laws 1961, ch. 96, § 2-208.

OFFICIAL COMMENT

Prior uniform statutory provision. No such general provision but concept of this section recognized by terms such as "course of dealing," "the circumstances of the case," "the conduct of the parties," etc., in Uniform Sales Act.

Purposes.1. The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the "agreement" and therefore also of the "unless otherwise agreed" qualification to various provisions of this article.

2. Under this section a course of performance is always relevant to determine the meaning of the agreement. Express mention of course of performance elsewhere in this article carries no contrary implication when there is a failure to refer to it in other sections.

3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of "waiver" whenever such construction, plus the application of the provisions on the reinstatement of rights waived (see Section 2-209), is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

4. A single occasion of conduct does not fall within the language of this section but other sections such as the ones on silence after acceptance and failure to specify particular defects can affect the parties' rights on a single occasion (see Sections 2-605 and 2-607).

Cross references.Point 1: Section 1-201.

Point 2: Section 2-202.

Point 3: Sections 2-209, 2-601 and 2-607.

Point 4: Sections 2-605 and 2-607.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 28; 38 Am. Jur. 2d Guaranty § 5; 68 Am. Jur. 2d Secured Transactions § 35.
77 C.J.S. Sales §§ 71, 119, 121, 130.

§ 55-2-209. Modification, rescission and waiver.

(1) An agreement modifying a contract within this article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by

the other party.

(3) The requirements of the statute of frauds section of this article (Section 2-201 [55-2-201 NMSA 1978]) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of Subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the 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.

History: 1953 Comp., § 50A-2-209, enacted by Laws 1961, ch. 96, § 2-209.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsection (1) - Compare Section 1, Uniform Written Obligations Act; Subsections (2) to (5) - none.

Purposes of changes and new matter.1. This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.

2. Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding.

However, modifications made thereunder must meet the test of good faith imposed by this act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.

3. Subsections (2) and (3) are intended to protect against false allegations of oral modifications. "Modification or rescission" includes abandonment or other change by mutual consent, contrary to the decision in Green v. Doniger, 300 N.Y. 238, 90 N.E. 2d 56 (1949); it does not include unilateral "termination" or "cancellation" as defined in Section 2-106.

The statute of frauds provisions of this article are expressly applied to modifications by Subsection (3). Under those provisions the "delivery and acceptance" test is limited to the goods which have been accepted, that is, to the past. "Modification" for the future cannot therefore be conjured up by oral testimony if the price involved is $500.00 or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it there is safeguard against oral evidence.

Subsection (2) permits the parties in effect to make their own statute of frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by signed writing. But note that if a consumer is to be held to such a clause on a form supplied by a merchant it must be separately signed.

4. Subsection (4) is intended, despite the provisions of Subsections (2) and (3), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct. The effect of such conduct as a waiver is further regulated in Subsection (5).

Cross references.Point 1: Section 1-203.

Point 2: Sections 1-201, 1-203, 2-615 and 2-616.

Point 3: Sections 2-106, 2-201 and 2-102.

Point 4: Sections 2-202 and 2-208.

Definitional cross references."Agreement". Section 1-201.

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Signed". Section 1-201.

"Term". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Alternative financing agreement waived need for written contract modification. - Where a boat buyer's agreement with a bank concerning alternate financing was conduct

waiving the need for a written contract modification, the financing terms agreed upon between the buyer and the bank became a part of the contract, and the contract was supplemented in a commercially reasonable manner. Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Assignability of right to rescind or of right to return of money or other property as incident of rescission, 162 A.L.R. 743.
Affirmations or representations made after the sale is closed as basis of warranty under UCC § 2-313(1)(a), 47 A.L.R.4th 200.
37 C.J.S. Frauds, Statute of § 232; 77 C.J.S. Sales § 83; 78 C.J.S. Sales § 565.

§ 55-2-210. Delegation of performance; assignment of rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) Unless the circumstances indicate the contrary, a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 2-609 [55-2-609 NMSA 1978]).

History: 1953 Comp., § 50A-2-210, enacted by Laws 1961, ch. 96, § 2-210.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Generally, this section recognizes both delegation of performance and assignability as normal and permissible incidents of a contract for the sale of goods.

2. Delegation of performance, either in conjunction with an assignment or otherwise, is provided for by Subsection (1) where no substantial reason can be shown as to why the delegated performance will not be as satisfactory as personal performance.

3. Under Subsection (2) rights which are no longer executory such as a right to damages for breach or a right to payment of an "account" as defined in the article on secured transactions (Article 9) may be assigned although the agreement prohibits assignment. In such cases no question of delegation of any performance is involved. The assignment of a "contract right" as defined in the article on secured transactions (Article 9) is not covered by this subsection.

4. The nature of the contract or the circumstances of the case, however, may bar assignment of the contract even where delegation of performance is not involved. This article and this section are intended to clarify this problem, particularly in cases dealing with output requirement and exclusive dealing contracts. In the first place the section on requirements and exclusive dealing removes from the construction of the original contract most of the "personal discretion" element by substituting the reasonably objective standard of good faith operation of the plant or business to be supplied. Secondly, the section on insecurity and assurances, which is specifically referred to in Subsection (5) of this section, frees the other party from the doubts and uncertainty which may afflict him under an assignment of the character in question by permitting him to demand adequate assurance of due performance without which he may suspend his own performance. Subsection (5) is not in any way intended to limit the effect of the section on insecurity and assurances and the word "performance" includes the giving of orders under a requirements contract. Of course, in any case where a material personal discretion is sought to be transferred, effective assignment is barred by subsection (2).

5. Subsection (4) lays down a general rule of construction distinguishing between a normal commercial assignment, which substitutes the assignee for the assignor both as to rights and duties, and a financing assignment in which only the assignor's rights are transferred.

This article takes no position on the possibility of extending some recognition or power to the original parties to work out normal commercial readjustments of the contract in the case of financing assignments even after the original obligor has been notified of the assignment. This question is dealt with in the article on secured transactions (Article 9).

6. Subsection (5) recognizes that the non-assigning original party has a stake in the reliability of the person with whom he has closed the original contract, and is, therefore,

entitled to due assurance that any delegated performance will be properly forthcoming.

7. This section is not intended as a complete statement of the law of delegation and assignment but is limited to clarifying a few points doubtful under the case law. Particularly, neither this section nor this article touches directly on such questions as the need or effect of notice of the assignment, the rights of successive assignees, or any question of the form of an assignment, either as between the parties or as against any third parties. Some of these questions are dealt with in Article 9.

Cross references.Point 3: Articles 5 and 9.

Point 4: Sections 2-306 and 2-609.

Point 5: Article 9, Sections 9-317 and 9-318.

Point 7: Article 9.

Definitional cross references."Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Party". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

ANNOTATION

Law reviews. - For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions § 127.
77 C.J.S. Sales § 80.

Part 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

§ 55-2-301. General obligations of parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

History: 1953 Comp., § 50A-2-301, enacted by Laws 1961, ch. 96, § 2-301.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 11 and 41, Uniform Sales Act.

Changes. Rewritten.

Purposes of changes.This section uses the term "obligation" in contrast to the term "duty" in order to provide for the "condition" aspects of delivery and payment insofar as they are not modified by other sections of this article such as those on cure of tender. It thus replaces not only the general provisions of the Uniform Sales Act on the parties' duties, but also the general provisions of that act on the effect of conditions. In order to determine what is "in accordance with the contract" under this article usage of trade, course of dealing and performance and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties.

Cross references.Section 1-106. See also Sections 1-205, 2-208, 2-209, 2-508 and 2-612.

Definitional cross references."Buyer". Section 2-103.

"Contract". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 405; 67 Am. Jur. 2d Sales §§ 102 to 239.
What amounts to delivery f.o.b., 16 A.L.R. 597.
Substantial performance of contract for manufacture or sale of article, 19 A.L.R. 815.
What constitutes delivery of goods sold under "c.i.f." contract, 20 A.L.R. 1236.

Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 A.L.R.2d 701.
Agent's authority to buy as including authority to accept goods, 55 A.L.R.2d 69.
77 C.J.S. Sales §§ 132, 218 to 221, 229.

§ 55-2-302. Unconscionable contract or clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

History: 1953 Comp., § 50A-2-302, enacted by Laws 1961, ch. 96, § 2-302.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. Campbell Soup Co. v. Wentz, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis; Hardy v. General Motors Acceptance Corporation, 38 Ga.App. 463, 144 S.E. 327 (1928), holding that a disclaimer of warranty clause applied only to express

warranties, thus letting in a fair implied warranty; Andrews Bros. v. Singer & Co. (1934 CA) 1 K.B. 17, holding that where a car with substantial mileage was delivered instead of a "new" car, a disclaimer of warranties, including those "implied," left unaffected an "express obligation" on the description, even though the Sale of Goods Act called such an implied warranty; New Prague Flouring Mill Co. v. G. A. Spears, 194 Iowa 417, 189 N.W. 815 (1922), holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the seller's advantage; Kansas Flour Mills Co. v. Dirks, 100 Kan. 376, 164 P. 273 (1917), where under a similar clause in a rising market the court permitted the buyer to measure his damages for non-delivery at the end of only one 30 day postponement; Green v. Arcos, Ltd. (1931 CA) 47 T.L.R. 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922), in which the court held that a "waiver" of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck; Austin Co. v. J. H. Tillman Co., 104 Or. 541, 209 P. 131 (1922), where a clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties "made" by the seller; and Robert A. Munroe & Co. v. Meyer (1930) 2 K.B. 312, holding that the warranty of description overrides a clause reading "with all faults and defects" where adulterated meat not up to the contract description was delivered.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in Subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.

Definitional cross reference."Contract". Section 1-201.

ANNOTATION

This section is part of the code applicable to sales, and by its terms does not apply to security transactions. Hernandez v. S.I.C. Fin. Co., 79 N.M. 673, 448 P.2d 474 (1968).

Comparative liability is not part of the Uniform Commercial Code under this section. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Determination of unconscionability in a contract clause is a matter of law. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Requiring loss claims to be made within two days not unconscionable. - In general, a contract provision requiring claims of loss to be made within two days of delivery is reasonable, lawful and not unconscionable. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Terms of written contract may carry over into substantially identical oral contract. - Where, after a written contract is terminated, an oral contract is entered into, and where there is a course of dealing for a number of years under the oral contract, which is identical in all respects other than to whom payment would be made, the provisions of which are fully known to and understood by the buyer, who has the obligation to give timely notice or waive any and all claims, the terms of the written contract carry over into the oral arrangement. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Court may not modify otherwise legal language of contract. - It is not the province of the courts to alter or amend a contract freely made by the parties for themselves. The courts cannot change or modify the language of a contract, otherwise legal, for the benefit of one party and to the detriment of another. Smith v. Price's Creameries, 98 N.M. 541, 650 P.2d 825 (1982).

Law reviews. - For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M. L. Rev. 293 (1976).

For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 28; 68 Am. Jur. 2d Secured Transactions § 20.
Sufficiency of description of collateral in security agreement under UCC §§ 9-110 and 9-203, 100 A.L.R.3d 940.
Unconscionability, under UCC § 2-302 or § 2-719(3), of disclaimer of warranties or limitation or exclusion of damages in contract subject to UCC Article 2 (Sales), 38 A.L.R.4th 25.
77 C.J.S. Sales § 67; 81 C.J.S. Specific Performance § 40.

§ 55-2-303. Allocation or division of risks.

Where this article allocates a risk or a burden as between the parties "unless otherwise

agreed," the agreement may not only shift the allocation but may also divide the risk or burden.

History: 1953 Comp., § 50A-2-303, enacted by Laws 1961, ch. 96, § 2-303.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is intended to make it clear that the parties may modify or allocate "unless otherwise agreed" risks or burdens imposed by this article as they desire, always subject, of course, to the provisions on unconscionability.

Compare Section 1-102(4).

2. The risk or burden may be divided by the express terms of the agreement or by the attending circumstances, since under the definition of "agreement" in this act the circumstances surrounding the transaction as well as the express language used by the parties enter into the meaning and substance of the agreement.

Cross references.Point 1: Sections 1-102 and 2-302.

Point 2: Section 1-201.

Definitional cross references."Party". Section 1-201.

"Agreement". Section 1-201.

ANNOTATION

Reasonable to require loss claims to be made within two days. - In general, a contract provision requiring claims of loss to be made within two days of delivery is reasonable, lawful and not unconscionable. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 C.J.S. Sales §§ 67, 287.

§ 55-2-304. Price payable in money, goods, realty or otherwise.

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this article,

but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

History: 1953 Comp., § 50A-2-304, enacted by Laws 1961, ch. 96, § 2-304.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsections (2) and (3) of Section 9, Uniform Sales Act.

Changes. Rewritten.

Purposes of changes.1. This section corrects the phrasing of the Uniform Sales Act so as to avoid misconstruction and produce greater accuracy in commercial result. While it continues the essential intent and purpose of the Uniform Sales Act it rejects any purely verbalistic construction in disregard of the underlying reason of the provisions.

2. Under Subsection (1) the provisions of this article are applicable to transactions where the "price" of goods is payable in something other than money. This does not mean, however, that this whole article applies automatically and in its entirety simply because an agreed transfer of title to goods is not a gift. The basic purposes and reasons of the article must always be considered in determining the applicability of any of its provisions.

3. Subsection (2) lays down the general principle that when goods are to be exchanged for realty, the provisions of this article apply only to those aspects of the transaction which concern the transfer of title to goods but do not affect the transfer of the realty since the detailed regulation of various particular contracts which fall outside the scope of this article is left to the courts and other legislation. However, the complexities of these situations may be such that each must be analyzed in the light of the underlying reasons in order to determine the applicable principles. Local statutes dealing with realty are not to be lightly disregarded or altered by language of this article. In contrast, this article declares definite policies in regard to certain matters legitimately within its scope though concerned with real property situations, and in those instances the provisions of this article control.

Cross references.Point 1: Section 1-102.

Point 3: Sections 1-102, 1-103, 1-104 and 2-107.

Definitional cross references."Goods". Section 2-105.

"Money". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 73, 113.
Right of purchaser to opportunity to pay in cash where tender has been made in other medium, 23 A.L.R. 630; 46 A.L.R. 914.
Necessity of independent consideration to support a modification of the price in a contract of sale, 34 A.L.R. 511.
Validity and enforceability of contract which expressly leaves open terms of payment for future negotiation, 49 A.L.R. 1464.
33 C.J.S. Exchange of Property § 1; 77 C.J.S. Sales §§ 75, 237.

§ 55-2-305. Open price term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if:

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party, the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

History: 1953 Comp., § 50A-2-305, enacted by Laws 1961, ch. 96, § 2-305.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 9 and 10, Uniform Sales Act.

Changes. Completely rewritten.

Purposes of changes.1. This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This article rejects in these instances the formula that "an agreement to agree is unenforceable" if the case falls within Subsection (1) of this section, and rejects also defeating such agreements on the ground of "indefiniteness". Instead this article recognizes the dominant intention of the parties to have the deal continue to be binding upon both. As to future performance, since this article recognizes remedies such as cover (Section 2-712), resale (Section 2-706) and specific performance (Section 2-716) which go beyond any mere arithmetic as between contract price and market price, there is usually a "reasonably certain basis for granting an appropriate remedy for breach" so that the contract need not fail for indefiniteness.

2. Under some circumstances the postponement of agreement on price will mean that no deal has really been concluded, and this is made express in the preamble of Subsection (1) ("The parties

if they so intend ") and in Subsection (4). Whether or not this is so is, in most cases, a question to be determined by the trier of fact.

3. Subsection (2), dealing with the situation where the price is to be fixed by one party rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish by the express qualification that the price so fixed must be fixed in good faith. Good faith includes observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant. (Section 2-103). But in the normal case a "posted price" or a future seller's or buyer's "given price," "price in effect," "market price" or the like satisfies the good faith requirement.

4. The section recognizes that there may be cases in which a particular person's judgment is not chosen merely as a barometer or index of a fair price but is an essential condition to the parties' intent to make any contract at all. For example, the case where a known and trusted expert is to "value" a particular painting for which there is no market standard differs sharply from the situation where a named expert is to determine the grade of cotton, and the difference would support a finding that in the one the parties did not intend to make a binding agreement if that expert were unavailable whereas in the other they did so intend. Other circumstances would of course affect the validity of such a finding.

5. Under Subsection (3), wrongful interference by one party with any agreed machinery for price fixing in the contract may be treated by the other party as a repudiation justifying cancellation, or merely as a failure to take cooperative action thus shifting to the aggrieved party the reasonable leeway in fixing the price.

6. Throughout the entire section, the purpose is to give effect to the agreement which has been made. That effect, however, is always conditioned by the requirement of good

faith action which is made an inherent part of all contracts within this act. (Section 1-203).

Cross references.Point 1: Sections 2-204(3), 2-706, 2-712 and 2-716.

Point 3: Section 2-103.

Point 5: Sections 2-311 and 2-610.

Point 6: Section 1-203.

Definitional cross references."Agreement". Section 1-201.

"Burden of establishing". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - "Escalator" price adjustment clause, 63 A.L.R.2d 1337.
Construction and application of U.C.C. § 2-305 dealing with open price term contracts, 91 A.L.R.3d 1237.
77 C.J.S. Sales § 75.

§ 55-2-306. Output, requirements and exclusive dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

History: 1953 Comp., § 50A-2-306, enacted by Laws 1961, ch. 96, § 2-306.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) of this section, in regard to output and requirements, applies to this specific problem the general approach of this act which requires the reading of commercial background and intent into the language of any agreement and demands good faith in the performance of that agreement. It applies to such contracts of nonproducing establishments such as dealers or distributors as well as to manufacturing concerns.

2. Under this article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shut-down by a requirements buyer for lack of orders might be permissible when a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith. Similarly, a sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made, but normal expansion undertaken in good faith would be within the scope of this section. One of the factors in an expansion situation would be whether the market price had risen greatly in a case in which the requirements contract contained a fixed price. Reasonable variation of an extreme sort is exemplified in Southwest Natural Gas Co. v. Oklahoma Portland Cement Co., 102 F.2d 630 (C.C.A. 10, 1939). This article takes no position as to whether a requirements contract is a provable claim in bankruptcy.

3. If an estimate of output or requirements is included in the agreement, no quantity

unreasonably disproportionate to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur.

4. When an enterprise is sold, the question may arise whether the buyer is bound by an existing output or requirements contract. That question is outside the scope of this article, and is to be determined on other principles of law. Assuming that the contract continues, the output or requirements in the hands of the new owner continue to be measured by the actual good faith output or requirements under the normal operation of the enterprise prior to sale. The sale itself is not grounds for sudden expansion or decrease.

5. Subsection (2), on exclusive dealing, makes explicit the commercial rule embodied in this act under which the parties to such contracts are held to have impliedly, even when not expressly, bound themselves to use reasonable diligence as well as good faith in their performance of the contract. Under such contracts the exclusive agent is required, although no express commitment has been made, to use reasonable effort and due diligence in the expansion of the market or the promotion of the product, as the case may be. The principal is expected under such a contract to refrain from supplying any other dealer or agent within the exclusive territory. An exclusive dealing agreement brings into play all of the good faith aspects of the output and requirement problems of Subsection (1). It also raises questions of insecurity and right to adequate assurance under this article.

Cross references.Point 4: Section 2-210.

Point 5: Sections 1-203 and 2-609.

Definitional cross references."Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Term". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Good faith controls requirement contract. - Contract that required contractor to furnish subcontractor all concrete aggregate and sand material "necessary to the preparation of said concrete pavement" amounts to a requirement contract; and whether contractor in good faith delivered a quantity of the material which was disproportionate to the normal requirements for the purpose for which it was delivered is a question of fact necessary to the determination of subcontractor's liability for breach of contract. Gruschus v. C.R. Davis Contracting Co., 75 N.M. 649, 409 P.2d 500 (1965).

And excessive delivery deemed lack of good faith. - Delivery of at least 10% in excess of all material actually used, wasted and dumped warrants inference that delivery was unreasonably disproportionate to the requirements for which it was delivered and too excessive to have been delivered in good faith. Gruschus v. C.R. Davis Contracting Co., 77 N.M. 614, 426 P.2d 589 (1967).

Lawful agreement imposes corresponding duty. - A lawful agreement by either seller or buyer imposes a corresponding duty on the other party under this section. McCasland v. Prather, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Construction and effect of contract for sale of commodity to fill buyer's requirements, 7 A.L.R. 498; 26 A.L.R.2d 1099.
Requirements contracts under § 2-306(1) of the Uniform Commercial Code, 96 A.L.R.3d 1275.
Output contracts under § 2-306(1) of Uniform Commercial Code, 30 A.L.R.4th 396.
77 C.J.S. Sales §§ 171, 172.

§ 55-2-307. Delivery in single lot or several lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

History: 1953 Comp., § 50A-2-307, enacted by Laws 1961, ch. 96, § 2-307.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 45(1), Uniform Sales Act.

Changes. Rewritten and expanded.

Purposes of changes.1. This section applies where the parties have not specifically agreed whether delivery and payment are to be by lots and generally continues the essential intent of original act, Section 45(1) by assuming that the parties intended delivery to be in a single lot.

2. Where the actual agreement or the circumstances do not indicate otherwise, delivery in lots is not permitted under this section and the buyer is properly entitled to reject for a deficiency in the tender, subject to any privilege in the seller to cure the tender.

3. The "but" clause of this section goes to the case in which it is not commercially feasible to deliver or to receive the goods in a single lot as for example, where a contract calls for the shipment of ten carloads of coal and only three cars are available at a given time. Similarly, in a contract involving brick necessary to build a building the buyer's storage space may be limited so that it would be impossible to receive the entire amount of brick at once, or it may be necessary to assemble the goods as in the case of cattle on the range, or to mine them.

In such cases, a partial delivery is not subject to rejection for the defect in quantity alone, if the circumstances do not indicate a repudiation or default by the seller as to the expected balance or do not give the buyer ground for suspending his performance because of insecurity under the provisions of Section 2-609. However, in such cases the undelivered balance of goods under the contract must be forthcoming within a reasonable time and in a reasonable manner according to the policy of Section 2-503 on manner of tender of delivery. This is reinforced by the express provisions of Section 2-608 that if a lot has been accepted on the reasonable assumption that its nonconformity will be cured, the acceptance may be revoked if the cure does not seasonably occur. The section rejects the rule of Kelly Construction Co. v. Hackensack Brick Co., 91 N.J.L. 585, 103 A. 417, 2 A.L.R. 685 (1918) and approves the result in Lynn M. Ranger, Inc. v. Gildersleeve, 106 Conn. 372, 138 A. 142 (1927) in which a contract was made for six carloads of coal then rolling from the mines and consigned to the seller but the seller agreed to divert the carloads to the buyer as soon as the car numbers became known to him. He arranged a diversion of two cars and then notified the buyer who then repudiated the contract. The seller was held to be entitled to his full remedy for the two cars diverted because simultaneous delivery of all of the cars was not contemplated by either party.

4. Where the circumstances indicate that a party has a right to delivery in lots, the price may be demanded for each lot if it is apportionable.

Cross references.Point 1: Section 1-201.

Point 2: Sections 2-508 and 2-601.

Point 3: Sections 2-503, 2-608 and 2-609.

Definitional cross references."Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Whether there has been sufficient delivery depends on the intent of the seller to deliver as manifested by the acts and circumstances surrounding the transaction. Garrison Gen. Tire Serv., Inc. v. Montgomery, 75 N.M. 321, 404 P.2d 143 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right upon buyer's default in payment of installment due, to recover amount not due, in absence of acceleration clause, 57 A.L.R. 825.
Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 A.L.R. 595.
Buyer's acceptance of delayed or defective installment of goods as waiver of similar default as to later installments, 32 A.L.R.2d 1117.
77 C.J.S. Sales §§ 175, 229.

§ 55-2-308. Absence of specified place for delivery.

Unless otherwise agreed:

(a) the place for delivery of goods is the seller's place of business or if he has none his residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.

History: 1953 Comp., § 50A-2-308, enacted by Laws 1961, ch. 96, § 2-308.

OFFICIAL COMMENT

Prior uniform statutory provision. Paragraphs (a) and (b) - Section 43(1), Uniform Sales Act; Paragraph (c) - none.

Changes. Slight modification in language.

Purposes of changes and new matter.1. Paragraphs (a) and (b) provide for those noncommercial sales and for those occasional commercial sales where no place or means of delivery has been agreed upon by the parties. Where delivery by carrier is "required or authorized by the agreement", the seller's duties as to delivery of the goods are governed not by this section but by Section 2-504.

2. Under Paragraph (b) when the identified goods contracted for are known to both parties to be in some location other than the seller's place of business or residence, the parties are presumed to have intended that place to be the place of delivery. This paragraph also applies (unless, as would be normal, the circumstances show that delivery by way of documents is intended) to a bulk of goods in the possession of a bailee. In such a case, however, the seller has the additional obligation to procure the acknowledgment by the bailee of the buyer's right to possession.

3. Where "customary banking channels" call only for due notification by the banker that the documents are on hand, leaving the buyer himself to see to the physical receipt of the goods, tender at the buyer's address is not required under Paragraph (c). But that paragraph merely eliminates the possibility of a default by the seller if "customary banking channels" have been properly used in giving notice to the buyer. Where the bank has purchased a draft accompanied by documents or has undertaken its collection on behalf of the seller, Part 5 of Article 4 spells out its duties and relations to its customer. Where the documents move forward under a letter of credit the article on letters of credit spells out the duties and relations between the bank, the seller and the buyer.

4. The rules of this section apply only "unless otherwise agreed." The surrounding circumstances, usage of trade, course of dealing and course of performance, as well as the express language of the parties, may constitute an "otherwise agreement".

Cross references.Point 1: Sections 2-504 and 2-505.

Point 2: Section 2-503.

Point 3: Section 2-512, Articles 4, Part 5, and 5.

Definitional cross references."Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 C.J.S. Sales § 143.

§ 55-2-309. Absence of specific time provisions; notice of termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

History: 1953 Comp., § 50A-2-309, enacted by Laws 1961, ch. 96, § 2-309.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsection (1) - see Sections 43(2), 45(2), 47(1) and 48, Uniform Sales Act, for policy continued under this Article; Subsection (2) - none; Subsection (3) - none.

Changes. Completely different in scope.

Purposes of changes and new matter.1. Subsection (1) requires that all actions taken under a sales contract must be taken within a reasonable time where no time has been agreed upon. The reasonable time under this provision turns on the criteria as to "reasonable time" and on good faith and commercial standards set forth in Sections 1-203, 1-204 and 2-103. It thus depends upon what constitutes acceptable commercial conduct in view of the nature, purpose and circumstances of the action to be taken. Agreement as to a definite time, however, may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Such cases fall outside of this subsection since in them the time for action is "agreed" by usage.

2. The time for payment, where not agreed upon, is related to the time for delivery; the particular problems which arise in connection with determining the appropriate time of payment and the time for any inspection before payment which is both allowed by law and demanded by the buyer are covered in Section 2-513.

3. The facts in regard to shipment and delivery differ so widely as to make detailed provision for them in the text of this article impracticable. The applicable principles, however, make it clear that surprise is to be avoided, good faith judgment is to be protected, and notice or negotiation to reduce the uncertainty to certainty is to be favored.

4. When the time for delivery is left open, unreasonably early offers of or demands for delivery are intended to be read under this article as expressions of desire or intention, requesting the assent or acquiescence of the other party, not as final positions which may amount without more to breach or to create breach by the other side. See Sections 2-207 and 2-609.

5. The obligation of good faith under this act requires reasonable notification before a contract may be treated as breached because a reasonable time for delivery or demand has expired. This operates both in the case of a contract originally indefinite as to time and of one subsequently made indefinite by waiver.

When both parties let an originally reasonable time go by in silence, the course of conduct under the contract may be viewed as enlarging the reasonable time for tender or demand of performance. The contract may be terminated by abandonment.

6. Parties to a contract are not required in giving reasonable notification to fix, at peril of breach, a time which is in fact reasonable in the unforeseeable judgment of a later trier of fact. Effective communication of a proposed time limit calls for a response, so that failure to reply will make out acquiescence. Where objection is made, however, or if the demand is merely for information as to when goods will be delivered or will be ordered out, demand for assurances on the ground of insecurity may be made under this article pending further negotiations. Only when a party insists on undue delay or on rejection of the other party's reasonable proposal is there a question of flat breach under the present section.

7. Subsection (2) applies a commercially reasonable view to resolve the conflict which has arisen in the cases as to contracts of indefinite duration. The "reasonable time" of duration appropriate to a given arrangement is limited by the circumstances. When the arrangement has been carried on by the parties over the years, the "reasonable time" can continue indefinitely and the contract will not terminate until notice.

8. Subsection (3) recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement. An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this subsection unless the results of putting it into operation would be the creation of an unconscionable state of affairs.

9. Justifiable cancellation for breach is a remedy for breach and is not the kind of termination covered by the present subsection.

10. The requirement of notification is dispensed with where the contract provides for termination on the happening of an "agreed event." "Event" is a term chosen here to contrast with "option" or the like.

Cross references.Point 1: Sections 1-203, 1-204 and 2-103.

Point 2: Sections 2-320, 2-321, 2-504 and 2-511 to 2-514.

Point 5: Section 1-203.

Point 6: Section 2-609.

Point 7: Section 2-204.

Point 9: Sections 2-106, 2-318, 2-610 and 2-703.

Definitional cross references."Agreement". Section 1-201.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Termination". Section 2-106.

ANNOTATION

Contract with indefinite time provisions terminable at will. - Subsections (2) and (3), when read together, set out that a contract with indefinite time provisions is terminable at will upon reasonable notification. McCasland v. Prather, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 C.J.S. Sales §§ 109, 110, 147; 78 C.J.S. Sales § 566.

§ 55-2-310. Open time for payment or running of credit; authority to ship under reservation.

Unless otherwise agreed:

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the

contract (Section 2-513 [55-2-513 NMSA 1978]); and

(c) if delivery is authorized and made by way of documents of title otherwise than by Subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

History: 1953 Comp., § 50A-2-310, enacted by Laws 1961, ch. 96, § 2-310.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 42 and 47(2), Uniform Sales Act.

Changes. Completely rewritten in this and other sections.

Purposes of Changes. This section is drawn to reflect modern business methods of dealing at a distance rather than face to face. Thus:

1. Paragraph (a) provides that payment is due at the time and place "the buyer is to receive the goods" rather than at the point of delivery except in documentary shipment cases (Paragraph (c)). This grants an opportunity for the exercise by the buyer of his preliminary right to inspection before paying even though under the delivery term the risk of loss may have previously passed to him or the running of the credit period has already started.

2. Paragraph (b) while providing for inspection by the buyer before he pays, protects the seller. He is not required to give possession of the goods until he has received payment, where no credit has been contemplated by the parties. The seller may collect through a bank by a sight draft against an order bill of lading "hold until arrival; inspection allowed." The obligations of the bank under such a provision are set forth in Part 5 of Article 4. In the absence of a credit term, the seller is permitted to ship under reservation and if he does, payment is then due where and when the buyer is to receive the documents.

3. Unless otherwise agreed, the place for the receipt of the documents and payment is the buyer's city but the time for payment is only after arrival of the goods, since under Paragraph (b), and Sections 2-512 and 2-513 the buyer is under no duty to pay prior to inspection.

4. Where the mode of shipment is such that goods must be unloaded immediately upon arrival, too rapidly to permit adequate inspection before receipt, the seller must be guided by the provisions of this article on inspection which provide that if the seller wishes to demand payment before inspection, he must put an appropriate term into the

contract. Even requiring payment against documents will not of itself have this desired result if the documents are to be held until the arrival of the goods. But under (b) and (c) if the terms are C.I.F., C.O.D., or cash against documents payment may be due before inspection.

5. Paragraph (d) states the common commercial understanding that an agreed credit period runs from the time of shipment or from that dating of the invoice which is commonly recognized as a representation of the time of shipment. The provision concerning any delay in sending forth the invoice is included because such conduct results in depriving the buyer of his full notice and warning as to when he must be prepared to pay.

Cross references.Generally: Part 5.

Point 1: Section 2-509.

Point 2: Sections 2-505, 2-511, 2-512, 2-513 and Article 4.

Point 3: Sections 2-308(b), 2-512 and 2-513.

Point 4: Section 2-513(3)(b).

Definitional cross references."Buyer". Section 2-103.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Sales §§ 185, 194, 409.
Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for property, 68 A.L.R.2d 1229.
77 C.J.S. Sales § 230.

§ 55-2-311. Options and cooperation respecting performance.

(1) An agreement for sale which is otherwise sufficiently definite (Subsection (3) of Section 2-204 [55-2-204 NMSA 1978]) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed, specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in Subsections (1) (c) and (3) of Section 2-319 [55-2-319 NMSA 1978] specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies:

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

History: 1953 Comp., § 50A-2-311, enacted by Laws 1961, ch. 96, § 2-311.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) permits the parties to leave certain detailed particulars of performance to be filled in by either of them without running the risk of having the contract invalidated for indefiniteness. The party to whom the agreement gives power to specify the missing details is required to exercise good faith and to act in accordance with commercial standards so that there is no surprise and the range of permissible variation is limited by what is commercially reasonable. The "agreement" which permits one party so to specify may be found as well in a course of dealing, usage of trade, or implication from circumstances as in explicit language used by the parties.

2. Options as to assortment of goods or shipping arrangements are specifically reserved to the buyer and seller respectively under Subsection (2) where no other arrangement has been made. This section rejects the test which mechanically and without regard to usage or the purpose of the option gave the option to the party "first under a duty to move" and applies instead a standard commercial interpretation to these circumstances. The "unless otherwise agreed" provision of this subsection covers not only express terms but the background and circumstances which enter into the agreement.

3. Subsection (3) applies when the exercise of an option or cooperation by one party is necessary to or materially affects the other party's performance, but it is not seasonably forthcoming; the subsection relieves the other party from the necessity for performance or excuses his delay in performance as the case may be. The contract-keeping party may at his option under this subsection proceed to perform in any commercially reasonable manner rather than wait. In addition to the special remedies provided, this subsection also reserves "all other remedies". The remedy of particular importance in this connection is that provided for insecurity. Request may also be made pursuant to the obligation of good faith for a reasonable indication of the time and manner of performance for which a party is to hold himself ready.

4. The remedy provided in Subsection (3) is one which does not operate in the situation which falls within the scope of Section 2-614 on substituted performance. Where the failure to cooperate results from circumstances set forth in that section, the other party is under a duty to proffer or demand (as the case may be) substitute performance as a condition to claiming rights against the noncooperating party.

Cross references.Point 1: Sections 1-201, 2-204 and 1-203.

Point 3: Sections 1-203 and 2-609.

Point 4: Section 2-614.

Definitional cross references."Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

ANNOTATION

Applicability of pre-UCC contract law. - Where leases do not define which party was to determine the particulars of the option to purchase, the courts will look to pre-code contract law to resolve matters relating to the exercise of the option. Cranetex, Inc. v. Mountain Dev. Corp., 106 N.M. 5, 738 P.2d 123 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Construction and effect of contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than amount specified, 58 A.L.R.2d 377.
77 C.J.S. Sales §§ 63, 72, 159, 165.

§ 55-2-312. Warranty of title and against infringement; buyer's obligation against infringement.

(1) Subject to Subsection (2) there is in a contract for sale a warranty by the seller that:

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under Subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

History: 1953 Comp., § 50A-2-312, enacted by Laws 1961, ch. 96, § 2-312.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 13, Uniform Sales Act.

Changes. Completely rewritten, the provisions concerning infringement being new.

Purposes of changes.1. Subsection (1) makes provision for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.

The warranty extends to a buyer whether or not the seller was in possession of the goods at the time the sale or contract to sell was made.

The warranty of quiet possession is abolished. Disturbance of quiet possession, although not mentioned specifically, is one way, among many, in which the breach of the warranty of title may be established.

The "knowledge" referred to in Subsection 1(b) is actual knowledge as distinct from notice.

2. The provisions of this article requiring notification to the seller within a reasonable time after the buyer's discovery of a breach apply to notice of a breach of the warranty of title, where the seller's breach was innocent. However, if the seller's breach was in bad faith he cannot be permitted to claim that he has been misled or prejudiced by the delay in giving notice. In such case the "reasonable" time for notice should receive a very liberal interpretation. Whether the breach by the seller is in good or bad faith Section 2-725 provides that the cause of action accrues when the breach occurs. Under the provisions of that section the breach of the warranty of good title occurs when tender of delivery is made since the warranty is not one which extends to "future performance of the goods."

3. When the goods are part of the seller's normal stock and are sold in his normal course of business, it is his duty to see that no claim of infringement of a patent or trademark by a third party will mar the buyer's title. A sale by a person other than a dealer, however, raises no implication in its circumstances of such a warranty. Nor is there such an implication when the buyer orders goods to be assembled, prepared or manufactured on his own specifications. If, in such a case, the resulting product infringes a patent or trademark, the liability will run from buyer to seller. There is, under such circumstances, a tacit representation on the part of the buyer that the seller will be safe in manufacturing according to the specifications, and the buyer is under an obligation in good faith to indemnify him for any loss suffered.

4. This section rejects the cases which recognize the principle that infringements violate the warranty of title but deny the buyer a remedy unless he has been expressly prevented from using the goods. Under this article "eviction" is not a necessary condition to the buyer's remedy since the buyer's remedy arises immediately upon receipt of notice of infringement; it is merely one way of establishing the fact of breach.

5. Subsection (2) recognizes that sales by sheriffs, executors, foreclosing lienors and persons similarly situated are so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This subsection does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner.

6. The warranty of Subsection (1) is not designated as an "implied" warranty, and hence is not subject to Section 2-316 (3). Disclaimer of the warranty of title is governed instead by Subsection (2), which requires either specific language or the described circumstances.

Cross references.Point 1: Section 2-403.

Point 2: Sections 2-607 and 2-725.

Point 3: Section 1-203.

Point 4: Sections 2-609 and 2-725.

Point 6: Section 2-316.

Definitional cross references."Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Person". Section 1-201.

"Right". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Guaranty § 13; 63 Am. Jur. 2d Products Liability §§ 451, 526, 527.
Assignment of lease, 19 A.L.R. 608.
Breach of warranty as to title as within statutory provision requiring notice of breach of warranty on sale of goods, 114 A.L.R. 707.
Validity of provision negativing implied warranties, 117 A.L.R. 1350.
Warranty of title by seller in conditional sale contract, 132 A.L.R. 338.
Measures of damages in action for breach of warranty of title to personal property under U.C.C. § 2-714, 94 A.L.R.3d 583.
77 C.J.S. Sales §§ 324, 333, 334.

§ 55-2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that

the goods shall 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 shall conform to the description;

(c) any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he 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 seller's opinion or commendation of the goods does not create a warranty.

History: 1953 Comp., § 50A-2-313, enacted by Laws 1961, ch. 96, § 2-313.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 12, 14 and 16, Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To consolidate and systematize basic principles with the result that:

1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. "Implied" warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.

This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied".

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this act may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon, good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

5. Paragraph (1) (b) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to

"suggest" or to "be" the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209).

8. Concerning affirmations of value or a seller's opinion or commendation under Subsection (2), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of Subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

Cross references.Point 1: Section 2-316.

Point 2: Sections 1-102(3) and 2-318.

Point 3: Section 2-316(2) (b).

Point 4: Section 2-316.

Point 5: Sections 1-205(4) and 2-314.

Point 6: Section 2-316.

Point 7: Section 2-209.

Point 8: Section 1-103.

Definitional cross references."Buyer". Section 2-103.

"Conforming". Section 2-106.

"Goods". Section 2-105.

"Seller". Section 2-103.

ANNOTATION

I. General Consideration.
II. Seller's Opinion.
III. Affirmation Of Facts.

I. General Consideration.

Any express warranty made with respect to surgeon would inure to patient's benefit on the basis that the surgeon is acting as the patient's agent in the use of a medical product. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Insufficiency of evidence. - Where there is no evidence that either the terms of the rental agreement or the reference to "good tires" were part of the basis of the bargain by renters, the evidence was insufficient for the question of express warranty to be submitted to the jury. Stang v. Hertz Corp., 83 N.M. 217, 490 P.2d 475 (Ct. App. 1971), rev'd on other grounds, 83 N.M. 730, 497 P.2d 732 (1972).

Law reviews. - For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63 Am. Jur. 2d Products Liability §§ 1, 191 to 210, 450 to 527, 947 to 950.
Right of retailer to rely upon express or implied warranty by wholesaler or manufacturer where there is an express warranty to the consumer, 59 A.L.R. 1239.
Construction and effect of express or implied warranty on sale of an article intended for use as an explosive, 62 A.L.R. 1510.
Scope and effect of provision of Uniform Sales Act as to effect of express warranty or condition to negative implied warranty or condition, 64 A.L.R. 951.
Express warranty as excluding implied warranty of fitness, 164 A.L.R. 1321.
Warranties and conditions upon sale of seed, nursery stock, etc., 168 A.L.R. 581.
What amounts to "sale by sample" as regards implied warranties, 12 A.L.R.2d 524.
Time to inspect goods for compliance with warranty of fitness or merchantability, 52 A.L.R.2d 900.
Warranty of amount by contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than an amount specified, 58 A.L.R.2d 377.
Question whether oral statements amount to express warranty, as one of fact for jury or

of law for court, 67 A.L.R.2d 619.
Express warranty as affecting existence of implied warranty by manufacturer or seller of drug or medicine, 79 A.L.R.2d 332.
Express warranty as affecting existence of implied warranty of fitness by manufacturer or seller of hair preparation, cosmetic, soap or other personal cleanser, or the like, 79 A.L.R.2d 445.
Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article in the condition in which it is, 24 A.L.R.3d 465.
Warranty or misrepresentation as to character of article as new, where seller fails to disclose that article has been used or is secondhand, 36 A.L.R.3d 125; 36 A.L.R.3d 237.
Products liability: stoves, 93 A.L.R.3d 99.
Measures of damages in action for breach of warranty of title to personal property under U.C.C. § 2-714, 94 A.L.R.3d 583.
What constitutes "affirmation of fact" giving rise to express warranty under U.C.C. § 2-313(1)(a), 94 A.L.R.3d 729.
Products liability: flammable clothing, 1 A.L.R.4th 251.
Products liability: fertilizers, insecticides, pesticides, fungicides, weed killers, and the like, or articles used in application thereof, 12 A.L.R.4th 462.
Products liability: stud guns, staple guns, or parts thereof, 33 A.L.R.4th 1189.
Computer sales and leases: breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief, 37 A.L.R.4th 110.
Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability, 41 A.L.R.4th 9.
Affirmations or representations made after the sale is closed as basis of warranty under UCC § 2-313(1)(a), 47 A.L.R.4th 200.
Liability of successor corporation for punitive damages for injury caused by predecessor's product, 55 A.L.R.4th 166.
77 C.J.S. Sales § 307.

II. Seller's Opinion.

When seller's opinion not express warranty. - When a seller asserts a fact of which the buyer is ignorant, and the buyer relies on the assertion, the seller makes an express warranty, but when the seller merely states his opinion or his judgment upon a matter of which the seller has no special knowledge, or upon which the buyer may be expected to have an opinion and exercise his judgment, then the seller's statement does not constitute an express warranty. Lovington Cattle Feeders, Inc. v. Abbott Labs., 97 N.M. 564, 642 P.2d 167 (1982).

When opinion amounts to warranty. - Even if a representative's statement amounts to an opinion, the opinion amounts to a warranty if the statement becomes a part of the basis of the bargain. Lovington Cattle Feeders, Inc. v. Abbott Labs., 97 N.M. 564, 642 P.2d 167 (1982).

All circumstances considered in determining whether warranty exists. - All of the circumstances of a sale are to be considered when determining whether there was an express warranty or a mere expression of opinion. Lovington Cattle Feeders, Inc. v. Abbott Labs., 97 N.M. 564, 642 P.2d 167 (1982).

III. Affirmation Of Facts.

When affirmations of facts express warranty. - Affirmations of facts do not amount to express warranties unless they are part of the basis of the bargain. Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983).

Affirmation of fact consists of all of the language in the manufacturer's publication; the plaintiff cannot limit the express warranty issue to words taken out of context. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

No independent "reliance" requirement as to affirmation of fact. - If there is an affirmation of fact which is a part of the basis of the bargain, there is no independent "reliance" requirement as to that affirmation of fact. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

But user must be aware of manufacturer's warning, or no express warranty. - Where a user is not aware of a manufacturer's warning and the warning does not enter into his decision to use the manufacturer's product, the affirmation is not part of any bargain and there is no express warranty. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

§ 55-2-314. Implied warranty: merchantability; usage of trade.

(1) Unless excluded or modified (Section 2-316 [55-2-316 NMSA 1978]), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316 [55-2-316 NMSA 1978]) other implied warranties may arise from course of dealing or usage of trade.

History: 1953 Comp., § 50A-2-314, enacted by Laws 1961, ch. 96, § 2-314.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 15(2), Uniform Sales Act.

Changes. Completely rewritten.

Purposes of changes. This section, drawn in view of the steadily developing case law on the subject, is intended to make it clear that:

1. The seller's obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (Subsection (2) of Section 2-316). Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller, and the absence of the words "grower or manufacturer or not" which appeared in Section 15(2) of the Uniform Sales Act does not restrict the applicability of this section.

3. A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

4. Although a seller may not be a "merchant" as to the goods in question, if he states generally that they are "guaranteed" the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the

case of second-hand sales, and has further significance in limiting the effect of fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of "guarantee".

5. The second sentence of Subsection (1) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in Subsections (1) and (2) (c) of this section.

6. Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as . . . ," and the intention is to leave open other possible attributes of merchantability.

7. Paragraphs (a) and (b) of Subsection (2) are to be read together. Both refer, as indicated above, to the standards of that line of the trade which fits the transaction and the seller's business. "Fair average" is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection." Of course a fair percentage of the least is permissible but the goods are not "fair average" if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

8. Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in Paragraph (c). As stated above, merchantability is also a part of the obligation owing to the purchaser for use. Correspondingly, protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be "honestly" resalable in the normal course of business because they are what they purport to be.

9. Paragraph (d) on evenness of kind, quality and quantity follows case law. But precautionary language has been added as a reminder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units.

10. Paragraph (e) applies only where the nature of the goods and of the transaction require a certain type of container, package or label. Paragraph (f) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labelling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the

package or container. No problem of extra consideration arises in this connection since, under this article, an obligation is imposed by the original contract not to deliver mislabeled articles, and the obligation is imposed where mercantile good faith so requires and without reference to the doctrine of consideration.

11. Exclusion or modification of the warranty of merchantability, or of any part of it, is dealt with in the section to which the text of the present section makes explicit precautionary references. That section must be read with particular reference to its Subsection (4) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.

12. Subsection (3) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus subject to exclusion or modification under Section 2-316. A typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull.

13. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

Cross references.Point 1: Section 2-316.

Point 3: Sections 1-203 and 2-104.

Point 5: Section 2-315.

Point 11: Section 2-316.

Point 12: Sections 1-201, 1-205 and 2-316.

Definitional cross references."Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Seller". Section 2-103.

ANNOTATION

Sale of goods required. - There must be a sale of goods to bring the warranty provisions of this section into operation. Where a gas company did not sell the faulty furnace, there is no basis under this section for a cause of action against the gas company in an action to recover for carbon monoxide poisoning sustained as a result of the faulty furnace. Ortiz v. Gas Co., 97 N.M. 81, 636 P.2d 900 (Ct. App. 1981).

Refusal to provide warranted service is breach of contract. - A seller's refusal to provide warranted service perfects a cause of action for breach of contract, subject to the statutory time limit for filing an action. Lieb v. Milne, 95 N.M. 716, 625 P.2d 1233 (Ct. App. 1980).

Product liability claim and implied warranty claim may be identical. - In a personal injury case, a products liability claim and a claim concerning an implied warranty of merchantability may be identical. Both claims require a defect. Where the identical defect is relied on to support both theories of liability, both theories may be submitted to the jury. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Privity of contract not required. - A defendant may be held liable for breach of implied warranty of merchantability under the UCC without regard to privity of contract. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Expiration of warranty period not bar to action. - The expiration of the term of a written warranty period is not a jurisdictional bar to an action for breach of implied warranties. Lieb v. Milne, 95 N.M. 716, 625 P.2d 1233 (Ct. App. 1980).

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 13; 38 Am. Jur. 2d Guaranty § 13; 63 Am. Jur. 2d Products Liability §§ 470 to 472.
Chain, cable, or wire, implied warranty of strength or fitness, 59 A.L.R. 1235.

Construction and effect of express or implied warranty on sale of an article intended for use as explosive, 62 A.L.R. 1510.
Liability of seller of article not inherently dangerous for personal injuries due to the defective or dangerous condition of the article, 74 A.L.R. 343.
Implied warranty by other than packer of fitness of food sold in sealed cans, 90 A.L.R. 1269; 142 A.L.R. 1434.
Implied warranty of quality, condition or fitness on sale of "job lot," "leftovers" and the like, 103 A.L.R. 1347.
Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 111 A.L.R. 1229; 140 A.L.R. 191.
Cosmetics, implied warranty by retailer, 131 A.L.R. 123.
Construction and application of provision in conditional sale contract regarding implied warranties, 139 A.L.R. 1276.
Implied warranty of reasonable fitness of food for human consumption, as breached by substance natural to the original product and not removed in processing, 143 A.L.R. 1421.
Implied warranty of quality, condition or fitness on sale of secondhand article, 151 A.L.R. 446.
Express warranty as excluding implied warranty of fitness, 164 A.L.R. 1321.
Implied warranty of fitness by one serving food, 7 A.L.R.2d 1027.
Jobber's or dealer's liability for injuries on theory of breach of warranty as affected by buyer's or user's allergy or unusual susceptibility to injury from the article, 26 A.L.R.2d 966.
Implied warranty of fitness on sale of article by trade name, trademark or other particular description, 49 A.L.R.2d 852.
Time to inspect or test for compliance with warranty of fitness or merchantability, 52 A.L.R.2d 900.
Existence and scope of implied warranty of fitness on sale of livestock, 53 A.L.R.2d 892.
Existence of implied warranty of fitness by manufacturer or seller of food or food products, 77 A.L.R.2d 55.
Existence of implied warranty of fitness by manufacturer, bottler or seller of beverage, 77 A.L.R.2d 241.
Express warranty as affecting existence of implied warranty of merchantability by manufacturer of automobile or other vehicle, aircraft, boat or their parts, supplies or equipment, 78 A.L.R.2d 492.
Implied warranty of fitness by manufacturer or seller of industrial, business or farm machinery, tool, equipment or material, 78 A.L.R.2d 615.
Express warranty as affecting implied warranty by manufacturer or seller of paint, cement, lumber, building supplies, ladders, small tools and like products, 78 A.L.R.2d 704.
Existence of manufacturer's or seller's warranty of toys, games, athletic or sports equipment or like products, 78 A.L.R.2d 741.
Implied warranty by manufacturer or seller of drug or medicine, 79 A.L.R.2d 332.
Implied warranty of fitness by manufacturer or seller of medical or health supplies, appliances or equipment, 79 A.L.R.2d 401.
Implied warranty by manufacturer of seller of clothing, shoes and similar products, 80

A.L.R.2d 707.
Implied warranty of fitness by seller of secondhand household or domestic machinery, appliances, furnishings or equipment, 80 A.L.R.2d 618.
Existence of implied warranty as to container or package by manufacturer or seller of product sold in container or package, 81 A.L.R.2d 257.
Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article in the condition in which it is, 24 A.L.R.3d 465.
Warranty or misrepresentation as to character of article as new, where seller fails to disclose that article has been used or is secondhand, 36 A.L.R.3d 125; 36 A.L.R.3d 237.
Elements and measure of damages for breach of warranty in sale of horse, 91 A.L.R.3d 419.
Who is "merchant" under U.C.C. § 2-314(1) dealing with implied warranties of merchantability, 91 A.L.R.3d 876.
Products liability: stoves, 93 A.L.R.3d 99.
Modern cases determining whether product is defectively designed, 96 A.L.R.3d 22.
Defective vehicular gasoline tanks, 96 A.L.R.3d 265.
Liability of packer, food store, or restaurant for causing trichinosis, 96 A.L.R.3d 451.
Architect's liability for personal injury or death allegedly caused by improper or defective plans or design, 97 A.L.R.3d 455.
Personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 A.L.R.3d 627.
Personal injury or death allegedly caused by defect in motorcycle or its parts, supplies, or equipment, 98 A.L.R.3d 317.
Personal injury or death allegedly caused by defect in braking system in motor vehicle, 99 A.L.R.3d 179.
When is person "engaged in the business" for purposes of doctrine of strict tort liability, 99 A.L.R.3d 671.
Manufacturer's or seller's obligation to supply or recommend available safety accessories in connection with industrial machinery or equipment, 99 A.L.R.3d 693.
Personal injury or death allegedly caused by defect in steering system in motor vehicle, 100 A.L.R.3d 158.
Personal injury or death allegedly caused by defect in drive train system in motor vehicle, 100 A.L.R.3d 471.
Personal injury or death allegedly caused by defect in suspension system in motor vehicle, 100 A.L.R.3d 912.
Application of rule of strict liability in tort to person or entity rendering medical services, 100 A.L.R.3d 1205.
Liability for injury on, or in connection with, escalator, 1 A.L.R.4th 144.
Products liability: flammable clothing, 1 A.L.R.4th 251.
Liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment, 1 A.L.R.4th 411.
Products liability: defective heating equipment, 1 A.L.R.4th 748.
Products liability in connection with prosthesis or other product designed to be surgically implanted in patient's body, 1 A.L.R.4th 921.
Products liability: fertilizers, insecticides, pesticides, fungicides, weed killers, and the

like, or articles used in application thereof, 12 A.L.R.4th 462.
Allowance of punitive damages in products liability case, 13 A.L.R.4th 52.
Products liability: Cranes and other lifting apparatuses, 13 A.L.R.4th 476.
Pre-emption of strict liability in tort by provisions of UCC Article 2, 15 A.L.R.4th 791.
Products liability: firearms, ammunition, and chemical weapons, 15 A.L.R.4th 909.
Products liability: cement and concrete, 15 A.L.R.4th 1186.
Products liability: tire rims and wheels, 16 A.L.R.4th 137.
Liability of builder or real estate developer who sells new dwelling for failure to provide potable water, 16 A.L.R.4th 1246.
Products liability: blasting materials and supplies, 18 A.L.R.4th 206.
Products liability: firefighting equipment, 19 A.L.R.4th 326.
What statute of limitations applies to actions for personal injuries based on breach of implied warranty under UCC provisions governing sales (UCC § 2-725(1)), 20 A.L.R.4th 915.
Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 A.L.R.4th 508.
Recovery, under strict liability in tort, for injury or damage caused by defects in building or land, 25 A.L.R.4th 351.
Strict products liability: liability for failure to warn as dependent on defendant's knowledge of danger, 33 A.L.R.4th 368.
Products liability: stud guns, staple guns, or parts thereof, 33 A.L.R.4th 1189.
Computer sales and leases: breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief, 37 A.L.R.4th 110.
Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability, 41 A.L.R.4th 9.
Liability of successor corporation for punitive damages for injury caused by predecessor's product, 55 A.L.R.4th 166.
Products liability: electricity, 60 A.L.R.4th 732.
Liability for injury incurred in operation of power golf cart, 66 A.L.R.4th 622.
Consumer product warranty suits in federal court under Magnuson-Moss Warranty - Federal Trade Commission Improvement Act (15 USCS §§ 2301 et seq.), 59 A.L.R. Fed. 461.
77 C.J.S. Sales § 327.

§ 55-2-315. Implied warranty: fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [55-2-316 NMSA 1978] an implied warranty that the goods shall be fit for such purpose.

History: 1953 Comp., § 50A-2-315, enacted by Laws 1961, ch. 96, § 2-315.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 15(1), (4), (5), Uniform Sales Act.

Changes. Rewritten.

Purposes of changes.1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller.

2. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.

The provisions of this article on the cumulation and conflict of express and implied warranties must be considered on the question of inconsistency between or among warranties. In such a case any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for particular purpose as against all other warranties except where the buyer has taken upon himself the responsibility of furnishing the technical specifications.

3. In connection with the warranty of fitness for a particular purpose the provisions of this article on the allocation or division of risks are particularly applicable in any transaction in which the purpose for which the goods are to be used combines requirements both as to the quality of the goods themselves and compliance with certain laws or regulations. How the risks are divided is a question of fact to be determined, where not expressly contained in the agreement, from the circumstances of contracting, usage of trade, course of performance and the like, matters which may constitute the "otherwise agreement" of the parties by which they may divide the risk or burden.

4. The absence from this section of the language used in the Uniform Sales Act in referring to the seller, "whether he be the grower or manufacturer or not," is not intended to impose any requirement that the seller be a grower or manufacturer. Although normally the warranty will arise only where the seller is a merchant with the appropriate "skill or judgment," it can arise as to nonmerchants where this is justified by the particular circumstances.

5. The elimination of the "patent or other trade name" exception constitutes the major extension of the warranty of fitness which has been made by the cases and continued in this article. Under the present section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the issue. If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate nonreliance if the article has been recommended by the seller as adequate for the buyer's purposes.

6. The specific reference forward in the present section to the following section on exclusion or modification of warranties is to call attention to the possibility of eliminating the warranty in any given case. However, it must be noted that under the following section the warranty of fitness for a particular purpose must be excluded or modified by a conspicuous writing.

Cross references.Point 2: Sections 2-314 and 2-317.

Point 3: Section 2-303.

Point 6: Section 2-316.

Definitional cross references."Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

ANNOTATION

Cross-references. - As to warranty against serum hepatitis not implied in blood transfusions, see 24-10-5 NMSA 1978.

When no warranty generally. - There is no implied warranty where rancher at all times exercised his own skill and judgment in the selection of the cattle he wanted from the herd and he did not rely on other ranchers. Fear Ranches, Inc. v. Berry, 470 F.2d 905 (10th Cir. 1972).

Where no express representations are made, and buyer does not tell seller what his plans are for the cattle he purchases and there is no discussion of the kind of ranching activity involved, an implied warranty of fitness for a particular purpose does not exist. Fear Ranches, Inc. v. Berry, 470 F.2d 905 (10th Cir. 1972).

No defect required. - Products liability requires a defect; the implied warranty of fitness for a particular purpose does not require a defect. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Hospital's reliance on purchased prosthesis extends to surgeon. - Where a hospital purchases a prosthesis from a manufacturer and supplies that prosthesis to a surgeon for use, the warranty of fitness for a particular purpose does not require that the manufacturer have actual knowledge that the prosthesis would be implanted in a particular patient nor that the surgeon rely on the manufacturer's skill or judgment. Evidence that the hospital purchased the prosthesis from the manufacturer for use as an implant is evidence of the hospital's reliance; the hospital's reliance extends to the surgeon, who is in the distributive chain. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

Refusal to provide warranted service. - A seller's refusal to provide warranted service perfects a cause of action for breach of contract, subject to the statutory time limit for filing an action. Lieb v. Milne, 95 N.M. 716, 625 P.2d 1233 (Ct. App. 1980).

Expiration of warranty period not bar to action. - The expiration of the term of a written warranty period is not a jurisdictional bar to an action for breach of implied warranties. Lieb v. Milne, 95 N.M. 716, 625 P.2d 1233 (Ct. App. 1980).

Law reviews. - For comment, "The Miller Act in New Mexico - Materialman's Right to Recover on Prime's Surety Bond in Public Works Contracts - Notice as Condition Precedent to Action," see 9 Nat. Resources J. 295 (1969).

For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Guaranty § 13; 63 Am. Jur. 2d Products Liability §§ 470 to 508.
Implied warranty by other than packer of fitness of food sold in sealed cans, 9 A.L.R. 1269; 90 A.L.R. 1269; 142 A.L.R. 1434.
Chain, cable or wire, implied warranty of strength or fitness, 59 A.L.R. 1235.
Construction and effect of express or implied warranty on sale of an article intended for use as explosive, 62 A.L.R. 1510.
Implied warranty of quality, condition or fitness on sale of "job lot," "leftovers," and the like, 103 A.L.R. 1347.
Cosmetics, implied warranty by retailer, 131 A.L.R. 123.
Implied warranty of reasonable fitness of food for human consumption as breached by substance natural to the original product and not removed in processing, 143 A.L.R. 1421.
Secondhand article, sale of, implied warranty of quality, condition or fitness, 151 A.L.R. 446.
Express warranty as excluding implied warranty of fitness, 164 A.L.R. 1321.
What amounts to "sale by sample" as regards implied warranties, 12 A.L.R.2d 524.

Jobber's or dealer's liability for injuries on theory of breach of warranty as affected by buyer's or user's allergy or unusual susceptibility to injury from the article, 26 A.L.R.2d 966.
Implied warranty of fitness on sale of article by trade name, trademark or other particular description, 49 A.L.R.2d 852.
Existence and scope of implied warranty of fitness on sale of livestock, 53 A.L.R.2d 892.
Existence of implied warranty of fitness by manufacturer or seller of food or food products, 77 A.L.R.2d 55.
Existence of implied warranty of fitness by manufacturer, bottler or seller of beverage, 77 A.L.R.2d 241.
Implied warranty of fitness by manufacturer or seller of industrial, business or farm machinery, tool, equipment or material, 78 A.L.R.2d 615.
Implied warranty of fitness by manufacturer or seller of paint, cement, building supplies and like products, 78 A.L.R.2d 704.
Existence of manufacturer's or seller's warranty of toy, game, athletic or sports equipment or like products, 78 A.L.R.2d 741.
Implied warranty of fitness by manufacturer or seller of medical or health supplies, appliances or equipment, 79 A.L.R.2d 401.
Express warranty as affecting existence of implied warranty of fitness by manufacturer or seller of hair preparation, cosmetic, soap or other personal cleanser or the like, 79 A.L.R.2d 445.
Warranty or misrepresentation as to character of article as new, where seller fails to disclose that article has been used or is secondhand, 36 A.L.R.3d 125; 36 A.L.R.3d 237.
Elements and measure of damages for breach of warranty in sale of horse, 91 A.L.R.3d 419.
Products liability: stoves, 93 A.L.R.3d 99.
Products liability: flammable clothing, 1 A.L.R.4th 251.
Products liability: fertilizers, insecticides, pesticides, fungicides, weed killers, and the like, or articles used in application thereof, 12 A.L.R.4th 462.
Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 A.L.R.4th 508.
Recovery, under strict liability in tort, for injury or damage caused by defects in building or land, 25 A.L.R.4th 351.
Products liability: stud guns, staple guns, or parts thereof, 33 A.L.R.4th 1189.
Computer sales and leases: breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief, 37 A.L.R.4th 110.
Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability, 41 A.L.R.4th 9.
Applicability of warranty of fitness under UCC § 2-315 to supplies or equipment used in performance of a service contract, 47 A.L.R.4th 238.
Liability of successor corporation for punitive damages for injury caused by predecessor's product, 55 A.L.R.4th 166.
Liability for injury incurred in operation of power golf cart, 66 A.L.R.4th 622.
77 C.J.S. Sales §§ 314, 325.

§ 55-2-316. 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 warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (Section 2-202 [55-2-202 NMSA 1978]) negation or limitation is inoperative to the extent that such 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 and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding Subsection (2):

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 [55-2-718 NMSA 1978] and 2-719 [55-2-719 NMSA 1978]).

History: 1953 Comp., § 50A-2-316, enacted by Laws 1961, ch. 96, § 2-316.

OFFICIAL COMMENT

Prior uniform statutory provision. None. See Sections 15 and 71, Uniform Sales Act.

Purposes.1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other

circumstances which protect the buyer from surprise.

2. The seller is protected under this article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under Subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under Subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

5. Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.

6. The exceptions to the general rule set forth in Paragraphs (a), (b) and (c) of Subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warrant is being excluded.

7. Paragraph (a) of Subsection (3) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by Paragraph (a) are in fact merely a particularization of Paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.

8. Under Paragraph (b) of Subsection (3) warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. "Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he

uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty. See Sections 2-314 and 2-715 and comments thereto.

In order to bring the transaction within the scope of "refused to examine" in Paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by Subsection (1) of the present section.

The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

9. The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under Paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.

Cross references.Point 2: Sections 2-202, 2-718 and 2-719.

Point 7: Sections 1-205 and 2-208.

Definitional cross references."Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Course of dealing". Section 1-205.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

"Usage of trade". Section 1-205.

ANNOTATION

Contract provision may preclude action for pre-contract negligent misrepresentation. - Commercial purchaser of a computer system may not maintain an action in tort against the seller for pre-contract negligent misrepresentations regarding the system's capacity to perform specific functions, where the subsequently executed written sales contract contains an effective integration clause, and an effective provision disclaiming all prior representations and all warranties, express or implied, not contained in the contract, where there is no indication or claim that the transaction was not undertaken at arm's length or freely entered into by two commercial entities. Rio Grande Jewelers Supply, Inc. v. Data Gen. Corp., 101 N.M. 798, 689 P.2d 1269 (1984).

Law reviews. - For note, "Contracts - Exculpatory Provisions - A Bank's Liability for Ordinary Negligence: Lynch v. Santa Fe National Bank," see 12 N.M.L. Rev. 821 (1982).

For annual survey of New Mexico commercial law, see 16 N.M.L. Rev. 1 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63 Am. Jur. 2d Products Liability §§ 509 to 520.
Validity of provision negativing implied warranties, 117 A.L.R. 1350.
Express warranty as excluding implied warranty of fitness, 164 A.L.R. 1321.
Warranty of amount by contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than an amount specified, 58 A.L.R.2d 377.
Express warranty as affecting existence of implied warranty of merchantability by manufacturer of automobile or other vehicle, aircraft, boat or their parts, supplies or equipment, 78 A.L.R.2d 492.
Express warranty as affecting implied warranty by manufacturer or seller of paint, cement, lumber, building supplies, ladders, small tools and like products, 78 A.L.R.2d 704.

Express warranty as affecting existence of implied warranty by manufacturer or seller of drug or medicine, 79 A.L.R.2d 332.
Express warranty as affecting existence of implied warranty of fitness by manufacturer or seller of hair preparation, cosmetic, soap or other personal cleanser or the like, 79 A.L.R.2d 445.
Express warranty as affecting existence of implied warranty by manufacturer or seller of tobacco product, 80 A.L.R.2d 687.
Express warranty as affecting implied warranty by seller of injury-causing animal feed or medicine, crop spray, fertilizer, insecticide, rodenticide or similar product, 81 A.L.R.2d 158.
Elements and measure of damages for breach of warranty in sale of horse, 91 A.L.R.3d 419.
77 C.J.S. Sales § 317.

§ 55-2-317. Cumulation and conflict of warranties express or implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) exact or technical specifications displace an inconsistent sample or model or general language of description;

(b) a sample from an existing bulk displaces inconsistent general language of description;

(c) express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

History: 1953 Comp., § 50A-2-317, enacted by Laws 1961, ch. 96, § 2-317.

OFFICIAL COMMENT

Prior uniform statutory provision. On cumulation of warranties see Sections 14, 15 and 16, Uniform Sales Act.

Changes. Completely rewritten into one section.

Purposes of changes.1. The present section rests on the basic policy of this article that no warranty is created except by some conduct (either affirmative action or failure to disclose) on the part of the seller. Therefore, all warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

This article thus follows the general policy of the Uniform Sales Act except that in case of the sale of an article by its patent or trade name the elimination of the warranty of fitness depends solely on whether the buyer has relied on the seller's skill and judgment; the use of the patent or trade name is but one factor in making this determination.

2. The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail. These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties which later turn out to be inconsistent. To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

3. The rules in Subsections (a), (b) and (c) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.

Cross reference.Point 1: Section 2-315.

Definitional cross reference."Party". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63 Am. Jur. 2d Products Liability § 519; 68 Am. Jur. 2d Secured Transactions § 111.
Elements and measure of damages for breach of warranty in sale of horse, 91 A.L.R.3d 419.
Measures of damages in action for breach of warranty of title to personal property under U.C.C. § 2-714, 94 A.L.R.3d 583.
77 C.J.S. Sales §§ 313, 324.

§ 55-2-318. Third-party beneficiaries of warranties express or implied.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

History: 1953 Comp., § 50A-2-318, enacted by Laws 1961, ch. 96, § 2-318.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by Section 2-316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in Section 2-718 or 2-719. To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section.

2. The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty under this article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him [As amended in 1966].

3. The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. The second alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965) in extending the rule beyond injuries to the person [As amended in 1966].

Cross references.Point 1: Sections 2-316, 2-718 and 2-719.

Point 2: Section 2-314.

Definitional cross references."Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

ANNOTATION

Compiler's notes. - New Mexico adopted Alternative A of 2-318 of the 1972 Official Text of the U.C.C.

Privity of contract not required. - A defendant may be held liable for breach of implied warranty of merchantability under the UCC without regard to privity of contract. Perfetti v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983).

This section only addresses horizontal privity, leaving vertical privity to judical decision. Armijo v. Ed Black's Chevrolet Center, Inc., 105 N.M. 422, 733 P.2d 870 (Ct. App. 1987).

Employees of a purchaser are excluded from the manufacturer's warranty protections offered by provisions comparable to this section. Armijo v. Ed Black's Chevrolet Center, Inc., 105 N.M. 422, 733 P.2d 870 (Ct. App. 1987).

Law reviews. - For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63 Am. Jur. 2d Products Liability § 450 et seq.; 67 Am. Jur. 2d Sales §§ 706 to 722.
Manufacturer's responsibility for defective component supplied by another and incorporated in product, 3 A.L.R.3d 1016.
Privity of contract as essential in action against remote manufacturer or distributor for defects in goods not causing injury to person or to other property, 16 A.L.R.3d 683.
In personam jurisdiction over nonresidential manufacturer or seller under "long-arm" statutes, 19 A.L.R.3d 13.
Discovery, in products liability case, of defendant's knowledge as to injury to or complaints by others than plaintiff, related to product, 20 A.L.R.3d 1430.
Right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 A.L.R.3d 943.
Extension of strict liability in tort to permit recovery by a third person who was neither a purchaser nor user of product, 33 A.L.R.3d 415.
Proof of defect under doctrine of strict liability in tort, 51 A.L.R.3d 8.
Necessity and sufficiency of identification of defendant as manufacturer or seller of product alleged to have caused injury, 51 A.L.R.3d 1344.
Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.
Application of strict liability in tort doctrine to lessor of personal property, 52 A.L.R.3d 121.
Liability of seller of used product, 53 A.L.R.3d 337.
Product as unreasonably dangerous or unsafe under doctrine of strict liability in tort, 54 A.L.R.3d 352.
Elements and measure of damages for breach of warranty in sale of horse, 91 A.L.R.3d 419.
Third-party beneficiaries of warranties under UCC § 2-318, 100 A.L.R.3d 743.

Pre-emption of strict liability in tort by provisions of UCC Article 2, 15 A.L.R.4th 791.
Admiralty products liability: recovery against remote manufacturer or distributor for economic or commercial loss caused by defect in product, 81 A.L.R. Fed. 181.
77 C.J.S. Sales § 305.

§ 55-2-319. F.O.B. and F.A.S. terms.

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which:

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this article (Section 2-504 [55-2-504 NMSA 1978]) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this article (Section 2-503 [55-2-503 NMSA 1978]);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this article on the form of bill of lading (Section 2-323 [55-2-323 NMSA 1978]).

(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must:

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within Subsection (1) (a) or (c) or Subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this article (Section 2-311 [55-2-311 NMSA 1978]). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must

make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History: 1953 Comp., § 50A-2-319, enacted by Laws 1961, ch. 96, § 2-319.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is intended to negate the uncommercial line of decision which treats an "F.O.B." term as "merely a price term." The distinctions taken in Subsection (1) handle most of the issues which have on occasion led to the unfortunate judicial language just referred to. Other matters which had led to sound results being based on unhappy language in regard to F.O.B. clauses are dealt with in this act by Section 2-311(2) (seller's option re-arrangements relating to shipment) and Sections 2-614 and 615 (substituted performance and seller's excuse).

2. Subsection (1) (c) not only specifies the duties of a seller who engages to deliver "F.O.B. vessel," or the like, but ought to make clear that no agreement is soundly drawn when it looks to reshipment from San Francisco or New York, but speaks merely of "F.O.B." the place.

3. The buyer's obligations stated in Subsection (1) (c) and Subsection (3) are, as shown in the text, obligations of cooperation. The last sentence of Subsection (3) expressly, though perhaps unnecessarily, authorizes the seller, pending instructions, to go ahead with such preparatory moves as shipment from the interior to the named point of delivery. The sentence presupposes the usual case in which instructions "fail"; a prior repudiation by the buyer, giving notice that breach was intended, would remove the reason for the sentence, and would normally bring into play, instead, the second sentence of Section 2-704, which duly calls for lessening damages.

4. The treatment of "F.O.B. vessel" in conjunction with F.A.S. fits, in regard to the need for payment against documents, with standard practice and case-law; but "F.O.B. vessel" is a term which by its very language makes express the need for an "on board" document. In this respect, that term is stricter than the ordinary overseas "shipment" contract (C.I.F., etc., Section 2-320).

Cross references.Sections 2-311(3), 2-323, 2-503 and 2-504.

Definitional cross references."Agreed". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - F.O.B. provision in sale contract as affecting time or place of passing title, 101 A.L.R. 292.
77 C.J.S. Sales §§ 75, 143.

§ 55-2-320. C.I.F. and C.&F. terms.

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C.&F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to:

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C.&F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the

obligation as to insurance.

(4) Under the term C.I.F. or C.&F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History: 1953 Comp., § 50A-2-320, enacted by Laws 1961, ch. 96, § 2-320.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To make it clear that:

1. The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and "title". Delivery of possession of the goods is accomplished by delivery of the bill of lading, and upon tender of the required documents the buyer must pay the agreed price without awaiting the arrival of the goods and if they have been lost or damaged after proper shipment he must seek his remedy against the carrier or insurer. The buyer has no right of inspection prior to payment or acceptance of the documents.

2. The seller's obligations remain the same even though the C.I.F. term is "used only in connection with the stated price and destination".

3. The insurance stipulated by the C.I.F. term is for the buyer's benefit, to protect him against the risk of loss or damage to the goods in transit. A clause in a C.I.F. contract "insurance - for the account of sellers" should be viewed in its ordinary mercantile meaning that the sellers must pay for the insurance and not that it is intended to run to the seller's benefit.

4. A bill of lading covering the entire transportation from the port of shipment is explicitly required but the provision on this point must be read in the light of its reason to assure the buyer of as full protection as the conditions of shipment reasonably permit, remembering always that this type of contract is designed to move the goods in the channels commercially available. To enable the buyer to deal with the goods while they are afloat the bill of lading must be one that covers only the quantity of goods called for by the contract. The buyer is not required to accept his part of the goods without a bill of lading because the latter covers a larger quantity, nor is he required to accept a bill of lading for the whole quantity under a stipulation to hold the excess for the owner. Although the buyer is not compelled to accept either goods or documents under such circumstances he may of course claim his rights in any goods which have been identified to his contract.

5. The seller is given the option of paying or providing for the payment of freight. He has no option to ship "freight collect" unless the agreement so provides. The rule of the common law that the buyer need not pay the freight if the goods do not arrive is preserved.

Unless the shipment has been sent "freight collect" the buyer is entitled to receive documentary evidence that he is not obligated to pay the freight; the seller is therefore required to obtain a receipt "showing that the freight has been paid or provided for." The usual notation in the appropriate space on the bill of lading that the freight has been prepaid is a sufficient receipt, as at common law. The phrase "provided for" is intended to cover the frequent situation in which the carrier extends credit to a shipper for the freight on successive shipments and receives periodical payments of the accrued freight charges from him.

6. The requirement that unless otherwise agreed the seller must procure insurance "of a kind and on terms then current at the port for shipment in the usual amount, in the currency of the contract, sufficiently shown to cover the same goods covered by the bill of lading", applies to both marine and war risk insurance. As applied to marine insurance, it means such insurance as is usual or customary at the port for shipment with reference to the particular kind of goods involved, the character and equipment of the vessel, the route of the voyage, the port of destination and any other considerations that affect the risk. It is the substantial equivalent of the ordinary insurance in the particular trade and on the particular voyage and is subject to agreed specifications of type or extent of coverage. The language does not mean that the insurance must be adequate to cover all risks to which the goods may be subject in transit. There are some types of loss or damage that are not covered by the usual marine insurance and are excepted in bills of lading or in applicable statutes from the causes of loss or damage for which the carrier or the vessel is liable. Such risks must be borne by the buyer under this article.

Insurance secured in compliance with a C.I.F. term must cover the entire transportation of the goods to the named destination.

7. An additional obligation is imposed upon the seller in requiring him to procure customary war risk insurance at the buyer's expense. This changes the common law on the point. The seller is not required to assume the risk of including in the C.I.F. price the cost of such insurance, since it often fluctuates rapidly, but is required to treat it simply as a necessary for the buyer's account. What war risk insurance is "current" or usual turns on the standard forms of policy or rider in common use.

8. The C.I.F. contract calls for insurance covering the value of the goods at the time and place of shipment and does not include any increase in market value during transit or any anticipated profit to the buyer on a sale by him.

The contract contemplates that before the goods arrive at their destination they may be sold again and again on C.I.F. terms and that the original policy of insurance and bill of

lading will run with the interest in the goods by being transferred to each successive buyer. A buyer who becomes the seller in such an intermediate contract for sale does not thereby, if his sub-buyer knows the circumstances, undertake to insure the goods again at an increased price fixed in the new contract or to cover the increase in price by additional insurance, and his buyer may not reject the documents on the ground that the original policy does not cover such higher price. If such a sub-buyer desires additional insurance he must procure it for himself.

Where the seller exercises an option to ship "freight collect" and to credit the buyer with the freight against the C.I.F. price, the insurance need not cover the freight since the freight is not at the buyer's risk. On the other hand, where the seller prepays the freight upon shipping under a bill of lading requiring prepayment and providing that the freight shall be deemed earned and shall be retained by the carrier "ship and/or cargo lost or not lost," or using words of similar import, he must procure insurance that will cover the freight, because notwithstanding that the goods are lost in transit the buyer is bound to pay the freight as part of the C.I.F. price and will be unable to recover it back from the carrier.

9. Insurance "for the account of whom it may concern" is usual and sufficient. However, for a valid tender the policy of insurance must be one which can be disposed of together with the bill of lading and so must be "sufficiently shown to cover the same goods covered by the bill of lading". It must cover separately the quantity of goods called for by the buyer's contract and not merely insure his goods as part of a larger quantity in which others are interested, a case provided for in American mercantile practice by the use of negotiable certificates of insurance which are expressly authorized by this section. By usage these certificates are treated as the equivalent of separate policies and are good tender under C.I.F. contracts. The term "certificate of insurance", however, does not of itself include certificates or "cover notes" issued by the insurance broker and stating that the goods are covered by a policy. Their sufficiency as substitutes for policies will depend upon proof of an established usage or course of dealing. The present section rejects the English rule that not only brokers' certificates and "cover notes" but also certain forms of American insurance certificates are not the equivalent of policies and are not good tender under a C.I.F. contract.

The seller's failure to tender a proper insurance document is waived if the buyer refuses to make payment on other and untenable grounds at a time when proper insurance could have been obtained and tendered by the seller if timely objection had been made. Even a failure to insure on shipment may be cured by seasonable tender of a policy retroactive in effect; e.g., one insuring the goods "lost or not lost." The provisions of this article on cure of improper tender and on waiver of buyer's objections by silence are applicable to insurance tenders under a C.I.F. term. Where there is no waiver by the buyer as described above, however, the fact that the goods arrive safely does not cure the seller's breach of his obligations to insure them and tender to the buyer a proper insurance document.

10. The seller's invoice of the goods shipped under a C.I.F. contract is regarded as a

usual and necessary document upon which reliance may properly be placed. It is the document which evidences points of description, quality and the like which do not readily appear in other documents. This article rejects those statements to the effect that the invoice is a usual but not a necessary document under a C.I.F. term.

11. The buyer needs all of the documents required under a C.I.F. contract, in due form and with necessary endorsements, so that before the goods arrive he may deal with them by negotiating the documents or may obtain prompt possession of the goods after their arrival. If the goods are lost or damaged in transit the documents are necessary to enable him promptly to assert his remedy against the carrier or insurer. The seller is therefore obligated to do what is mercantilely reasonable in the circumstances and should make every reasonable exertion to send forward the documents as soon as possible after the shipment. The requirement that the documents be forwarded with "commercial promptness" expresses a more urgent need for action than that suggested by the phrase "reasonable time".

12. Under a C.I.F. contract the buyer, as under the common law, must pay the price upon tender of the required documents without first inspecting the goods, but his payment in these circumstances does not constitute an acceptance of the goods nor does it impair his right of subsequent inspection or his options and remedies in the case of improper delivery. All remedies and rights for the seller's breach are reserved to him. The buyer must pay before inspection and assert his remedy against the seller afterward unless the nonconformity of the goods amounts to a real failure of consideration, since the purpose of choosing this form of contract is to give the seller protection against the buyer's unjustifiable rejection of the goods at a distant port of destination which would necessitate taking possession of the goods and suing the buyer there.

13. A valid C.I.F. contract may be made which requires part of the transportation to be made on land and part on the sea, as where the goods are to be brought by rail from an inland point to a seaport and thence transported by vessel to the named destination under a "through" or combination bill of lading issued by the railroad company. In such a case shipment by rail from the inland point within the contract period is a timely shipment notwithstanding that the loading of the goods on the vessel is delayed by causes beyond the seller's control.

14. Although Subsection (2) stating the legal effects of the C.I.F. term is an "unless otherwise agreed" provision, the express language used in an agreement is frequently a precautionary, fuller statement of the normal C.I.F. terms and hence not intended as a departure or variation from them. Moreover, the dominant outlines of the C.I.F. term are so well understood commercially that any variation should, whenever reasonably possible, be read as falling within those dominant outlines rather than as destroying the whole meaning of a term which essentially indicates a contract for proper shipment rather than one for delivery at destination. Particularly careful consideration is necessary before a printed form or clause is construed to mean agreement otherwise and where a C.I.F. contract is prepared on a printed form designed for some other type

of contract, the C.I.F. terms must prevail over printed clauses repugnant to them.

15. Under Subsection (4) the fact that the seller knows at the time of the tender of the documents that the goods have been lost in transit does not affect his rights if he has performed his contractual obligations. Similarly, the seller cannot perform under a C.I.F. term by purchasing and tendering landed goods.

16. Under the C.&F. term, as under the C.I.F. term, title and risk of loss are intended to pass to the buyer on shipment. A stipulation in a C.&F. contract that the seller shall effect insurance on the goods and charge the buyer with the premium (in effect that he shall act as the buyer's agent for that purpose) is entirely in keeping with the pattern. On the other hand, it often happens that the buyer is in a more advantageous position than the seller to effect insurance on the goods or that he has in force an "open" or "floating" policy covering all shipments made by him or to him, in either of which events the C.&F. term is adequate without mention of insurance.

17. It is to be remembered that in a French contract the term "C.A.F." does not mean "Cost and Freight" but has exactly the same meaning as the term "C.I.F." since it is merely the French equivalent of that term. The "A" does not stand for "and" but for "assurance" which means insurance.

Cross references.Point 4: Section 2-323.

Point 6: Section 2-509(1)(a).

Point 9: Sections 2-508 and 2-605(1)(a).

Point 12: Sections 2-321(3), 2-512 and 2-513(3) and Article 5.

Definitional cross references."Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Term". Section 2-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Sales §§ 551 to 565.
What constitutes delivery of goods sold under C.I.F. contract, 10 A.L.R. 701; 20 A.L.R. 1236; 47 A.L.R. 193.
77 C.J.S. Sales §§ 75, 217.

§ 55-2-321. C.I.F. or C.&F.: "net landed weights"; "payment on arrival"; warranty of condition on arrival.

Under a contract containing a term C.I.F. or C.&F.:

(1) where the price is based on or is to be adjusted according to "net landed weights," "delivered weights," "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness;

(2) an agreement described in Subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss;

(3) unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost, delivery of the documents and payment are due when the goods should have arrived.

History: 1953 Comp., § 50A-2-321, enacted by Laws 1961, ch. 96, § 2-321.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section deals with two variations of the C.I.F. contract which have evolved in mercantile practice but are entirely consistent with the basic C.I.F. pattern. Subsections (1) and (2), which provide for a shift to the seller of the risk of quality and weight deterioration during shipment, are designed to conform the law to the best mercantile practice and usage without changing the legal consequences of the C.I.F. or C.&F. term as to the passing of marine risks to the buyer at the point of shipment. Subsection (3) provides that where under the contract documents are to be presented for payment after arrival of the goods, this amounts merely to a postponement of the payment under the C.I.F. contract and is not to be confused with the "no arrival, no sale" contract. If the goods are lost, delivery of the documents and payment against them are due when the goods should have arrived. The clause for payment on or after arrival is not to be construed as such a condition precedent to payment that if the goods are lost in transit the buyer need never pay and the seller must bear the loss.

Cross reference.Section 2-324.

Definitional cross references."Agreement". Section 1-201.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Goods". Section 2-105.

"Seller". Section 2-103.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Sales §§ 551 to 565.
What constitutes delivery of goods sold under "C.I.F." contract, 10 A.L.R. 701; 20 A.L.R. 1236.
Buyer's right to inspect at destination where goods are delivered to carrier, 27 A.L.R. 524.
Applicability of provision in contract of sale for return of article, where article delivered does not answer to description, 30 A.L.R. 321.
Notice of rejection, duty of purchaser of goods "on trial" or "on approval," 78 A.L.R. 533.
Time within which buyer must make inspection, trial or test to determine whether goods are of requisite quality, 52 A.L.R.2d 900.
Elements and measure of damages for breach of warranty in sale of horse, 91 A.L.R.3d 419.
77 C.J.S. Sales §§ 189, 229, 259, 273 to 276.

§ 55-2-322. Delivery "ex-ship."

(1) Unless otherwise agreed a term for delivery of goods "ex-ship" (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed:

(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

History: 1953 Comp., § 50A-2-322, enacted by Laws 1961, ch. 96, § 2-322.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The delivery term, "ex-ship", as between seller and buyer, is the reverse of the f. a. s. term covered.

2. Delivery need not be made from any particular vessel under a clause calling for delivery "ex-ship", even though a vessel on which shipment is to be made originally is named in the contract, unless the agreement by appropriate language, restricts the clause to delivery from a named vessel.

3. The appropriate place and manner of unloading at the port of destination depend upon the nature of the goods and the facilities and usages of the port.

4. A contract fixing a price "ex-ship" with payment "cash against documents" calls only for such documents as are appropriate to the contract. Tender of a delivery order and of a receipt for the freight after the arrival of the carrying vessel is adequate. The seller is not required to tender a bill of lading as a document of title nor is he required to insure the goods for the buyer's benefit, as the goods are not at the buyer's risk during the voyage.

Cross reference.Point 1: Section 2-319(2).

Definitional cross references."Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Sales §§ 559 to 562.
Delay in delivery placing goods at risk of party at fault under § 22(b) of Uniform Sales Act, 38 A.L.R.2d 658.
77 C.J.S. Sales §§ 75, 217, 259, 273 to 276.

§ 55-2-323. Form of bill of lading required in overseas shipment; "overseas."

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or

C.&F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C.&F., received for shipment.

(2) Where in a case within Subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set:

(a) due tender of a single part is acceptable within the provisions of this article on cure of improper delivery (Subsection (1) of Section 2-508 [55-2-508 NMSA 1978]); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

History: 1953 Comp., § 50A-2-323, enacted by Laws 1961, ch. 96, § 2-323.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) follows the "American" rule that a regular bill of lading indicating delivery of the goods at the dock for shipment is sufficient, except under a term "F.O.B. vessel." See Section 2-319 and comment thereto.

2. Subsection (2) deals with the problem of bills of lading covering deep water shipments, issued not as a single bill of lading but in a set of parts, each part referring to the other parts and the entire set constituting in commercial practice and at law a single bill of lading. Commercial practice in international commerce is to accept and pay against presentation of the first part of a set if the part is sent from overseas even though the contract of the buyer requires presentation of a full set of bills of lading provided adequate indemnity for the missing parts is forthcoming.

This subsection codifies that practice as between buyer and seller. Article 5 (Section 5-113) authorizes banks presenting drafts under letters of credit to give indemnities against the missing parts, and this subsection means that the buyer must accept and act on such indemnities if he in good faith deems them adequate. But neither this subsection nor Article 5 decides whether a bank which has issued a letter of credit is similarly bound. The issuing bank's obligation under a letter of credit is independent and depends on its own terms. See Article 5.

Cross references.Sections 2-508(2) and 5-113.

Definitional cross references."Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Financing agency". Section 2-104.

"Person". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 265; 15A Am. Jur. 2d Commercial Code § 39; 67 Am. Jur. 2d Sales § 561.
77 C.J.S. Sales §§ 155, 156, 164, 165; 80 C.J.S. Shipping § 111.

§ 55-2-324. "No arrival, no sale" term.

Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed:

(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the nonarrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 2-613 [55-2-613 NMSA 1978]).

History: 1953 Comp., § 50A-2-324, enacted by Laws 1961, ch. 96, § 2-324.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The "no arrival, no sale" term in a "destination" overseas contract leaves risk of loss on the seller but gives him an exemption from liability for non-delivery. Both the nature of the case and the duty of good faith require that the seller must not interfere with the arrival of the goods in any way. If the circumstances imposed upon him the responsibility for making or arranging the shipment, he must have a shipment made despite the exemption clause. Further, the shipment made must be a conforming one, for the exemption under a "no arrival, no sale" term applies only to the hazards of transportation and the goods must be proper in all other respects.

The reason of this section is that where the seller is reselling goods bought by him as shipped by another and this fact is known to the buyer, so that the seller is not under any obligation to make the shipment himself, the seller is entitled under the "no arrival, no sale" clause to exemption from payment of damages for non-delivery if the goods do not arrive or if the goods which actually arrive are non-conforming. This does not extend to sellers who arrange shipment by their own agents, in which case the clause is limited to casualty due to marine hazards. But sellers who make known that they are contracting only with respect to what will be delivered to them by parties over whom they assume no control are entitled to the full quantum of the exemption.

2. The provisions of this article on identification must be read together with the present section in order to bring the exemption into application. Until there is some designation of the goods in a particular shipment or on a particular ship as being those to which the contract refers there can be no application of an exemption for their non-arrival.

3. The seller's duty to tender the agreed or declared goods if they do arrive is not impaired because of their delay in arrival or by their arrival after transshipment.

4. The phrase "to arrive" is often employed in the same sense as "no arrival, no sale" and may then be given the same effect. But a "to arrive" term, added to a C.I.F. or C.&F. contract, does not have the full meaning given by this section to "no arrival, no sale". Such a "to arrive" term is usually intended to operate only to the extent that the risks are not covered by the agreed insurance and the loss or casualty is due to such uncovered hazards. In some instances the "to arrive" term may be regarded as a time of payment term, or, in the case of the reselling seller discussed in Point 1 above, as negating responsibility for conformity of the goods, if they arrive, to any description which was based on his good faith belief of the quality. Whether this is the intention of the parties is a question of fact based on all the circumstances surrounding the resale and in case of ambiguity the rules of Sections 2-316 and 2-317 apply to preclude dishonor.

5. Paragraph (b) applies where goods arrive impaired by damage or partial loss during transportation and makes the policy of this article on casualty to identified goods applicable to such a situation. For the term cannot be regarded as intending to give the seller an unforeseen profit through casualty; it is intended only to protect him from loss due to causes beyond his control.

Cross references.Point 1: Section 1-203.

Point 2: Section 2-501(a) and (c).

Point 5: Section 2-613.

Definitional cross references."Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Sale". Section 2-106.

"Seller". Section 2-103.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Sales §§ 563 to 565.
77 C.J.S. Sales §§ 4, 165, 247, 249, 259, 285 to 287.

§ 55-2-325. "Letter of credit" term; "confirmed credit."

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

History: 1953 Comp., § 50A-2-325, enacted by Laws 1961, ch. 96, § 2-325.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To express the established commercial and banking understanding as to the meaning and effects of terms calling for "letters of credit" or "confirmed credit":

1. Subsection (2) follows the general policy of this article and Article 3 (Section 3-802) on conditional payment, under which payment by check or other short-term instrument is not ordinarily final as between the parties if the recipient duly presents the instrument and honor is refused. Thus the furnishing of a letter of credit does not substitute the financing agency's obligation for the buyer's, but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him.

2. Subsection (3) requires that the credit be irrevocable and be a prime credit as determined by the standing of the issuer. It is not necessary, unless otherwise agreed, that the credit be a negotiation credit; the seller can finance himself by an assignment of the proceeds under Section 5-116(2).

3. The definition of "confirmed credit" is drawn on the supposition that the credit is issued by a bank which is not doing direct business in the seller's financial market; there is no intention to require the obligation of two banks both local to the seller.

Cross references.Sections 2-403, 2-511(3) and 3-802 and Article 5.

Definitional cross references."Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Draft". Section 3-104.

"Financing agency". Section 2-104.

"Notifies". Section 1-201.

"Overseas". Section 2-323.

"Purchaser". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 26; 67 Am. Jur. 2d Sales §§ 270, 674.
Construction of provision for letter of credit in contract for sale, 38 A.L.R. 608.
9 C.J.S. Banks and Banking § 174; 77 C.J.S. Sales § 238.

§ 55-2-326. Sale on approval and sale or return; consignment sales and rights of creditors.

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:

(a) a "sale on approval" if the goods are delivered primarily for use; and

(b) a "sale or return" if the goods are delivered primarily for resale.

(2) Except as provided in Subsection (3) of this section, goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery:

(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign;

(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others;

(c) complies with the filing provisions of the article on secured transactions (Article 9); or

(d) is delivering a work of art pursuant to the Artists' Consignment Act [56-11-1 to 56-11-3 NMSA 1978].

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this article (Section 2-201 [55-2-201 NMSA 1978]) and as contradicting the sale aspect of the contract within the provisions of this article on parol or extrinsic evidence (Section 2-202 [55-2-202 NMSA 1978]).

History: 1953 Comp., § 50A-2-326, enacted by Laws 1961, ch. 96, § 2-326; 1979, ch. 196, § 4.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 19(3), Uniform Sales Act.

Changes. Completely rewritten in this and the succeeding section.

Purposes of changes. To make it clear that:

1. A "sale on approval" or "sale or return" is distinct from other types of transactions with which they have frequently been confused. The type of "sale on approval," "on trial" or "on satisfaction" dealt with involves a contract under which the seller undertakes a particular business risk to satisfy his prospective buyer with the appearance or performance of the goods in question. The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them. The price has already been agreed. The buyer's willingness to receive and test the goods is the consideration for the seller's engagement to deliver and sell. The type of "sale or return" involved herein is a sale to a merchant whose unwillingness to buy is overcome only by the seller's engagement to take back the goods (or any commercial unit of goods) in lieu of payment if they fail to be resold. These two transactions are so strongly delineated in practice and in general understanding that every presumption runs against a delivery to a consumer being a "sale or return" and against a delivery to a merchant for resale being a "sale on approval."

The right to return the goods for failure to conform to the contract does not make the transaction a "sale on approval" or "sale or return" and has nothing to do with this and the following section. The present section is not concerned with remedies for breach of contract. It deals instead with a power given by the contract to turn back the goods even though they are wholly as warranted.

This section nevertheless presupposes that a contract for sale is contemplated by the parties although that contract may be of the peculiar character here described.

Where the buyer's obligation as a buyer is conditioned not on his personal approval but on the article's passing a described objective test, the risk of loss by casualty pending the test is properly the seller's and proper return is at his expense. On the point of "satisfaction" as meaning "reasonable satisfaction" where an industrial machine is involved, this article takes no position.

2. Pursuant to the general policies of this act which require good faith not only between the parties to the sales contract, but as against interested third parties, Subsection (3) resolves all reasonable doubts as to the nature of the transaction in favor of the general creditors of the buyer. As against such creditors words such as "on consignment" or "on memorandum", with or without words of reservation of title in the seller, are disregarded

when the buyer has a place of business at which he deals in goods of the kind involved. A necessary exception is made where the buyer is known to be engaged primarily in selling the goods of others or is selling under a relevant sign law, or the seller complies with the filing provisions of Article 9 as if his interest were a security interest. However, there is no intent in this section to narrow the protection afforded to third parties in any jurisdiction which has a selling factors act. The purpose of the exception is merely to limit the effect of the present subsection itself, in the absence of any such factors act, to cases in which creditors of the buyer may reasonably be deemed to have been misled by the secret reservation.

3. Subsection (4) resolves a conflict in the preexisting case law by recognition that an "or return" provision is so definitely at odds with any ordinary contract for sale of goods that where written agreements are involved it must be contained in a written memorandum. The "or return" aspect of a sales contract must be treated as a separate contract under the statute of frauds section and as contradicting the sale insofar as questions of parol or extrinsic evidence are concerned.

Cross references.Point 2: Article 9.

Point 3: Sections 2-201 and 2-202.

Definitional cross references."Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Creditor". Section 1-201.

"Goods". Section 2-105.

"Sale". Section 2-106.

"Seller". Section 2-103.

ANNOTATION

The 1979 amendment inserted "of this section" following "Subsection (3)" near the beginning of Subsection (2), added Paragraph (d) in Subsection (3) and made other minor changes.

"Sale or return" generally. - Despite insurer's contention that policy exclusion for cars sold was in effect, insurer was liable on policy when one of insured's vehicles, used in a sales promotion with another dealer, was involved in an accident, because transaction

between dealers here was not within the code's "sale or return" provision. Security Ins. Co. v. Alliance Mut. Ins. Co. 408 F.2d 878 (10th Cir. 1969).

Allegations that seller shipped cattle to buyer subject to buyer's right to return some or all of the cattle and subject to further negotiations on the price did not raise material issues of fact as to whether a contract existed. The fact that the transaction was a "sale or return" did not negate the existence of the contract. O'Brien v. Chandler, N.M. , 765 P.2d 1165 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 7; 67 Am. Jur. 2d Sales §§ 465 to 502; 68 Am. Jur. 2d Secured Transactions §§ 8, 115.
Validity and effect of provision in a contract of sale making acceptance of goods conditional on third person's approval, 46 A.L.R. 864.
Contracts of sale or return as distinguished from contracts for sale on approval, 52 A.L.R. 589.
Goods consigned to shipper's order, 60 A.L.R. 677.
Duty of purchaser of goods "on trial" or "on approval" regarding notice of rejection, 78 A.L.R. 533.
Validity and enforceability of agreement of seller to repurchase on buyer's demand as affected by failure to fix time for demand, 88 A.L.R. 842.
Application of statute of frauds to agreements of repurchase or repayment, 121 A.L.R. 312.
Presumption and burden of proof as to consignee's title to or interest in respect of goods comprising shipment, in consignee's action against carrier for loss, damage, delay, nondelivery or conversion, 135 A.L.R. 456.
Conclusiveness of determination of third party whose approval is provided for by contract for sale of goods, 7 A.L.R.3d 555.
35 C.J.S. Factors §§ 1, 56, 60, 63; 77 C.J.S. Sales §§ 268, 270, 271, 283.

§ 55-2-327. Special incidents of sale on approval and sale or return.

(1) Under a sale on approval unless otherwise agreed:

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed:

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) the return is at the buyer's risk and expense.

History: 1953 Comp., § 50A-2-327, enacted by Laws 1961, ch. 96, § 2-327.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 19(3), Uniform Sales Act.

Changes. Completely rewritten in preceding and this section.

Purposes of changes. To make it clear that:

1. In the case of a sale on approval:

If all of the goods involved conform to the contract, the buyer's acceptance of part of the goods constitutes acceptance of the whole. Acceptance of part falls outside the normal intent of the parties in the "on approval" situation and the policy of this article allowing partial acceptance of a defective delivery has no application here. A case where a buyer takes home two dresses to select one commonly involves two distinct contracts; if not, it is covered by the words "unless otherwise agreed".

2. In the case of a sale or return, the return of any unsold unit merely because it is unsold is the normal intent of the "sale or return" provision, and therefore the right to return for this reason alone is independent of any other action under the contract which would turn on wholly different considerations. On the other hand, where the return of goods is for breach, including return of items resold by the buyer and returned by the ultimate purchasers because of defects, the return procedure is governed not by the present section but by the provisions on the effects and revocation of acceptance.

3. In the case of a sale on approval the risk rests on the seller until acceptance of the goods by the buyer, while in a sale or return the risk remains throughout on the buyer.

4. Notice of election to return given by the buyer in a sale on approval is sufficient to relieve him of any further liability. Actual return by the buyer to the seller is required in the case of a sale or return contract. What constitutes due "giving" of notice, as required in "on approval" sales, is governed by the provisions on good faith and notice. "Seasonable" is used here as defined in Section 1-204. Nevertheless, the provisions of both this article and of the contract on this point must be read with commercial reason and with full attention to good faith.

Cross references.Point 1: Sections 2-501, 2-601 and 2-603.

Point 2: Sections 2-607 and 2-608.

Point 4: Sections 1-201 and 1-204.

Definitional cross references."Agreed". Section 1-201.

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Notification". Section 1-201.

"Sale on approval". Section 2-326.

"Sale or return". Section 2-326.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Sales §§ 465 to 502.
Notice of rejection, duty of purchaser of goods "on trial" or "on approval," 78 A.L.R. 533.
Duty of consignee as to valuation of goods on reshipment to consignor, 16 A.L.R.2d 866.
Time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality, 52 A.L.R.2d 900.
Reasonableness of personal judgment of buyer as test where goods are sold subject to being satisfactory to the buyer, 86 A.L.R.2d 200.
Time for return of goods sold on "sale or return" absent specific time provision in contract, 93 A.L.R.2d 342.
77 C.J.S. Sales §§ 4, 247, 249, 268, 269, 271, 286, 287.

§ 55-2-328. Sale by auction.

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

History: 1953 Comp., § 50A-2-328, enacted by Laws 1961, ch. 96, § 2-328.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 21, Uniform Sales Act.

Changes. Completely rewritten.

Purposes of changes. To make it clear that:

1. The auctioneer may in his discretion either reopen the bidding or close the sale on the bid on which the hammer was falling when a bid is made at that moment. The recognition of a bid of this kind by the auctioneer in his discretion does not mean a closing in favor of such a bidder, but only that the bid has been accepted as a continuation of the bidding. If recognized, such a bid discharges the bid on which the hammer was falling when it was made.

2. An auction "with reserve" is the normal procedure. The crucial point, however, for determining the nature of an auction is the "putting up" of the goods. This article accepts the view that the goods may be withdrawn before they are actually "put up," regardless of whether the auction is advertised as one without reserve, without liability on the part

of the auction announcer to persons who are present. This is subject to any peculiar facts which might bring the case within the "firm offer" principle of this article, but an offer to persons generally would require unmistakable language in order to fall within that section. The prior announcement of the nature of the auction either as with reserve or without reserve will, however, enter as an "explicit term" in the "putting up" of the goods and conduct thereafter must be governed accordingly. The present section continues the prior rule permitting withdrawal of bids in auctions both with and without reserve; and the rule is made explicit that the retraction of a bid does not revive a prior bid.

Cross reference.Point 2: Section 2-205.

Definitional cross references."Buyer". Section 2-103.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Notice". Section 1-201.

"Sale". Section 2-106.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Implied authority of auctioneer to receive payment for commodities which he is authorized to sell, 8 A.L.R. 227; 105 A.L.R. 718.
Modes of making and accepting bids at auctions, 11 A.L.R. 543.
Auctioneer's personal liability for sale of property which does not belong to person employing him, 20 A.L.R. 134; 99 A.L.R. 418.
Advertisements of property offered at auction as affecting rights of purchaser, 28 A.L.R. 991; 158 A.L.R. 1413.
Regulations affecting auctions or auctioneers, 31 A.L.R. 299; 39 A.L.R 773; 111 A.L.R. 473.
By-bidding or puffing, effect on auction sale, 46 A.L.R. 122.
Title to goods, as between purchaser from, and one who entrusted them to auctioneer, 36 A.L.R.2d 1362.
Withdrawal of property from auction sale, 37 A.L.R.2d 1049.
Liability of auctioneer, 80 A.L.R.2d 1237.
Liability of defaulting purchaser to auctioneer, 30 A.L.R.3d 1395.
Auction sales under UCC § 2-328, 44 A.L.R.4th 110.
7 C.J.S. Auctions and Auctioneers §§ 8 to 20.

Part 4

TITLE, CREDITORS AND GOOD FAITH PURCHASERS

§ 55-2-401. Passing of title; reservation for security; limited application of this section.

Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this article and matters concerning title become material the following rules apply:

(1) title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501 [55-2-501 NMSA 1978]), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act [chapter]. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on secured transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties;

(2) unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there;

(3) unless otherwise explicitly agreed where delivery is to be made without moving the goods:

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting;

(4) a rejection or other refusal by the buyer to receive or retain the goods, whether or

not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."

History: 1953 Comp., § 50A-2-401, enacted by Laws 1961, ch. 96, § 2-401.

OFFICIAL COMMENT

Prior uniform statutory provision. See generally, Sections 17, 18, 19 and 20, Uniform Sales Act.

Purposes. To make it clear that:

1. This article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not "title" to the goods has passed. That the rules of this section in no way alter the rights of either the buyer, seller or third parties declared elsewhere in the article is made clear by the preamble of this section. This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon a "sale" or upon location of "title" without further definition. The basic policy of this article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a "sale" is and when title passes under this article in case the courts deem any public regulation to incorporate the defined term of the "private" law.

2. "Future" goods cannot be the subject of a present sale. Before title can pass the goods must be identified in the manner set forth in Section 2-501. The parties, however, have full liberty to arrange by specific terms for the passing of title to goods which are existing.

3. The "special property" of the buyer in goods identified to the contract is excluded from the definition of "security interest"; its incidents are defined in provisions of this article such as those on the rights of the seller's creditors, on good faith purchase, on the buyer's right to goods on the seller's insolvency and on the buyer's right to specific performance or replevin.

4. The factual situations in Subsections (2) and (3) upon which passage of title turn actually base the test upon the time when the seller has finally committed himself in regard to specific goods. Thus in a "shipment" contract he commits himself by the act of making the shipment. If shipment is not contemplated Subsection (3) turns on the seller's final commitment, i.e. the delivery of documents or the making of the contract.

Cross references.Point 2: Sections 2-102, 2-501 and 2-502.

Point 3: Sections 1-201, 2-402, 2-403, 2-502 and 2-716.

Definitional cross references."Agreement". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Party". Section 1-201.

"Purchaser". Section 1-201.

"Receipt" of goods. Section 2-103.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

ANNOTATION

Question of ownership of automobile in suit on insurance policy is for jury, where alleged owner was part-time salesman for an automobile dealer under an arrangement whereby salesman was to sell the car or keep it himself, paying off the balance. Knotts v. Safeco Ins. Co. of Am., 78 N.M. 395, 432 P.2d 106 (1967).

And title revests on refusal of conditional tender. - Bankrupt, when it refused to accept the tender of crude oil from seller conditioned upon payment by bankrupt of seller's

common carrier lien, caused thereby title to the oil to revest in the oil producing sellers. Amoco Pipeline Co. v. Admiral Crude Oil Corp. 490 F.2d 114 (10th Cir. 1974).

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 7; 67 Am. Jur. 2d Sales §§ 387 to 464; 68 Am. Jur. 2d Secured Transactions §§ 8, 197, 198.
Receipt of partial payment or commercial paper for purchase price for goods as terminating vendor's right of stoppage in transitu, 7 A.L.R. 1412.
Dishonor of draft or check for purchase price on a cash sale as affecting seller's rights in respect of property or its proceeds, 31 A.L.R. 578; 54 A.L.R. 526.
Failure to ship by carrier designated by buyer as affecting passing of title, 31 A.L.R. 955.
Rule that title passes on delivery to carrier as applicable to shipment in "pool" car for several purchasers, 36 A.L.R. 410.
Delivery to carrier of quantity of goods greater than that called for by contract as passing title, 38 A.L.R. 1544.
Effect of provision making acceptance of goods conditional on approval by third person, as affecting passing of title, 46 A.L.R. 869.
Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 A.L.R. 1116.
Time and place of passage of title to goods shipped under bill of lading, with draft attached, consigning them to shipper's order, 60 A.L.R. 677.
Validity as to creditors of the buyer or consignee of reservation of title to goods delivered under implied or express authority to resell, 63 A.L.R. 355.
Accession to property which is the subject of a conditional sale or chattel mortgage, 68 A.L.R. 1242.
Necessity and sufficiency of appropriation to pass title on sale of corporate stock or securities, 78 A.L.R. 1019.
Applicability of protective provisions of Uniform Conditional Sales Act or similar statutes where there has been a novation of the contract, 83 A.L.R. 998.
F.o.b. provision in sale contract as affecting time or place of passing of title, 101 A.L.R. 292.
Right of seller of fixtures retaining title thereto or lien thereon, as against purchasers or encumbrancers of the realty, 111 A.L.R. 362; 141 A.L.R. 1283.
Passing title to personal property under contract covering real and personal property, 117 A.L.R. 395.
Valuables secreted in articles sold, 4 A.L.R.2d 318.
Measures of damages in action for breach of warranty of title to personal property under U.C.C. § 2-714, 94 A.L.R.3d 583.
77 C.J.S. Sales §§ 4, 245, 247, 249, 286, 287.

§ 55-2-402. Rights of seller's creditors against sold goods.

(1) Except as provided in Subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this article (Sections 2-502 [55-2-502 NMSA 1978] and 2-716 [55-2-716 NMSA 1978]).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this article shall be deemed to impair the rights of creditors of the seller:

(a) under the provisions of the article on secured transactions (Article 9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this article constitute the transaction a fraudulent transfer or voidable preference.

History: 1953 Comp., § 50A-2-402, enacted by Laws 1961, ch. 96, § 2-402.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsection (2) - Section 26, Uniform Sales Act; Subsections (1) and (3) - none.

Changes. Rephrased.

Purposes of changes and new matter. To avoid confusion on ordinary issues between current sellers and buyers and issues in the field of preference and hindrance by making it clear that:

1. Local law on questions of hindrance of creditors by the seller's retention of possession of the goods are outside the scope of this article, but retention of possession in the current course of trade is legitimate. Transactions which fall within the law's policy against improper preferences are reserved from the protection of this article.

2. The retention of possession of the goods by a merchant seller for a commercially reasonable time after a sale or identification in current course is exempted from attack as fraudulent. Similarly, the provisions of Subsection (3) have no application to

identification or delivery made in the current course of trade, as measured against general commercial understanding of what a "current" transaction is.

Definitional cross references."Contract for sale". Section 2-106.

"Creditor". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Money". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 69; 78 Am. Jur. 2d Warehouses §§ 74, 81, 108, 224.
37 C.J.S. Fraudulent Conveyances § 212; 77 C.J.S. Sales § 281.

§ 55-2-403. Power to transfer; good faith purchase of goods; "entrusting."

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of

the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:

(a) the transferor was deceived as to the identity of the purchaser; or

(b) the delivery was in exchange for a check which is later dishonored; or

(c) it was agreed that the transaction was to be a "cash sale"; or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (Article 9), bulk transfers (Article 6) and documents of title (Article 7).

History: 1953 Comp., § 50A-2-403, enacted by Laws 1961, ch. 96, § 2-403.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 20(4), 23, 24 and 25, Uniform Sales Act; Section 9, especially 9(2), Uniform Trust Receipts Act; Section 9, Uniform Conditional Sales Act.

Changes. Consolidated and rewritten.

Purposes of changes. To gather together a series of prior uniform statutory provisions and the case law thereunder and to state a unified and simplified policy on good faith purchase of goods.

1. The basic policy of our law allowing transfer of such title as the transferor has is generally continued and expanded under Subsection (1). In this respect the provisions of the section are applicable to a person taking by any form of "purchase" as defined by this act. Moreover the policy of this act expressly providing for the application of supplementary general principles of law to sales transactions wherever appropriate

joins with the present section to continue unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles. The section also leaves unimpaired the powers given to selling factors under the earlier factors acts. In addition Subsection (1) provides specifically for the protection of the good faith purchaser for value in a number of specific situations which have been troublesome under prior law.

On the other hand, the contract of purchase is of course limited by its own terms as in a case of pledge for a limited amount or of sale of a fractional interest in goods.

2. The many particular situations in which a buyer in ordinary course of business from a dealer has been protected against reservation of property or other hidden interest are gathered by Subsections (2)-(4) into a single principle protecting persons who buy in ordinary course out of inventory. Consignors have no reason to complain, nor have lenders who hold a security interest in the inventory, since the very purpose of goods in inventory is to be turned into cash by sale.

The principle is extended in Subsection (3) to fit with the abolition of the old law of "cash sale" by Subsection (1) (c). It is also freed from any technicalities depending on the extended law of larceny; such extension of the concept of theft to include trick, particular types of fraud, and the like is for the purpose of helping conviction of the offender; it has no proper application to the long-standing policy of civil protection of buyers from persons guilty of such trick or fraud. Finally, the policy is extended, in the interest of simplicity and sense, to any entrusting by a bailor; this is in consonance with the explicit provisions of Section 7-205 on the powers of a warehouseman who is also in the business of buying and selling fungible goods of the kind he warehouses. As to entrusting by a secured party, Subsection (2) is limited by the more specific provisions of Section 9-307(1), which deny protection to a person buying farm products from a person engaged in farming operations.

3. The definition of "buyer in ordinary course of business" (Section 1-201) is effective here and preserves the essence of the healthy limitations engrafted by the case law on the older statutes. The older loose concept of good faith and wide definition of value combined to create apparent good faith purchasers in many situations in which the result outraged common sense; the court's solution was to protect the original title especially by use of "cash sale" or of overtechnical construction of the enabling clauses of the statutes. But such rulings then turned into limitations on the proper protection of buyers in the ordinary market. Section 1-201(9) cuts down the category of buyer in ordinary course in such fashion as to take care of the results of the cases, but with no price either in confusion or in injustice to proper dealings in the normal market.

4. Except as provided in Subsection (1), the rights of purchasers other than buyers in ordinary course are left to the articles on secured transactions, documents of title, and bulk sales.

Cross references.Point 1: Sections 1-103 and 1-201.

Point 2: Sections 1-201, 2-402, 7-205 and 9-307(1).

Points 3 and 4: Sections 1-102, 1-201, 2-104, 2-707 and Articles 6, 7 and 9.

Definitional cross references."Buyer in ordinary course of business". Section 1-201.

"Good faith". Sections 1-201 and 2-103.

"Goods". Section 2-105.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Signed". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Status of "bona fide purchaser" does not automatically pass. - After property has passed into the hands of a bona fide purchaser, every subsequent purchaser does not automatically stand in the shoes of such a bona fide purchaser, irrespective of the subpurchaser's notice of any other claimed interests in the property. Hunick v. Orona, 99 N.M. 306, 657 P.2d 633 (1983).

The significance of being a buyer in the ordinary course of business is the acquisition of goods free of any outstanding claims from those who may be the true owners. Therefore, a buyer in the ordinary course of business is a privileged status that is conferred upon a purchaser, even against the true owners, if he meets the requirements of Subsections (9) and (19) of 55-1-201 NMSA 1978. Hunick v. Orona, 99 N.M. 306, 657 P.2d 633 (1983).

Statute is not intended as cure for false misrepresentation or breach of warranty of title and does not preclude buyers of automobiles from repudiating transaction on the ground of used car dealer's material misrepresentation and breach of warranty. State v. DeBaca, 82 N.M. 727, 487 P.2d 155 (Ct. App. 1971).

Power to transfer upheld. - Upon delivery of cattle pursuant to seller's agreement with buyer, buyer had the power to transfer good title to a good faith purchaser for value, notwithstanding seller's contention that the cattle had been shipped to buyer under a title-retention contract. O'Brien v. Chandler, N.M. , 765 P.2d 1165 (1988).

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 67 to 69; 68 Am. Jur. 2d Secured Transactions § 138; 69 Am. Jur. 2d Secured Transactions § 463.
Right of purchaser of stolen bonds, 1 A.L.R. 717; 85 A.L.R. 357; 102 A.L.R. 28.
Delivery of key as satisfying condition of immediate delivery and actual or continued change of possession to uphold sale of personal property against subsequent purchaser or third persons generally, 56 A.L.R. 518.
Right of purchaser from agent or dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 A.L.R. 393.
Right of purchaser from party to conditional sale as affected by actual or apparent authority in party to sell property, 88 A.L.R. 109.
Estoppel of owner of tangible personal property who permits another to have possession of evidences of title, endorsed in blank, or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge or otherwise deal with, the property, 151 A.L.R. 690.
Relative rights as between purchase of chattel from one who had previously bought it with stolen money, and victim of the theft, 62 A.L.R.2d 537.
Measures of damages in action for breach of warranty of title to personal property under U.C.C. § 2-714, 94 A.L.R.3d 583.
Sales: what is "entrusting" goods to merchant dealer under UCC § 2-403, 54 A.L.R.4th 567.
31 C.J.S. Estoppel § 106; 77 C.J.S. Sales § 288.

Part 5

PERFORMANCE

§ 55-2-501. Insurable interest in goods; manner of identification of goods.

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs:

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in Paragraph

(c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may, until default or insolvency or notification to the buyer that the identification is final, substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

History: 1953 Comp., § 50A-2-501, enacted by Laws 1961, ch. 96, § 2-501.

OFFICIAL COMMENT

Prior uniform statutory provision. See Sections 17 and 19, Uniform Sales Act.

Purposes.1. The present section deals with the manner of identifying goods to the contract so that an insurable interest in the buyer and the rights set forth in the next section will accrue. Generally speaking, identification may be made in any manner "explicitly agreed to" by the parties. The rules of Paragraphs (a), (b) and (c) apply only in the absence of such "explicit agreement".

2. In the ordinary case identification of particular existing goods as goods to which the contract refers is unambiguous and may occur in one of many ways. It is possible, however, for the identification to be tentative or contingent. In view of the limited effect given to identification by this article, the general policy is to resolve all doubts in favor of identification.

3. The provision of this section as to "explicit agreement" clarifies the present confusion in the law of sales which has arisen from the fact that under prior uniform legislation all rules of presumption with reference to the passing of title or to appropriation (which in turn depended upon identification) were regarded as subject to the contrary intention of the parties or of the party appropriating. Such uncertainty is reduced to a minimum under this section by requiring "explicit agreement" of the parties before the rules of Paragraphs (a), (b) and (c) are displaced - as they would be by a term giving the buyer power to select the goods. An "explicit" agreement, however, need not necessarily be found in the terms used in the particular transaction. Thus, where a usage of the trade has previously been made explicit by reduction to a standard set of "rules and regulations" currently incorporated by reference into the contracts of the parties, a relevant provision of those "rules and regulations" is "explicit" within the meaning of this

section.

4. In view of the limited function of identification there is no requirement in this section that the goods be in deliverable state or that all of the seller's duties with respect to the processing of the goods be completed in order that identification occur. For example, despite identification the risk of loss remains on the seller under the risk of loss provisions until completion of his duties as to the goods and all of his remedies remain dependent upon his not defaulting under the contract.

5. Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of the contract with reference to an undivided share in an identified fungible bulk is enough under Subsection (a) to effect an identification if there is no explicit agreement otherwise. The seller's duty, however, to segregate and deliver according to the contract is not affected by such an identification but is controlled by other provisions of this article.

6. Identification of crops under Paragraph (c) is made upon planting only if they are to be harvested within the year or within the next normal harvest season. The phrase "next normal harvest season" fairly includes nursery stock raised for normally quick "harvest," but plainly excludes a "timber" crop to which the concept of a harvest "season" is inapplicable.

Paragraph (c) is also applicable to a crop of wool or the young of animals to be born within twelve months after contracting. The product of a lumbering, mining or fishing operation, though seasonal, is not within the the concept of "growing". Identification under a contract for all or part of the output of such an operation can be effected early in the operation.

Cross references.Point 1: Section 2-502.

Point 4: Sections 2-509, 2-510 and 2-703.

Point 5: Sections 2-105, 2-308, 2-503 and 2-509.

Point 6: Sections 2-105(1), 2-107(1) and 2-402.

Definitional cross references."Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Future goods". Section 2-105.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Party". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Question of ownership of automobile in suit on insurance policy is for jury, where alleged owner was a part-time salesman for an automobile dealer under an arrangement whereby salesman was to sell the car or keep it himself, paying off the balance. Knotts v. Safeco Ins. Co. of Am., 78 N.M. 395, 432 P.2d 106 (1967).

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Sales §§ 503 to 689; 68 Am. Jur. 2d Secured Transactions § 36.
Vendee or vendor under executory contract as having exclusive ownership or interest, within the meaning of condition in insurance policy requiring interest of insured to be that of "unconditional and sole ownership," or the like, 60 A.L.R. 11.
Theft insurance by seller of automobile, 48 A.L.R.2d 8.
Insurable interest of buyer of automobile, 58 A.L.R.2d 1351.
Right of vendor and purchaser inter se in respect of proceeds of insurance, 64 A.L.R.2d 1402.
44 C.J.S. Insurance § 175.

§ 55-2-502. Buyer's right to goods on seller's insolvency.

(1) Subject to Subsection (2) and even though the goods have not been shipped, a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section [55-2-501 NMSA 1978] may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer, he acquires the right to recover the goods only if they conform to the contract for sale.

History: 1953 Comp., § 50A-2-502, enacted by Laws 1961, ch. 96, § 2-502.

OFFICIAL COMMENT

Prior uniform statutory provision. Compare Sections 17, 18 and 19, Uniform Sales Act.

Purposes.1. This section gives an additional right to the buyer as a result of identification of the goods to the contract in the manner provided in Section 2-501. The buyer is given a right to the goods on the seller's insolvency occurring within 10 days after he receives the first installment on their price.

2. The question of whether the buyer also acquires a security interest in identified goods and has rights to the goods when insolvency takes place after the ten-day period provided in this section depends upon compliance with the provisions of the article on secured transactions (Article 9).

3. Subsection (2) is included to preclude the possibility of unjust enrichment which exists if the buyer were permitted to recover goods even though they were greatly superior in quality or quantity to that called for by the contract for sale.

Cross references.Point 1: Sections 1-201 and 2-702.

Point 2: Article 9.

Definitional cross references."Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Right". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions § 36. 77 C.J.S. Sales § 281.

§ 55-2-503. Manner of seller's tender of delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this article, and in particular:

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section [55-2-504 NMSA 1978] respecting shipment, tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination, tender requires that he comply with Subsection (1) and also in any appropriate case tender documents as described in Subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved:

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a nonnegotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents:

(a) he must tender all such documents in correct form, except as provided in this article with respect to bills of lading in a set (Subsection (2) of Section 2-323 [55-2-323 NMSA 1978]); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection.

History: 1953 Comp., § 50A-2-503, enacted by Laws 1961, ch. 96, § 2-503.

OFFICIAL COMMENT

Prior uniform statutory provision. See Sections 11, 19, 20, 43(3) and (4), 46 and 51, Uniform Sales Act.

Changes. The general policy of the above sections is continued and supplemented but Subsection (3) changes the rule of prior Section 19(5) as to what constitutes a "destination" contract and Subsection (4) incorporates a minor correction as to tender of delivery of goods in the possession of a bailee.

Purposes of changes.1. The major general rules governing the manner of proper or due tender of delivery are gathered in this section. The term "tender" is used in this article in two different senses. In one sense it refers to "due tender" which contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed. Unless the context unmistakably indicates otherwise this is the meaning of "tender" in this article and the occasional addition of the word "due" is only for clarity and emphasis. At other times it is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation. Used in either sense, however, "tender" connotes such performance by the tendering party as puts the other party in default if he fails to proceed in some manner.

2. The seller's general duty to tender and deliver is laid down in Section 2-301 and more particularly in Section 2-507. The seller's right to a receipt if he demands one and receipts are customary is governed by Section 1-205. Subsection (1) of the present section proceeds to set forth two primary requirements of tender: first, that the seller "put and hold conforming goods at the buyer's disposition" and, second, that he "give the buyer any notice reasonably necessary to enable him to take delivery."

In cases in which payment is due and demanded upon delivery the "buyer's disposition" is qualified by the seller's right to retain control of the goods until payment by the provision of this article on delivery on condition. However, where the seller is demanding payment on delivery he must first allow the buyer to inspect the goods in order to avoid impairing his tender unless the contract for sale is on C.I.F., C.O.D., cash against documents or similar terms negating the privilege of inspection before payment.

In the case of contracts involving documents the seller can "put and hold conforming goods at the buyer's disposition" under Subsection (1) by tendering documents which give the buyer complete control of the goods under the provisions of Article 7 on due negotiation.

3. Under Paragraph (a) of Subsection (1) usage of the trade and the circumstances of the particular case determine what is a reasonable hour for tender and what constitutes a reasonable period of holding the goods available.

4. The buyer must furnish reasonable facilities for the receipt of the goods tendered by the seller under Subsection (1), Paragraph (b). This obligation of the buyer is no part of the seller's tender.

5. For the purposes of Subsections (2) and (3) there is omitted from this article the rule under prior uniform legislation that a term requiring the seller to pay the freight or cost of transportation to the buyer is equivalent to an agreement by the seller to deliver to the buyer or at an agreed destination. This omission is with the specific intention of negating the rule, for under this article the "shipment" contract is regarded as the normal one and the "destination" contract as the variant type. The seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed so to deliver or the commercial understanding of the terms used by the parties contemplates such delivery.

6. Paragraph (a) of Subsection (4) continues the rule of the prior uniform legislation as to acknowledgment by the bailee. Paragraph (b) of Subsection (4) adopts the rule that between the buyer and the seller the risk of loss remains on the seller during a period reasonable for securing acknowledgment of the transfer from the bailee, while as against all other parties the buyer's rights are fixed as of the time the bailee receives notice of the transfer.

7. Under Subsection (5) documents are never "required" except where there is an express contract term or it is plainly implicit in the peculiar circumstances of the case or in a usage of trade. Documents may, of course, be "authorized" although not required, but such cases are not within the scope of this subsection. When documents are required, there are three main requirements of this subsection: (1) "All": each required document is essential to a proper tender; (2) "Such": the documents must be the ones actually required by the contract in terms of source and substance; (3) "Correct form": all documents must be in correct form.

When a prescribed document cannot be procured, a question of fact arises under the provision of this article on substituted performance as to whether the agreed manner of delivery is actually commercially impracticable and whether the substitute is commercially reasonable.

Cross references.Point 2: Sections 1-205, 2-301, 2-310, 2-507 and 2-513 and Article 7.

Point 5: Sections 2-308, 2-310 and 2-509.

Point 7: Section 2-614(1).

Specific matters involving tender are covered in many additional sections of this article. See Sections 1-205, 2-301, 2-306 to 2-319, 2-321(3), 2-504, 2-507(2), 2-511(1), 2-513, 2-612 and 2-614.

Definitional cross references."Agreement". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Dishonor". Section 3-508.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Receipt" of goods. Section 2-103.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Written". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of seller as condition of delivery to insist on payment or resort to means not provided by contract to assure payment, 44 A.L.R. 443.
Insolvency of buyer as justifying seller on credit in refusing to deliver except for cash, 117 A.L.R. 1125.
Duty of seller to tender delivery where buyer has not exercised his option under contract

to require shipment before time specified, 119 A.L.R. 1495.
May delivery which will support gift be predicated upon deposit in mail, filing of telegram or delivery to carrier, 126 A.L.R. 924.
Presumption and burden of proof as to consignee's title to or interest in respect of goods comprising shipment, in consignee's action against carrier for loss, damage, delay, nondelivery or conversion, 135 A.L.R. 456.
What amounts to acknowledgment by third person that he holds goods on buyer's behalf within statutory provision respecting delivery when goods are in possession of third person, 4 A.L.R.2d 213.
Delay in delivery placing goods at the risk of the party at fault under § 22(b) of Uniform Sales Act, 38 A.L.R.2d 658.
77 C.J.S. Sales §§ 141, 142.

§ 55-2-504. Shipment by seller.

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must:

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under Paragraph (c) or to make a proper contract under Paragraph (a) is a ground for rejection only if material delay or loss ensues.

History: 1953 Comp., § 50A-2-504, enacted by Laws 1961, ch. 96, § 2-504.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 46, Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To continue the general policy of the prior uniform statutory provision while incorporating certain modifications with respect to the requirement that the contract with the carrier be made expressly on behalf of the buyer and as to the necessity of giving notice of the shipment to the buyer, so that:

1. The section is limited to "shipment" contracts as contrasted with "destination" contracts or contracts for delivery at the place where the goods are located. The general principles embodied in this section cover the special cases of F. O. B. point of shipment contracts and C. I. F. and C. & F. contracts. Under the preceding section on manner of tender of delivery, due tender by the seller requires that he comply with the requirements of this section in appropriate cases.

2. The contract to be made with the carrier under Paragraph (a) must conform to all express terms of the agreement, subject to any substitution necessary because of failure of agreed facilities as provided in the later provision on substituted performance. However, under the policies of this article on good faith and commercial standards and on buyer's rights on improper delivery, the requirements of explicit provisions must be read in terms of their commercial and not their literal meaning. This policy is made express with respect to bills of lading in a set in the provision of this article on form of bills of lading required in overseas shipment.

3. In the absence of agreement, the provision of this article on options and cooperation respecting performance gives the seller the choice of any reasonable carrier, routing and other arrangements. Whether or not the shipment is at the buyer's expense the seller must see to any arrangements, reasonable in the circumstances, such as refrigeration, watering of live stock, protection against cold, the sending along of any necessary help, selection of specialized cars and the like for Paragraph (a) is intended to cover all necessary arrangements whether made by contract with the carrier or otherwise. There is, however, a proper relaxation of such requirements if the buyer is himself in a position to make the appropriate arrangements and the seller gives him reasonable notice of the need to do so. It is an improper contract under Paragraph (a) for the seller to agree with the carrier to a limited valuation below the true value and thus cut off the buyer's opportunity to recover from the carrier in the event of loss, when the risk of shipment is placed on the buyer by his contract with the seller.

4. Both the language of Paragraph (b) and the nature of the situation it concerns indicate that the requirement that the seller must obtain and deliver promptly to the buyer in due form any document necessary to enable him to obtain possession of the goods is intended to cumulate with the other duties of the seller such as those covered in Paragraph (a).

In this connection, in the case of pool car shipments a delivery order furnished by the seller on the pool car consignee, or on the carrier for delivery out of a larger quantity, satisfies the requirements of Paragraph (b) unless the contract requires some other form of document.

5. This article, unlike the prior uniform statutory provision, makes it the seller's duty to notify the buyer of shipment in all cases. The consequences of his failure to do so, however, are limited in that the buyer may reject on this ground only where material delay or loss ensues.

A standard and acceptable manner of notification in open credit shipments is the sending of an invoice and in the case of documentary contracts is the prompt forwarding of the documents as under Paragraph (b) of this section. It is also usual to send on a straight bill of lading but this is not necessary to the required notification. However, should such a document prove necessary or convenient to the buyer, as in the case of loss and claim against the carrier, good faith would require the seller to send it on request.

Frequently the agreement expressly requires prompt notification as by wire or cable. Such a term may be of the essence and the final clause of Paragraph (c) does not prevent the parties from making this a particular ground for rejection. To have this vital and irreparable effect upon the seller's duties, such a term should be part of the "dickered" terms written in any "form," or should otherwise be called seasonably and sharply to the seller's attention.

6. Generally, under the final sentence of the section, rejection by the buyer is justified only when the seller's dereliction as to any of the requirements of this section in fact is followed by material delay or damage. It rests on the seller, so far as concerns matters not within the peculiar knowledge of the buyer, to establish that his error has not been followed by events which justify rejection.

Cross references.Point 1: Sections 2-319, 2-320 and 2-503(2).

Point 2: Sections 1-203, 2-323(2), 2-601 and 2-614(1).

Point 3: Section 2-311(2).

Point 5: Section 1-203.

Definitional cross references."Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Usage of trade". Section 1-205.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Construction and effect of provision as to declaration by seller of carrier vessel, 27 A.L.R. 165.
Failure to ship by carrier designated by buyer as affecting passing of title, 31 A.L.R. 955.
Right to fill orders from diverted ship, under contract which calls for shipment to certain point, 36 A.L.R. 518.
Delivery to carrier of quantity of goods greater than that called for by contract as passing title to goods, 38 A.L.R. 1544.
Misrouting as affecting duty of the buyer to accept goods, 46 A.L.R. 1120.
Right of shipper or consignee to divert shipment, 61 A.L.R. 1309.
Seller's remedy against consignee's carrier for consignee's wrongful refusal to accept goods and pay freight because of damage by carrier, 96 A.L.R. 774.
Railroad carrier's liability where goods were allegedly damaged by failure to properly refrigerate, 4 A.L.R.3d 994.
77 C.J.S. Sales §§ 164, 165.

§ 55-2-505. Seller's shipment under reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named;

(b) a nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (Subsection (2) of Section 2-507 [55-2-507 NMSA 1978]) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section [55-2-504 NMSA 1978] but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

History: 1953 Comp., § 50A-2-505, enacted by Laws 1961, ch. 96, § 2-505.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 20(2), (3) and (4), Uniform Sales Act.

Changes. Completely rephrased, the "powers" of the parties in cases of reservation being emphasized primarily rather than the "rightfulness" of reservation.

Purposes of changes. To continue in general the policy of the prior uniform statutory provision with certain modifications of emphasis and language, so that:

1. The security interest reserved to the seller under Subsection (1) is restricted to securing payment or performance by the buyer and the seller is strictly limited in his disposition and control of the goods as against the buyer and third parties. Under this article, the provision as to the passing of interest expressly applies "despite any reservation of security title" and also provides that the "rights, obligations and remedies" of the parties are not altered by the incidence of title generally. The security interest, therefore, must be regarded as a means given to the seller to enforce his rights against the buyer which is unaffected by and in turn does not affect the location of title generally. The rules set forth in Subsection (1) are not to be altered by any apparent "contrary intent" of the parties as to passing of title, since the rights and remedies of the parties to the contract of sale, as defined in this article, rest on the contract and its performance or breach and not on stereotyped presumptions as to the location of title.

This article does not attempt to regulate local procedure in regard to the effective maintenance of the seller's security interest when the action is in replevin by the buyer against the carrier.

2. Every shipment of identified goods under a negotiable bill of lading reserves a security interest in the seller under Subsection (1) Paragraph (a).

It is frequently convenient for the seller to make the bill of lading to the order of a nominee such as his agent at destination, the financing agency to which he expects to negotiate the document or the bank issuing a credit to him. In many instances, also, the buyer is made the order party. This article does not deal directly with the question as to whether a bill of lading made out by the seller to the order of a nominee gives the carrier notice of any rights which the nominee may have so as to limit its freedom or obligation to honor the bill of lading in the hands of the seller as the original shipper if the expected negotiation fails. This is dealt with in the article on documents of title (Article 7).

3. A non-negotiable bill of lading taken to a party other than the buyer under Subsection (1) Paragraph (b) reserves possession of the goods as security in the seller but if he seeks to withhold the goods improperly the buyer can tender payment and recover them.

4. In the case of a shipment by non-negotiable bill of lading taken to a buyer, the seller, under Subsection (1) retains no security interest or possession as against the buyer and by the shipment he

de facto loses control as against the carrier except where he rightfully and effectively stops delivery in transit. In cases in which the contract gives the seller the right to

payment against delivery, the seller, by making an immediate demand for payment, can show that his delivery is conditional, but this does not prevent the buyer's power to transfer full title to a sub-buyer in ordinary course or other purchaser under Section 2-403.

5. Under Subsection (2) an improper reservation by the seller which would constitute a breach in no way impairs such of the buyer's rights as results from identification of the goods. The security title reserved by the seller under Subsection (1) does not protect his holding of the document or the goods for the purpose of exacting more than is due him under the contract.

Cross references.Point 1: Section 1-201.

Point 2: Article 7.

Point 3: Sections 2-501(2) and 2-504.

Point 4: Sections 2-403, 2-507(2) and 2-705.

Point 5: Sections 2-310, 2-319(4), 2-320(4), 2-501 and 2-502 and Article 7.

Definitional cross references."Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Consignee". Section 7-102.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Financing agency". Section 2-104.

"Goods". Section 2-105.

"Holder". Section 1-201.

"Person". Section 1-201.

"Security interest". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Receipt of partial payment or commercial paper for purchase price for goods as terminating vendor's right of stoppage in transitu, 7 A.L.R. 1412.
Rule that title passes on delivery to carrier as applicable to shipment in "pool" car for several purchasers, 36 A.L.R. 410.
Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 A.L.R. 1116; 60 A.L.R. 677.
Seller's consignment to own order, 60 A.L.R. 677.
13 C.J.S. Carriers § 128; 78 C.J.S. Sales §§ 390, 412, 413; 80 C.J.S. Shipping § 113.

§ 55-2-506. Rights of financing agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

History: 1953 Comp., § 50A-2-506, enacted by Laws 1961, ch. 96, § 2-506.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. "Financing agency" is broadly defined in this article to cover every normal instance in which a party aids or intervenes in the financing of a sales transaction. The term as used in Subsection (1) is not in any sense intended as a limitation and covers any other appropriate situation which may arise outside the scope of the definition.

2. "Paying" as used in Subsection (1) is typified by the letter of credit, or "authority to pay" situation in which a banker, by arrangement with the buyer or other consignee, pays on his behalf a draft for the price of the goods. It is immaterial whether the draft is formally drawn on the party paying or his principal, whether it is a sight draft paid in cash or a time draft "paid" in the first instance by acceptance, or whether the payment is viewed as absolute or conditional. All of these cases constitute "payment" under this subsection. Similarly, "purchasing for value" is used to indicate the whole area of financing by the seller's banker, and the principle of Subsection (1) is applicable without

any niceties of distinction between "purchase," "discount," "advance against collection" or the like. But it is important to notice that the only right to have the draft honored that is acquired is that

against the buyer; if any right against any one else is claimed it will have to be under some separate obligation of that other person. A letter of credit does not necessarily protect

3. Subsection (1) is made applicable to payments or advances against a draft which "relates to" a shipment of goods and this has been chosen as a term of maximum breadth. In particular the term is intended to cover the case of a draft against an invoice or against a delivery order. Further, it is unnecessary that there be an explicit assignment of the invoice attached to the draft to bring the transaction within the reason of this subsection.

4. After shipment, "the rights of the shipper in the goods" are merely security rights and are subject to the buyer's right to force delivery upon tender of the price. The rights acquired by the financing agency are similarly limited and, moreover, if the agency fails to procure any outstanding negotiable document of title, it may find its exercise of these rights hampered or even defeated by the seller's disposition of the document to a third party. This section does not attempt to create any new rights in the financing agency against the carrier which would force the latter to honor a stop order from the agency, a stranger to the shipment, or any new rights against a holder to whom a document of title has been duly negotiated under Article 7.

Cross references.Point 1: Section 2-104(2) and Article 4.

Point 2: Part 5 of Article 4, and Article 5.

Point 4: Sections 2-501 and 2-502(1) and Article 7.

Definitional cross references."Buyer". Section 2-103.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Financing agency". Section 2-104.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Honor". Section 1-201.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 78 C.J.S. Sales §§ 398, 406.

§ 55-2-507. Effect of seller's tender; delivery on condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

History: 1953 Comp., § 50A-2-507, enacted by Laws 1961, ch. 96, § 2-507.

OFFICIAL COMMENT

Prior uniform statutory provision. See Sections 11, 41, 42 and 69, Uniform Sales Act.

Purposes.1. Subsection (1) continues the policies of the prior uniform statutory provisions with respect to tender and delivery by the seller. Under this article the same rules in these matters are applied to present sales and to contracts for sale. But the provisions of this subsection must be read within the framework of the other sections of this article which bear upon the question of delivery and payment.

2. The "unless otherwise agreed" provision of Subsection (1) is directed primarily to cases in which payment in advance has been promised or a letter of credit term has been included. Payment "according to the contract" contemplates immediate payment, payment at the end of an agreed credit term, payment by a time acceptance or the like. Under this act, "contract" means the total obligation in law which results from the parties' agreement including the effect of this article. In this context, therefore, there must be considered the effect in law of such provisions as those on means and manner of payment and on failure of agreed means and manner of payment.

3. Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's "right as against the seller" conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of

this article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.

Cross references.Point 1: Sections 2-310, 2-503, 2-511, 2-601 and 2-711 to 2-713.

Point 2: Sections 1-201, 2-511 and 2-614.

Point 3: Sections 2-401, 2-403, and 2-702(1) (b).

Definitional cross references."Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Effect of stipulation for return of advance payment, if order is not accepted, 1 A.L.R. 1513.
Entirety or divisibility of contract as affecting time of payment, 2 A.L.R. 677.
Right of purchaser to opportunity to pay in cash where tender has been made in other medium, 11 A.L.R. 811; 23 A.L.R. 630; 46 A.L.R. 914.
Rights and remedies of purchaser under seller's agreement to assist him in reselling the goods, 29 A.L.R. 666.
Right of seller as condition of delivery to insist on payment or resort to means not provided by contract to assure payment, 44 A.L.R. 443.
Time of delivery as of the essence of the contract so as to release buyer in case of premature delivery, 47 A.L.R. 193.
Contract requiring seller to look to property alone for payment, 50 A.L.R. 714.
Reserving to seller right to demand cash or security, if buyer's credit or financial responsibility becomes impaired, 64 A.L.R. 1117.
Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 A.L.R.2d 701.
In absence of written provision in sales contract, place where cash consideration for

goods purchased is payable, 49 A.L.R.2d 1350.
77 C.J.S. Sales §§ 141, 142.

§ 55-2-508. Cure by seller of improper tender or delivery; replacement.

(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance, the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

History: 1953 Comp., § 50A-2-508, enacted by Laws 1961, ch. 96, § 2-508.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) permits a seller who has made a non-conforming tender in any case to make a conforming delivery within the contract time upon seasonable notification to the buyer. It applies even where the seller has taken back the non-conforming goods and refunded the purchase price. He may still make a good tender within the contract period. The closer, however, it is to the contract date, the greater is the necessity for extreme promptness on the seller's part in notifying of his intention to cure, if such notification is to be "seasonable" under this subsection.

The rule of this subsection, moreover, is qualified by its underlying reasons. Thus if, after contracting for June delivery, a buyer later makes known to the seller his need for shipment early in the month and the seller ships accordingly, the "contract time" has been cut down by the supervening modification and the time for cure of tender must be referred to this modified time term.

2. Subsection (2) seeks to avoid injustice to the seller by a reason of a surprise rejection by the buyer. However, the seller is not protected unless he had "reasonable grounds to believe" that the tender would be acceptable. Such reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if the buyer gives notice either implicitly, as by a prior

course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a "no replacement" clause in the contract, the seller is to be held to rigid compliance. If the clause appears in a "form" contract evidence that it is out of line with trade usage or the prior course of dealing and was not called to the seller's attention may be sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable.

3. The words "a further reasonable time to substitute a conforming tender" are intended as words of limitation to protect the buyer. What is a "reasonable time" depends upon the attending circumstances. Compare Section 2-511 on the comparable case of a seller's surprise demand for legal tender.

4. Existing trade usages permitting variations without rejection but with price allowance enter into the agreement itself as contractual limitations of remedy and are not covered by this section.

Cross references.Point 2: Section 2-302.

Point 3: Section 2-511.

Point 4: Sections 1-205 and 2-721.

Definitional cross references."Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Money". Section 1-201.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Applicability of provision in contract of sale for return of article, where article delivered does not answer to description, 30 A.L.R. 321.
Remedy of seller in case of mistake as to amount of commodity called for by contract, 31 A.L.R. 384.

Seller's cure of improper tender or delivery under U.C.C. § 2-508, 36 A.L.R.4th 544.
77 C.J.S. Sales §§ 141, 142.

§ 55-2-509. Risk of loss in the absence of breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier:

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505 [55-2-505 NMSA 1978]); but

(b) if it does require him to deliver them 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 buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a nonnegotiable document of title or other written direction to deliver, as provided in Subsection (4) (b) of Section 2-503 [55-2-503 NMSA 1978].

(3) In any case not within Subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval (Section 2-327 [55-2-327 NMSA 1978]) and on effect of breach on risk of loss (Section 2-510 [55-2-510 NMSA 1978]).

History: 1953 Comp., § 50A-2-509, enacted by Laws 1961, ch. 96, § 2-509.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 22, Uniform Sales Act.

Changes. Rewritten, Subsection (3) of this section modifying prior law.

Purposes of changes. To make it clear that:

1. The underlying theory of these sections on risk of loss is the adoption of the

contractual approach rather than an arbitrary shifting of the risk with the "property" in the goods. The scope of the present section, therefore, is limited strictly to those cases where there has been no breach by the seller. Where for any reason his delivery or tender fails to conform to the contract, the present section does not apply and the situation is governed by the provisions on effect of breach on risk of loss.

2. The provisions of Subsection (1) apply where the contract "requires or authorizes" shipment of the goods. This language is intended to be construed parallel to comparable language in the section on shipment by seller. In order that the goods be "duly delivered to the carrier" under Paragraph (a) a contract must be entered into with the carrier which will satisfy the requirements of the section on shipment by the seller and the delivery must be made under circumstances which will enable the seller to take any further steps necessary to a due tender. The underlying reason of this subsection does not require that the shipment be made after contracting, but where, for example, the seller buys the goods afloat and later diverts the shipment to the buyer, he must identify the goods to the contract before the risk of loss can pass. To transfer the risk it is enough that a proper shipment and a proper identification come to apply to the same goods although, aside from special agreement, the risk will not pass retroactively to the time of shipment in such a case.

3. Whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. Protection is afforded him, in the event of breach by the buyer, under the next section.

The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

4. Where the agreement provides for delivery of the goods as between the buyer and seller without removal from the physical possession of a bailee, the provisions on manner of tender of delivery apply on the point of transfer of risk. Due delivery of a negotiable document of title covering the goods or acknowledgment by the bailee that he holds for the buyer completes the "delivery" and passes the risk.

5. The provisions of this section are made subject by Subsection (4) to the "contrary agreement" of the parties. This language is intended as the equivalent of the phrase "unless otherwise agreed" used more frequently throughout this act. "Contrary" is in no way used as a word of limitation and the buyer and seller are left free to readjust their rights and risks as declared by this section in any manner agreeable to them. Contrary agreement can also be found in the circumstances of the case, a trade usage or practice, or a course of dealing or performance.

Cross references.Point 1: Section 2-510(1).

Point 2: Sections 2-503 and 2-504.

Point 3: Sections 2-104, 2-503 and 2-510.

Point 4: Section 2-503(4).

Point 5: Section 1-201.

Definitional cross references."Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Party". Section 1-201.

"Receipt" of goods. Section 2-103.

"Sale on approval". Section 2-326.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 69 Am. Jur. 2d Secured Transactions § 215.
Goods remaining in custody of seller or third person, when deemed to have been received by buyer, 4 A.L.R. 902.
Liability for loss of or damage to property delivered on trial or with privilege of return, 31 A.L.R. 1365.

Who bears loss incidentally to destruction of goods sold conditionally, 38 A.L.R. 1319.
Delay in delivery placing goods at the risk of the party at fault, 38 A.L.R.2d 658.
Upon whom loss from theft or the like falls, where seller turns over goods at buyer's premises, 50 A.L.R.2d 330.
77 C.J.S. Sales §§ 4, 247, 249, 285 to 287.

§ 55-2-510. Effect of breach on risk of loss.

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection, the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance, he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

History: 1953 Comp., § 50A-2-510, enacted by Laws 1961, ch. 96, § 2-510.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To make clear that:

1. Under Subsection (1) the seller by his individual action cannot shift the risk of loss to the buyer unless his action conforms with all the conditions resting on him under the contract.

2. The "cure" of defective tenders contemplated by Subsection (1) applies only to those situations in which the seller makes changes in goods already tendered, such as repair, partial substitution, sorting out from an improper mixture and the like since "cure" by repossession and new tender has no effect on the risk of loss of the goods originally tendered. The seller's privilege of cure does not shift the risk, however, until the cure is completed.

Where defective documents are involved a cure of the defect by the seller or a waiver of the defects by the buyer will operate to shift the risk under this section. However, if the goods have been destroyed prior to the cure or the buyer is unaware of their destruction at the time he waives the defect in the documents, the risk of the loss must still be borne by the seller, for the risk shifts only at the time of cure, waiver of documentary defects or acceptance of the goods.

3. In cases where there has been a breach of the contract, if the one in control of the goods is the aggrieved party, whatever loss or damage may prove to be uncovered by his insurance falls upon the contract breaker under Subsections (2) and (3) rather than upon him. The word "effective" as applied to insurance coverage in those subsections is used to meet the case of supervening insolvency of the insurer. The "deficiency" referred to in the text means such deficiency in the insurance coverage as exists without subrogation. This section merely distributes the risk of loss as stated and is not intended to be disturbed by any subrogation of an insurer.

Cross reference.Section 2-509.

Definitional cross references."Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Delay in delivery placing goods at the risk of the party at fault under § 22(b) of Uniform Sales Act, 38 A.L.R.2d 658.
77 C.J.S. Sales §§ 4, 247, 249, 285 to 287.

§ 55-2-511. Tender of payment by buyer; payment by check.

(1) Unless otherwise agreed, tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this act [this chapter] on the effect of an instrument on an obligation (Section 3-802 [55-3-802 NMSA 1978]), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

History: 1953 Comp., § 50A-2-511, enacted by Laws 1961, ch. 96, § 2-511.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 42, Uniform Sales Act.

Changes. Rewritten by this section and Section 2-507.

Purposes of changes.1. The requirement of payment against delivery in Subsection (1) is applicable to noncommercial sales generally and to ordinary sales at retail although it has no application to the great body of commercial contracts which carry credit terms. Subsection (1) applies also to documentary contracts in general and to contracts which look to shipment by the seller but contain no term on time and manner of payment, in which situations the payment may, in proper case, be demanded against delivery of appropriate documents.

In the case of specific transactions such as C.O.D. sales or agreements providing for payment against documents, the provisions of this subsection must be considered in conjunction with the special sections of the article dealing with such terms. The provision that tender of payment is a condition to the seller's duty to tender and complete "any delivery" integrates this section with the language and policy of the section on delivery in several lots which call for separate payment. Finally, attention should be directed to the provision on right to adequate assurance of performance which recognizes, even before the time for tender, an obligation on the buyer not to impair the seller's expectation of receiving payment in due course.

2. Unless there is agreement otherwise the concurrence of the conditions as to tender of payment and tender of delivery requires their performance at a single place or time. This article determines that place and time by determining in various other sections the place and time for tender of delivery under various circumstances and in particular types of transactions. The sections dealing with time and place of delivery together with the section on right to inspection of goods answer the subsidiary question as to when payment may be demanded before inspection by the buyer.

3. The essence of the principle involved in Subsection (2) is avoidance of commercial surprise at the time of performance. The section on substituted performance covers the peculiar case in which legal tender is not available to the commercial community.

4. Subsection (3) is concerned with the rights and obligations as between the parties to a sales transaction when payment is made by check. This article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way. The conditional character of the payment under this section refers only to the effect of the transaction "as between the parties" thereto and does not purport to cut into the law of "absolute" and "conditional" payment as applied to such other problems as the discharge of sureties or the responsibilities of a drawee bank which is at the same time an agent for collection.

The phrase "by check" includes not only the buyer's own but any check which does not effect a discharge under Article 3 (Section 3-802). Similarly the reason of this subsection should apply and the same result should be reached where the buyer "pays" by sight draft on a commercial firm which is financing him.

5. Under Subsection (3) payment by check is defeated if it is not honored upon due presentment. This corresponds to the provisions of article on commercial paper. (Section 3-802). But if the seller procures certification of the check instead of cashing it, the buyer is discharged. (Section 3-411).

6. Where the instrument offered by the buyer is not a payment but a credit instrument such as a note or a check postdated by even one day, the seller's acceptance of the instrument insofar as third parties are concerned, amounts to a delivery on credit and his remedies are set forth in the section on buyer's insolvency. As between the buyer and the seller, however, the matter turns on the present subsection and the section on conditional delivery and subsequent dishonor of the instrument gives the seller rights on it as well as for breach of the contract for sale.

Cross references.Point 1: Sections 2-307, 2-310, 2-320, 2-325, 2-503, 2-513 and 2-609.

Point 2: Sections 2-307, 2-310, 2-319, 2-322, 2-503, 2-504 and 2-513.

Point 3: Section 2-614.

Point 5: Article 3, esp. Sections 3-802 and 3-411.

Point 6: Sections 2-507, 2-702, and Article 3.

Definitional cross references."Buyer". Section 2-103.

"Check". Section 3-104.

"Dishonor". Section 3-508.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Entirety or divisibility of contract as affecting time of payment, 2 A.L.R. 677.
Authority of agent to receive payment for commodities which he is authorized to sell, or for which he is to find market, 8 A.L.R. 203; 105 A.L.R. 718.
Right of purchaser to opportunity to pay in cash where tender has been made in other medium, 11 A.L.R. 811; 23 A.L.R. 630; 46 A.L.R. 914.
Dishonor of draft or check for purchase price on a cash sale as affecting sellers' rights in respect of property or its proceeds, 31 A.L.R. 578; 54 A.L.R. 526.
Option to pay purchase price in cash or on terms, 36 A.L.R. 857.
Acceptance of draft for purchase price with warehouse receipt attached or by transfer of draft with receipt as passing title to goods, 55 A.L.R. 116; 76 A.L.R. 885; 109 A.L.R. 1381.
Right of purchaser in making tender to deduct from agreed purchase price amount of obligations which it is the vendor's duty to satisfy, 173 A.L.R. 1309.
In absence of written provision in sales contract, place where cash consideration for goods purchased is payable, 49 A.L.R.2d 1350.
Conclusiveness of determination of third party whose approval is provided for by contract for sale of goods, 7 A.L.R.3d 555.
77 C.J.S. Sales §§ 229, 230; 86 C.J.S. Tender § 21.

§ 55-2-512. Payment by buyer before inspection.

(1) Where the contract requires payment before inspection, nonconformity of the goods does not excuse the buyer from so making payment unless:

(a) the nonconformity appears without inspection; or

(b) despite tender of the required documents the circumstances would justify injunction against honor under the provisions of this act (Section 5-114 [55-5-114 NMSA 1978]).

(2) Payment pursuant to Subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

History: 1953 Comp., § 50A-2-512, enacted by Laws 1961, ch. 96, § 2-512.

OFFICIAL COMMENT

Prior uniform statutory provision. None, but see Sections 47 and 49, Uniform Sales Act.

Purposes.1. Subsection (1) of the present section recognizes that the essence of a contract providing for payment before inspection is the intention of the parties to shift to the buyer the risks which would usually rest upon the seller. The basic nature of the transaction is thus preserved and the buyer is in most cases required to pay first and litigate as to any defects later.

2. "Inspection" under this section is an inspection in a manner reasonable for detecting defects in goods whose surface appearance is satisfactory.

3. Clause (a) of this subsection states an exception to the general rule based on common sense and normal commercial practice. The apparent non-conformity referred to is one which is evident in the mere process of taking delivery.

4. Clause (b) is concerned with contracts for payment against documents and incorporates the general clarification and modification of the case law contained in the section on excuse of a financing agency. Section 5-114.

5. Subsection (2) makes explicit the general policy of the Uniform Sales Act that the payment required before inspection in no way impairs the buyer's remedies or rights in the event of a default by the seller. The remedies preserved to the buyer are all of his remedies, which include as a matter of reason the remedy for total non-delivery after payment in advance.

The provision on performance or acceptance under reservation of rights does not apply to the situations contemplated here in which payment is made in due course under the contract and the buyer need not pay "under protest" or the like in order to preserve his rights as to defects discovered upon inspection.

6. This section applies to cases in which the contract requires payment before inspection either by the express agreement of the parties or by reason of the effect in law of that contract. The present section must therefore be considered in conjunction with the provision on rights to inspection of goods which sets forth the instances in which the buyer is not entitled to inspection before payment.

Cross references.Point 4: Article 5.

Point 5: Section 1-207.

Point 6: Section 2-513(3).

Definitional cross references."Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Financing agency". Section 2-104.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Effect of opportunity to inspect on question of implied warranty, 52 A.L.R. 1536.
Time within which buyer must make inspection, trial or test to determine whether goods are of requisite quality, 52 A.L.R.2d 900.
77 C.J.S. Sales § 231.

§ 55-2-513. Buyer's right to inspection of goods.

(1) Unless otherwise agreed and subject to Subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this article on C.I.F. contracts (Subsection (3) of Section 2-321 [55-2-321 NMSA 1978]), the buyer is not entitled to inspect the goods before payment of the price when the contract provides:

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition, failure of which avoids the contract.

History: 1953 Comp., § 50A-2-513, enacted by Laws 1961, ch. 96, § 2-513.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 47(2) and (3), Uniform Sales Act.

Changes. Rewritten, Subsections (2) and (3) being new.

Purposes of changes and new matter. To correspond in substance with the prior uniform statutory provision and to incorporate in addition some of the results of the better case law so that:

1. The buyer is entitled to inspect goods as provided in Subsection (1) unless it has been otherwise agreed by the parties. The phrase "unless otherwise agreed" is intended principally to cover such situations as those outlined in Subsections (3) and (4) and those in which the agreement of the parties negates inspection before tender of delivery. However, no agreement by the parties can displace the entire right of inspection except where the contract is simply for the sale of "this thing." Even in a sale of boxed goods "as is" inspection is a right of the buyer, since if the boxes prove to contain some other merchandise altogether the price can be recovered back; nor do the limitations of the provision on effect of acceptance apply in such a case.

2. The buyer's right of inspection is available to him upon tender, delivery or appropriation of the goods with notice to him. Since inspection is available to him on tender, where payment is due against delivery he may, unless otherwise agreed, make his inspection before payment of the price. It is also available to him after receipt of the goods and so may be postponed after receipt for a reasonable time. Failure to inspect before payment does not impair the right to inspect after receipt of the goods unless the case falls within Subsection (4) on agreed and exclusive inspection provisions. The right to inspect goods which have been appropriated with notice to the buyer holds whether or not the sale was by sample.

3. The buyer may exercise his right of inspection at any reasonable time or place and in any reasonable manner. It is not necessary that he select the most appropriate time, place or manner to inspect or that his selection be the customary one in the trade or locality. Any reasonable time, place or manner is available to him and the reasonableness will be determined by trade usages, past practices between the parties and the other circumstances of the case.

The last sentence of Subsection (1) makes it clear that the place of arrival of shipped goods is a reasonable place for their inspection.

4. Expenses of an inspection made to satisfy the buyer of the seller's performance must be assumed by the buyer in the first instance. Since the rule provides merely for an allocation of expense there is no policy to prevent the parties from providing otherwise in the agreement. Where the buyer would normally bear the expenses of the inspection but the goods are rightly rejected because of what the inspection reveals, demonstrable and reasonable costs of the inspection are part of his incidental damage caused by the seller's breach.

5. In the case of payment against documents, Subsection (3) requires payment before inspection, since shipping documents against which payment is to be made will commonly arrive and be tendered while the goods are still in transit. This article recognizes no exception in any peculiar case in which the goods happen to arrive

before the documents. However, where by the agreement payment is to await the arrival of the goods, inspection before payment becomes proper since the goods are then "available for inspection."

Where by the agreement the documents are to be held until arrival the buyer is entitled to inspect before payment since the goods are then "available for inspection". Proof of usage is not necessary to establish this right, but if inspection before payment is disputed the contrary must be established by usage or by an explicit contract term to that effect.

For the same reason, that the goods are available for inspection, a term calling for payment against storage documents or a delivery order does not normally bar the buyer's right to inspection before payment under Subsection (3) (b). This result is reinforced by the buyer's right under Subsection (1) to inspect goods which have been appropriated with notice to him.

6. Under Subsection (4) an agreed place or method of inspection is generally held to be intended as exclusive. However, where compliance with such an agreed inspection term becomes impossible, the question is basically one of intention. If the parties clearly intend that the method of inspection named is to be a necessary condition without which the entire deal is to fail, the contract is at an end if that method becomes impossible. On the other hand, if the parties merely seek to indicate a convenient and reliable method but do not intend to give up the deal in the event of its failure, any reasonable method of inspection may be substituted under this article.

Since the purpose of an agreed place of inspection is only to make sure at that point whether or not the goods will be thrown back, the "exclusive" feature of the named place is satisfied under this article if the buyer's failure to inspect there is held to be an acceptance with the knowledge of such defects as inspection would have revealed within the section on waiver of buyer's objections by failure to particularize. Revocation of the acceptance is limited to the situations stated in the section pertaining to that subject. The reasonable time within which to give notice of defects within the section on notice of breach begins to run from the point of the "acceptance."

7. Clauses on time of inspection are commonly clauses which limit the time in which the buyer must inspect and give notice of defects. Such clauses are therefore governed by the section of this article which requires that such a time limitation must be reasonable.

8. Inspection under this article is not to be regarded as a "condition precedent to the passing of title" so that risk until inspection remains on the seller. Under Subsection (4) such an approach cannot be sustained. Issues between the buyer and seller are settled in this article almost wholly by special provisions and not by the technical determination of the locus of the title. Thus "inspection as a condition to the passing of title" becomes a concept almost without meaning. However, in peculiar circumstances inspection may still have some of the consequences hitherto sought and obtained under that concept.

9. "Inspection" under this section has to do with the buyer's check-up on whether the seller's performance is in accordance with a contract previously made and is not to be confused with the "examination" of the goods or of a sample or model of them at the time of contracting which may affect the warranties involved in the contract.

Cross references.Generally: Sections 2-310 (b), 2-321(3) and 2-606(1)(b).

Point 1: Section 2-607.

Point 2: Sections 2-501 and 2-502.

Point 4: Section 2-715.

Point 5: Section 2-321(3).

Point 6: Sections 2-606 to 2-608.

Point 7: Section 1-204.

Point 8: Comment to Section 2-401.

Point 9: Section 2-316(3)(b).

Definitional cross references."Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Presumed". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Buyer's right to inspect at destination where goods are delivered to carrier, 27 A.L.R. 524.
Effect of provision making acceptance of goods conditional on approval by third person on passing title, 46 A.L.R. 869.
Effect of opportunity to inspect on question of implied warranty, 52 A.L.R. 1543.
Duty of a purchaser of goods "on trial" or "on approval" regarding notice or rejection, 78 A.L.R. 533.
Buyer's acceptance of delayed or defective installment of goods as waiver of similar default as to later installments, 32 A.L.R.2d 1117.
Time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality, 52 A.L.R.2d 900.
Reasonableness of personal judgment of buyer as test where goods are sold subject to being satisfactory to the buyer, 86 A.L.R.2d 200.
Time, place and manner of buyer's inspection of goods under U.C.C. § 2-513, 36 A.L.R.4th 726.
77 C.J.S. Sales § 189.

§ 55-2-514. When documents deliverable on acceptance; when on payment.

Unless otherwise agreed, documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

History: 1953 Comp., § 50A-2-514, enacted by Laws 1961, ch. 96, § 2-514.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 41, Uniform Bills of Lading Act.

Changes. Rewritten.

Purposes of changes. To make the provision one of general application so that:

1. It covers any document against which a draft may be drawn, whatever may be the form of the document, and applies to interpret the action of a seller or consignor insofar as it may affect the rights and duties of any buyer, consignee or financing agency concerned with the paper. Supplementary or corresponding provisions are found in Sections 4-503 and 5-112.

2. An "arrival" draft is a sight draft within the purpose of this section.

Cross references.Point 1: See Sections 2-502, 2-505(2), 2-507(2), 2-512, 2-513, 2-607 concerning protection of rights of buyer and seller, and 4-503 and 5-112 on delivery of documents.

Definitional cross references."Delivery". Section 1-201.

"Draft". Section 3-104.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 311.
Damages for bank's breach of duty in surrendering attached bill of lading before payment of draft held for collection, 19 A.L.R. 555; 67 A.L.R. 1511.
77 C.J.S. Sales §§ 127, 238, 267, 275, 276.

§ 55-2-515. Preserving evidence of goods in dispute.

In furtherance of the adjustment of any claim or dispute:

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third-party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent itigation [litigation] or adjustment.

History: 1953 Comp., § 50A-2-515, enacted by Laws 1961, ch. 96, § 2-515.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. To meet certain serious problems which arise when there is a dispute as to the quality of the goods and thereby perhaps to aid the parties in reaching a settlement, and to further the use of devices which will promote certainty as to the condition of the goods, or at least aid in preserving evidence of their condition.

2. Under Paragraph (a), to afford either party an opportunity for preserving evidence, whether or not agreement has been reached, and thereby to reduce uncertainty in any litigation and, in turn perhaps, to promote agreement.

Paragraph (a) does not conflict with the provisions on the seller's right to resell rejected goods or the buyer's similar right. Apparent conflict between these provisions which will be suggested in certain circumstances is to be resolved by requiring prompt action by the parties. Nor does Paragraph (a) impair the effect of a term for payment before inspection. Short of such defects as amount to fraud or substantial failure of consideration, non-conformity is neither an excuse nor a defense to an action for non-acceptance of documents. Normally, therefore, until the buyer has made payment, inspected and rejected the goods, there is no occasion or use for the rights under Paragraph (a).

3. Under Paragraph (b), to provide for third party inspection upon the agreement of the parties, thereby opening the door to amicable adjustments based upon the findings of such third parties.

The use of the phrase "conformity or condition" makes it clear that the parties' agreement may range from a complete settlement of all aspects of the dispute by a third party to the use of a third party merely to determine and record the condition of the goods so that they can be resold or used to reduce the stake in controversy. "Conformity", at one end of the scale of possible issues, includes the whole question of interpretation of the agreement and its legal effect, the state of the goods in regard to quality and condition, whether any defects are due to factors which operate at the risk of the buyer, and the degree of non-conformity where that may be material. "Condition", at the other end of the scale, includes nothing but the degree of damage or deterioration which the goods show. Paragraph (b) is intended to reach any point in the gamut which the parties may agree upon.

The principle of the section on reservation of rights reinforces this paragraph in simplifying such adjustments as the parties wish to make in partial settlement while reserving their rights as to any further points. Paragraph (b) also suggests the use of arbitration, where desired, of any points left open, but nothing in this section is intended to repeal or amend any statute governing arbitration. Where any question arises as to the extent of the parties' agreement under the paragraph, the presumption should be that it was meant to extend only to the relation between the contract description and the goods as delivered, since that is what a craftsman in the trade would normally be expected to report upon. Finally, a written and authenticated report of inspection or tests by a third party, whether or not sampling has been practicable, is entitled to be admitted as evidence under this act, for it is a third party document.

Cross references.Point 2: Sections 2-513(3), 2-706 and 2-711(2) and Article 5.

Point 3: Sections 1-202 and 1-207.

Definitional cross references."Conform". Section 2-106.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Party". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Effect of provision making acceptance of goods conditional on approval by third person on passing title, 46 A.L.R. 869.
17A C.J.S. Contracts § 496; 77 C.J.S. Sales §§ 189 to 191, 197, 198, 240.

Part 6

BREACH, REPUDIATION AND EXCUSE

§ 55-2-601. Buyer's rights on improper delivery.

Subject to the provisions of this article on breach in installment contracts (Section 2-612 [55-2-612 NMSA 1978]) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 [55-2-718 NMSA 1978] and 2-719 [55-2-719 NMSA 1978]), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

History: 1953 Comp., § 50A-2-601, enacted by Laws 1961, ch. 96, § 2-601.

OFFICIAL COMMENT

Prior uniform statutory provision. No one general equivalent provision but numerous provisions, dealing with situations of non-conformity where buyer may accept or reject, including Sections 11, 44 and 69(1), Uniform Sales Act.

Changes. Partial acceptance in good faith is recognized and the buyer's remedies on the contract for breach of warranty and the like, where the buyer has returned the goods after transfer of title, are no longer barred.

Purposes of changes. To make it clear that:

1. A buyer accepting a non-conforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover and regulate the

acceptance of a part of any lot improperly tendered in any case where the price can reasonably be apportioned. Partial acceptance is permitted whether the part of the goods accepted conforms or not. The only limitation on partial acceptance is that good faith and commercial reasonableness must be used to avoid undue impairment of the value of the remaining portion of the goods. This is the reason for the insistence on the "commercial unit" in Paragraph (c). In this respect, the test is not only what unit has been the basis of contract, but whether the partial acceptance produces so materially adverse an effect on the remainder as to constitute bad faith.

2. Acceptance made with the knowledge of the other party is final. An original refusal to accept may be withdrawn by a later acceptance if the seller has indicated that he is holding the tender open. However, if the buyer attempts to accept, either in whole or in part, after his original rejection has caused the seller to arrange for other disposition of the goods, the buyer must answer for any ensuing damage since the next section provides that any exercise of ownership after rejection is wrongful as against the seller. Further, he is liable even though the seller may choose to treat his action as acceptance rather than conversion, since the damage flows from the misleading notice. Such arrangements for resale or other disposition of the goods by the seller must be viewed as within the normal contemplation of a buyer who has given notice of rejection. However, the buyer's attempts in good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as an acceptance.

Cross references.Sections 2-602(2) (a), 2-612, 2-718 and 2-719.

Definitional cross references."Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Installment contract". Section 2-612.

"Rights". Section 1-201.

ANNOTATION

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Sales §§ 407, 431, 504, 518, 530, 679; 67A Am. Jur. 2d Sales §§ 853 et seq., 1037, 1212, 1213.
Remedy of seller in case of mistake as to amount of commodity called for by contract, 31 A.L.R. 384.
Delivery to carrier of quantity of goods greater than that called for by contract as passing title to goods, 38 A.L.R. 1544.
Acceptance of some "commercial units" of goods purchased under UCC § 2-601(C), 41 A.L.R.4th 396.
77 C.J.S. Sales §§ 218 to 221.

§ 55-2-602. Manner and effect of rightful rejection.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (Sections 2-603 [55-2-603 NMSA 1978] and 2-604 [55-2-604 NMSA 1978]):

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this article (Subsection (3) of Section 2-711 [55-2-711 NMSA 1978]), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this article on seller's remedies in general (Section 2-703 [55-2-703 NMSA 1978]).

History: 1953 Comp., § 50A-2-602, enacted by Laws 1961, ch. 96, § 2-602.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 50, Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To make it clear that:

1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under

Subsection (1), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective. The sections of this article dealing with inspection of goods must be read in connection with the buyer's reasonable time for action under this subsection. Contract provisions limiting the time for rejection fall within the rule of the section on "Time" and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due "notifying" of rejection by the buyer to the seller is defined in Section 1-201.

2. Subsection (2) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the buyer's [seller's] disposition, this section continues the policy of prior uniform legislation in generally relieving the buyer from any duties with respect to them, except when the circumstances impose the limited obligation of salvage upon him under the next section.

3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (3) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.

4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

Cross references.Point 1: Sections 1-201, 1-204(1) and (3), 2-512(2), 2-513(1) and 2-606(1) (b).

Point 2: Section 2-603(1).

Point 3: Section 2-703.

Definitional cross references."Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Security interest". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Burden is on buyers to make timely and unequivocal rejection if they do not intend to accept goods as delivered. Woods v. Van Wallis Trailer Sales Co., 77 N.M. 121, 419 P.2d 964 (1966).

Actions of buyer inconsistent with rejection. - Buyer's claims that it had rejected or revoked acceptance of juniper plants by telephone statement that plants were not "up to snuff" was refuted by the fact that four months after receiving them it had removed them from their five gallon containers and had planted them in fulfillment of its contract with a third party. Oda Nursery, Inc. v. Garcia Tree & Lawn, Inc., 103 N.M. 438, 708 P.2d 1039 (1985).

Buyer's acts amounting to ownership prohibited after rejection. - A buyer, after having given seller notice of a rejection of goods within a reasonable time, may not then exercise acts over the property amounting to dominion or ownership, and a buyer who does not have a security interest in such property is under a duty after rejection to hold the goods with reasonable care for a time sufficient to permit the seller to remove them. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Except to extent of security interest therein. - Where the buyer rightfully rejects goods in his possession, it necessarily follows that he has a security interest in the goods pursuant to 55-2-711(3) NMSA 1978, in the entire amount spent for the goods, and he should not be required to return them for an amount less than the entire amount. Consequently, Subsection (2)(b) of this section, which obligates a buyer without a security interest in rejected goods in his possession to hold them with reasonable care, cannot apply. Because the security interest entitles the buyer to hold the goods and resell them, such action cannot constitute a violation of Subsection (2)(a) of this section, which makes any exercise of ownership by the buyer after rejection wrongful. Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982).

Continued use of property will not negate the claim of revocation of acceptance in every case, particularly where the sellers fail to contact the buyers to arrange for removal of the property, or to show how any delay may have prejudiced them or to show that the delay could have been avoided. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Three-month delay in rejection not seasonable notice. - Where buyer fails to reject the entire shipment of goods until three months after seller's salesman refused to make requested adjustments for those goods rejected by buyer, the buyer has failed to give seller seasonable and particular notice of rejection as to the entire shipment and is precluded from rejecting any goods other than those originally set aside and presented to salesman. Celebrity, Inc. v. Kemper, 96 N.M. 508, 632 P.2d 743 (1981).

Reasonable to require loss claims to be made within two days. - In general, a contract provision requiring claims of loss to be made within two days of delivery is reasonable, lawful and not unconscionable. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Comparative liability is not part of the UCC under this section. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Law reviews. - For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Applicability of provision in contract of sale for return of article, where article delivered does not answer to description, 30 A.L.R. 321.
Duty of purchaser of goods "on trial" or "on approval" regarding notice of rejection, 78 A.L.R. 533.
Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 A.L.R.2d 701.
77 C.J.S. Sales §§ 218 to 221, 342.

§ 55-2-603. Merchant buyer's duties as to rightfully rejected goods.

(1) Subject to any security interest in the buyer (Subsection (3) of Section 2-711 [55-2-711 NMSA 1978]), when the seller has no agent or place of business at the market of rejection, a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under Subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten percent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

History: 1953 Comp., § 50A-2-603, enacted by Laws 1961, ch. 96, § 2-603.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section recognizes the duty imposed upon the merchant buyer by good faith and commercial practice to follow any reasonable instructions of the seller as to reshipping, storing, delivery to a third party, reselling or the like. Subsection (1) goes further and extends the duty to include the making of reasonable efforts to effect a salvage sale where the value of the goods is threatened and the seller's instructions do not arrive in time to prevent serious loss.

2. The limitations on the buyer's duty to resell under Subsection (1) are to be liberally construed. The buyer's duty to resell under this section arises from commercial necessity and thus is present only when the seller has "no agent or place of business at the market of rejection". A financing agency which is acting in behalf of the seller in handling the documents rejected by the buyer is sufficiently the seller's agent to lift the burden of salvage resale from the buyer. (See provisions of Sections 4-503 and 5-112 on bank's duties with respect to rejected documents.) The buyer's duty to resell is extended only to goods in his "possession or control", but these are intended as words of wide, rather than narrow, import. In effect, the measure of the buyer's "control" is whether he can practicably effect control without undue commercial burden.

3. The explicit provisions for reimbursement and compensation to the buyer in Subsection (2) are applicable and necessary only where he is not acting under instructions from the seller. As provided in Subsection (1) the seller's instructions to be "reasonable" must on demand of the buyer include indemnity for expenses.

4. Since this section makes the resale of perishable goods an affirmative duty in contrast to a mere right to sell as under the case law, Subsection (3) makes it clear that the buyer is liable only for the exercise of good faith in determining whether the value of the goods is sufficiently threatened to justify a quick resale or whether he has waited a sufficient length of time for instructions, or what a reasonable means and place of resale is.

5. A buyer who fails to make a salvage sale when his duty to do so under this section has arisen is subject to damages pursuant to the section on liberal administration of remedies.

Cross references.Point 2: Sections 4-503 and 5-112.

Point 5: Section 1-106. Compare generally Section 2-706.

Definitional cross references."Buyer". Section 2-103.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Security interest". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Farmers as "merchants" within provisions of U.C.C. Article 2, dealing with sales, 95 A.L.R.3d 484.
77 C.J.S. Sales § 342.

§ 55-2-604. Buyer's options as to salvage of rightfully rejected goods.

Subject to the provisions of the immediately preceding section [55-2-603 NMSA 1978] on perishables, if the seller gives no instructions within a reasonable time after notification of rejection, the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

History: 1953 Comp., § 50A-2-604, enacted by Laws 1961, ch. 96, § 2-604.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The basic purpose of this section is twofold: on the one hand it aims at reducing the stake in dispute and on the other at avoiding the pinning of a technical "acceptance" on a buyer who has taken steps towards realization on or preservation of the goods in good faith. This section is essentially a salvage section and the buyer's right to act under it is conditioned upon (1) non-conformity of the goods, (2) due

notification of rejection to the seller under the section on manner of rejection and (3) the absence of any instructions from the seller which the merchant-buyer has a duty to follow under the preceding section.

This section is designed to accord all reasonable leeway to a rightfully rejecting buyer acting in good faith. The listing of what the buyer may do in the absence of instructions from the seller is intended to be not exhaustive but merely illustrative. This is not a "merchant's" section and the options are pure options given to merchant and non-merchant buyers alike. The merchant-buyer, however, may in some instances be under a duty rather than an option to resell under the provisions of the preceding section.

Cross references.Sections 2-602(1), 2-603(1) and 2-706.

Definitional cross references."Buyer". Section 2-103.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 C.J.S. Sales § 342.

§ 55-2-605. Waiver of buyer's objections by failure to particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach:

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

History: 1953 Comp., § 50A-2-605, enacted by Laws 1961, ch. 96, § 2-605.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The present section rests upon a policy of permitting the buyer to give a quick and informal notice of defects in a tender without penalizing him for omissions in his statement, while at the same time protecting a seller who is reasonably misled by the buyer's failure to state curable defects.

2. Where the defect in a tender is one which could have been cured by the seller, a buyer who merely rejects the delivery without stating his objections to it is probably acting in commercial bad faith and seeking to get out of a deal which has become unprofitable. Subsection (1) (a), following the general policy of this article which looks to preserving the deal wherever possible, therefore insists that the seller's right to correct his tender in such circumstances be protected.

3. When the time for cure is past, Subsection (1) (b) makes it plain that a seller is entitled upon request to a final statement of objections upon which he can rely. What is needed is that he make clear to the buyer exactly what is being sought. A formal demand under Paragraph (b) will be sufficient in the case of a merchant-buyer.

4. Subsection (2) applies to the particular case of documents the same principle which the section on effects of acceptance applies to the case of goods. The matter is dealt with in this section in terms of "waiver" of objections rather than of right to revoke acceptance, partly to avoid any confusion with the problems of acceptance of goods and partly because defects in documents which are not taken as grounds for rejection are generally minor ones. The only defects concerned in the present subsection are defects in the documents which are apparent on their face. Where payment is required against the documents they must be inspected before payment, and the payment then constitutes acceptance of the documents. Under the section dealing with this problem, such acceptance of the documents does not constitute an acceptance of the goods or impair any options or remedies of the buyer for their improper delivery. Where the documents are delivered without requiring such contemporary action as payment from the buyer, the reason of the next section on what constitutes acceptance of goods, applies. Their acceptance by non-objection is therefore postponed until after a reasonable time for their inspection. In either situation, however, the buyer "waives" only what is apparent on the face of the documents.

Cross references.Point 2: Section 2-508.

Point 4: Sections 2-512(2), 2-606(1) (b) and 2-607(2).

Definitional cross references."Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Writing" and "written". Section 1-201.

ANNOTATION

Complaint that goods not "up to snuff" insufficient to permit cure. - Buyer's complaint that plants did not look "up to snuff," without detailing the particular problems, was insufficient to constitute rejection so as to permit cure by seller as contemplated by this section. Oda Nursery, Inc. v. Garcia Tree & Lawn, Inc., 103 N.M. 438, 708 P.2d 1039 (1985).

Three-month delay in rejection not seasonable notice. - Where buyer fails to reject the entire shipment of goods until three months after seller's salesman refused to make requested adjustments for those goods rejected by buyer, the buyer has failed to give seller seasonable and particular notice of rejection as to the entire shipment and is precluded from rejecting any goods other than those originally set aside and presented to salesman. Celebrity, Inc. v. Kemper, 96 N.M. 508, 632 P.2d 743 (1981).

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 C.J.S. Sales §§ 339, 345, 346.

§ 55-2-606. What constitutes acceptance of goods.

(1) Acceptance of goods occurs when the buyer:

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (Subsection (1) of Section 2-602 [55-2-602 NMSA 1978]), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

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

History: 1953 Comp., § 50A-2-606, enacted by Laws 1961, ch. 96, § 2-606.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 48, Uniform Sales Act.

Changes. Rewritten, the qualification in Paragraph (c) and Subsection (2) being new; otherwise the general policy of the prior legislation is continued.

Purposes of changes and new matter. To make it clear that:

1. Under this article "acceptance" as applied to goods means that the buyer, pursuant to the contract, takes particular goods which have been appropriated to the contract as his own, whether or not he is obligated to do so, and whether he does so by words, action, or silence when it is time to speak. If the goods conform to the contract, acceptance amounts only to the performance by the buyer of one part of his legal obligation.

2. Under this article acceptance of goods is always acceptance of identified goods which have been appropriated to the contract or are appropriated by the contract. There is no provision for "acceptance of title" apart from acceptance in general, since acceptance of title is not material under this article to the detailed rights and duties of the parties. (See Section 2-401). The refinements of the older law between acceptance of goods and of title become unnecessary in view of the provisions of the sections on effect and revocation of acceptance, on effects of identification and on risk of loss, and those sections which free the seller's and buyer's remedies from the complications and confusions caused by the question of whether title has or has not passed to the buyer before breach.

3. Under Paragraph (a), payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself it can never be more than one circumstance and is not conclusive. Also, a conditional communication of acceptance always remains subject to its expressed conditions.

4. Under Paragraph (c), any action taken by the buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance. However, the provisions of Paragraph (c) are subject to the sections dealing with rejection by the buyer which permit the buyer to take certain actions with respect to the goods pursuant to his options and duties imposed by those sections, without effecting an acceptance of the goods. The second clause of Paragraph (c) modifies some of the prior case law and makes it clear that "acceptance" in law based on the wrongful act of the acceptor is acceptance only as against the wrongdoer and then only at the option of the party wronged.

In the same manner in which a buyer can bind himself, despite his insistence that he is rejecting or has rejected the goods, by an act inconsistent with the seller's ownership under Paragraph (c), he can obligate himself by a communication of acceptance despite a prior rejection under Paragraph (a). However, the sections on buyer's rights on improper delivery and on the effect of rightful rejection, make it clear that after he once

rejects a tender, Paragraph (a) does not operate in favor of the buyer unless the seller has re-tendered the goods or has taken affirmative action indicating that he is holding the tender open. See also Comment 2 to Section 2-601.

5. Subsection (2) supplements the policy of the section on buyer's rights on improper delivery, recognizing the validity of a partial acceptance but insisting that the buyer exercise this right only as to whole commercial units.

Cross references.Point 2: Sections 2-401, 2-509, 2-510, 2-607, 2-608 and Part 7.

Point 4: Sections 2-601 through 2-604.

Point 5: Section 2-601.

Definitional cross references."Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Goods". Section 2-105.

"Seller". Section 2-103.

ANNOTATION

Rights upon revocation of acceptance. - Buyer who justifiably revokes his acceptance has the same right to rescission as though he had rejected the goods in the first place. Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965).

Items not properly rejected are accepted. - Where buyer fails to properly reject all but certain specific items, those items not rejected are accepted. Celebrity, Inc. v. Kemper, 96 N.M. 508, 632 P.2d 743 (1981).

Reasonable time to reject determined by circumstances. - Absent a specific provision in a sales contract, a buyer has a reasonable time within which to determine whether or not the goods are defective, and the time depends upon all the circumstances surrounding the transaction. The actions of the parties may affect what is deemed to constitute a "reasonable time." O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Three-month delay in rejection not seasonable notice. - Where buyer fails to reject the entire shipment of goods until three months after seller's salesman refused to make requested adjustments for those goods rejected by buyer, the buyer has failed to give seller seasonable and particular notice of rejection as to the entire shipment and is precluded from rejecting any goods other than those originally set aside and presented to salesman. Celebrity, Inc. v. Kemper, 96 N.M. 508, 632 P.2d 743 (1981).

Acceptance by actions inconsistent with seller's ownership is question of fact. - Whether a buyer accepts goods by subsequent acts inconsistent with the seller's ownership is a question of fact to be determined from the evidence in each particular case. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Material alteration of goods by buyer will void a prior revocation of acceptance. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 72 Am. Jur. 2d Statute of Frauds §§ 130, 155, 157.
Contractual provision making acceptance conditional on approval by, or satisfaction of, third person, 46 A.L.R. 864.
Acceptance as affected by cancellation of contract before goods were shipped, 113 A.L.R. 810.
Buyer's acceptance of delayed installment of goods as waiver of similar default as to later installments, 32 A.L.R.2d 1128.
Reasonableness of personal judgment of buyer as test where goods are sold subject to being satisfactory to the buyer, 86 A.L.R.2d 200.
77 C.J.S. Sales § 222.

§ 55-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this article for nonconformity.

(3) Where a tender has been accepted:

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (Subsection (3) of Section 2-312 [55-2-312 NMSA 1978]) and the buyer is sued as a result of such a breach, he must so notify

the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over:

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then, unless the seller after seasonable receipt of the notice does come in and defend, he is so bound;

(b) if the claim is one for infringement or the like (Subsection (3) of Section 2-312 [55-2-312 NMSA 1978]), the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then, unless the buyer after seasonable receipt of the demand does turn over control, the buyer is so barred.

(6) The provisions of Subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (Subsection (3) of Section 2-312 [55-2-312 NMSA 1978]).

History: 1953 Comp., § 50A-2-607, enacted by Laws 1961, ch. 96, § 2-607.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsection (1) - Section 41, Uniform Sales Act; Subsections (2) and (3) - Sections 49 and 69, Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To continue the prior basic policies with respect to acceptance of goods while making a number of minor though material changes in the interest of simplicity and commercial convenience so that:

1. Under Subsection (1), once the buyer accepts a tender the seller acquires a right to its price on the contract terms. In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned, using the type of apportionment familiar to the courts in quantum valebat cases, to be determined in terms of "the contract rate," which is the rate determined from the bargain in fact (the agreement) after the rules and policies of this article have been brought to bear.

2. Under Subsection (2) acceptance of goods precludes their subsequent rejection. Any return of the goods thereafter must be by way of revocation of acceptance under the next section. Revocation is unavailable for a non-conformity known to the buyer at the time of acceptance, except where the buyer has accepted on the reasonable assumption that the non-conformity would be seasonably cured.

3. All other remedies of the buyer remain unimpaired under Subsection (2). This is intended to include the buyer's full rights with respect to future installments despite his acceptance of any earlier non-conforming installment.

4. The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

5. Under this article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

6. Subsection (4) unambiguously places the burden of proof to establish breach on the buyer after acceptance. However, this rule becomes one purely of procedure when the tender accepted was non-conforming and the buyer has given the seller notice of breach under Subsection (3). For Subsection (2) makes it clear that acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the price.

7. Subsections (3) (b) and (5) (b) give a warrantor against infringement an opportunity to defend or compromise third-party claims or be relieved of his liability. Subsection (5) (a)

codifies for all warranties the practice of voucher to defend. Compare Section 3-803. Subsection (6) makes these provisions applicable to the buyer's liability for infringement under Section 2-312.

8. All of the provisions of the present section are subject to any explicit reservation of rights.

Cross references.Point 1: Section 1-201.

Point 2: Section 2-608.

Point 4: Sections 1-204 and 2-605.

Point 5: Section 2-318.

Point 6: Section 2-717.

Point 7: Sections 2-312 and 3-803.

Point 8: Section 1-207.

Definitional cross references."Burden of establishing". Section 1-201.

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Remedy". Section 1-201.

"Seasonably". Section 1-204.

ANNOTATION

Comparative liability is not part of the UCC under this section. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

The purpose of the requirement of notice to the seller of a breach of warranty is to enable the seller to minimize damages in some manner, if possible to correct the defect,

and also to give the seller some immunity against stale claims. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

No notice of intent to claim damages. - When a tender has been accepted, the buyer must, within a reasonable time after he discovers or should have discovered any breach, notify the seller or be barred from any remedy. There is no requirement that the buyer also notify the seller of an intent to claim damages for the breach. State ex rel. Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc., 106 N.M. 539, 746 P.2d 645 (1987).

Notification of breach may be oral or written. - Notification of a breach of warranty may be either oral or in writing and is sufficient if it is informative to the seller of the general nature of the difficulty encountered with the warranted goods. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Buyer must give notice within "reasonable time". - After a buyer has determined that there has been a breach of warranty relating to the property sold, the buyer must give notice to the seller within a "reasonable time" after he discovers or should have discovered the breach, to avoid liability for the sale. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Sufficiency and timeliness of notice are questions of fact. - The sufficiency of notice and what is considered a reasonable time within which to give notice of a breach of warranty are ordinarily questions of fact, based upon the circumstances of each case. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Reasonable to require loss claims to be made within two days. - In general, a contract provision requiring claims of loss to be made within two days of delivery is reasonable, lawful and not unconscionable. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Acceptance of partial shipment. - Notice is not a condition precedent to the remedy of "cover" for failure to make a complete delivery. Not until the buyer accepts a complete tender must he, within a reasonable time after he discovers or should have discovered any breach, notify the seller of a breach or be barred from any remedy. A buyer's mere acceptance of partial goods does not waive or otherwise affect his right to damages for the seller's failure to deliver the remainder under the contract of sale. State ex rel. Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc., 106 N.M. 539, 746 P.2d 645 (1987).

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63 Am. Jur. 2d Products Liability § 525.
Effect of stipulation for return of advance payment, if order is not accepted, 1 A.L.R. 1513.
Judgment against seller of chattels for breach of warranty as conclusive upon prior warrantor, 8 A.L.R. 667.
Right of purchaser to opportunity to pay in cash where tender has been made in other medium, 11 A.L.R. 811; 23 A.L.R. 630; 46 A.L.R. 914.
Liability of seller of article not inherently dangerous for personal injuries to the buyer due to the defective or dangerous condition of the article, 13 A.L.R. 1176; 74 A.L.R. 343; 168 A.L.R. 1054.
Right of dealer against his vendor in case of breach of warranty as to article purchased for resale and resold, 22 A.L.R. 133; 64 A.L.R. 883.
Right of seller to ship goods after notice of repudiation by buyer, 27 A.L.R. 1230.
Loss of profits as element of damages for fraud of seller as to quality of goods purchased for resale, 28 A.L.R. 354.
Rights and remedies of purchaser under seller's agreement to assist him in reselling the goods, 29 A.L.R. 666.
Applicability of provision in contract of sale for return of article, where article delivered does not answer to description, 30 A.L.R. 321.
Automobile or truck, right of action for breach of warranty, 34 A.L.R. 549; 43 A.L.R. 648.
Effect of action as an election of remedy or choice of substantive rights in case of fraud in sale of property, 35 A.L.R. 1153; 123 A.L.R. 378.
Liability of seller of serum or vaccine matter for use on livestock for defects in quality thereof, 39 A.L.R. 399.
Right of seller as condition of delivery to insist on payment or resort to means not provided by contract to assure payment, 44 A.L.R. 443.
Misrouting as affecting duty of the buyer to accept goods, 46 A.L.R. 1120.
What constitutes delivery of goods sold under C.I.F. contracts, 47 A.L.R. 193.
Contract requiring seller to look to property alone for payment, 50 A.L.R. 714.
Factor's failure to account for proceeds of sale as affecting rights of seller and purchaser inter se, 50 A.L.R. 1301.
Reserving to seller right to demand cash or security, if buyer's credit or financial responsibility becomes impaired, 64 A.L.R. 1117.
Acceptance after agreed time of delivery as waiver of damages on account of seller's delay, 80 A.L.R. 322.
Waiver of warranty on aeroplane, 83 A.L.R. 406; 99 A.L.R. 173.
Effect of express provision of contract limiting obligation in case of breach of warranty to replacement of defective article or part under Uniform Sales Act, 106 A.L.R. 1466.
Breach of warranty as to title, as within statutory provision requiring notice of breach of warranty on sale of goods, 114 A.L.R. 707.
Insolvency of buyer as justifying seller on credit in refusing to deliver except for cash, 117 A.L.R. 1105.
Sufficiency of buyer's attempt to rescind, 118 A.L.R. 530.
Duty of seller to tender delivery where buyer has not exercised his option under contract to require shipment before time specified, 119 A.L.R. 1495.
Purchaser's remedy for personal injury due to defective or dangerous condition of

purchased article not inherently dangerous, 168 A.L.R. 1054.
Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 A.L.R. 595.
What amounts to acknowledgment by third person that he holds goods on buyer's behalf within statutory provision respecting delivery when goods are in possession of third person, 4 A.L.R.2d 213.
Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 A.L.R.2d 701.
Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods or article for defects or failure to comply with warranty or representations, 24 A.L.R.2d 717.
Buyer's acceptance of delayed or defective installment of goods as waiver of similar default as to later installments, 32 A.L.R.2d 1117.
Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 33 A.L.R.2d 511.
Construction, application and effect of statutory provisions requiring notice of breach of warranty on sale of goods, 41 A.L.R.2d 812; 53 A.L.R.2d 270.
Use of article by buyer as waiver of right to rescind for fraud, breach of warranty or failure of goods to comply with contract, 41 A.L.R.2d 1173.
In absence of written provision and sales contract, place where cash consideration for goods purchased is payable, 49 A.L.R.2d 1350.
Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 A.L.R.2d 270.
Extent of liability of seller of livestock infected with communicable disease, 87 A.L.R.2d 1317.
Sufficiency and timeliness of buyer's notice under U.C.C. § 2-607 of seller's breach of warranty, 93 A.L.R.3d 363.
Third-party beneficiaries of warranties under U.C.C. § 2-318, 100 A.L.R.3d 743.
Necessity that buyer of goods give notice of breach of warranty to manufacturer under UCC § 2-607, requiring notice to seller of breach, 24 A.L.R.4th 277.
42 C.J.S. Indemnity §§ 15, 26; 77 C.J.S. Sales §§ 225, 226, 339.

§ 55-2-608. Revocation of acceptance in whole or in part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial

change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

History: 1953 Comp., § 50A-2-608, enacted by Laws 1961, ch. 96, § 2-608.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 69(1) (d), (3), (4) and (5), Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To make it clear that:

1. Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non-alternative character of the two remedies is stressed by the terms used in the present section. The section no longer speaks of "rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale and involves no suggestion of "election" of any sort.

2. Revocation of acceptance is possible only where the nonconformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

3. "Assurances" by the seller under Paragraph (b) of Subsection (1) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. These are the only assurances involved in Paragraph (b). Explicit assurances may be made either in good faith or bad faith. In either case any remedy accorded by this article is available to the buyer under the section on remedies for fraud.

4. Subsection (2) requires notification of revocation of acceptance within a reasonable time after discovery of the grounds for such revocation. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender. The parties may by their agreement limit the time for

notification under this section, but the same sanctions and considerations apply to such agreements as are discussed in the comment on manner and effect of rightful rejection.

5. The content of the notice under Subsection (2) is to be determined in this case as in others by considerations of good faith, prevention of surprise, and reasonable adjustment. More will generally be necessary than the mere notification of breach required under the preceding section. On the other hand the requirements of the section on waiver of buyer's objections do not apply here. The fact that quick notification of trouble is desirable affords good ground for being slow to bind a buyer by his first statement. Following the general policy of this article, the requirements of the content of notification are less stringent in the case of a non-merchant buyer.

6. Under Subsection (2) the prior policy is continued of seeking substantial justice in regard to the condition of goods restored to the seller. Thus the buyer may not revoke his acceptance if the goods have materially deteriorated except by reason of their own defects. Worthless goods, however, need not be offered back and minor defects in the articles reoffered are to be disregarded.

7. The policy of the section allowing partial acceptance is carried over into the present section and the buyer may revoke his acceptance, in appropriate cases, as to the entire lot or any commercial unit thereof.

Cross references.Point 3: Section 2-721.

Point 4: Sections 1-204, 2-602 and 2-607.

Point 5: Sections 2-605 and 2-607.

Point 7: Section 2-601.

Definitional cross references."Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

ANNOTATION

Rights upon revocation of acceptance. - Buyer who justifiably revokes his acceptance has the same right to rescission as though he had rejected the goods in the first place. Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965).

But reasonable efforts required. - After buyers accepted delivery of gelding they believed to be a stallion, they were still able to revoke acceptance by making every reasonable effort to locate and inform seller of horse's misrepresentation, upon their discovery of the mistake of sex. Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965).

And damages generally. - Since Subsection (3) of this section states that a buyer who revokes has same rights with regard to goods involved as if he had rejected them, plaintiff, who purchased used automobile but then revoked acceptance of the vehicle when defendant vendor failed to deliver clear title as warranted, was not precluded from recovering "nondelivery" damages under 55-2-711 NMSA 1978, even where physical delivery took place. Gawlick v. American Bldrs. Supply, Inc., 86 N.M. 77, 519 P.2d 313 (Ct. App. 1974).

Buyer may not revoke acceptance and recover for breach. - Even though buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach, recovery from one claim precludes recovery from the other. GMAC v. Anaya, 103 N.M. 72, 703 P.2d 169 (1985).

Continued possession not waiver of right to revoke acceptance. - Continued possession and reasonable use of property after the buyer has notified the seller of a revocation of acceptance does not, as a matter of law, constitute a waiver of the right to revoke acceptance. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Continued use of property will not negate the claim of revocation of acceptance in every case, particularly where the sellers fail to contact the buyers to arrange for removal of the property, or to show how any delay may have prejudiced them or to show that the delay could have been avoided. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Strict adherence to use of specific revoking words not required of buyers: they must, however, give sufficient indication of revocation that there can be no surprise on the part of the seller. Ybarra v. Modern Trailer Sales, Inc., 94 N.M. 249, 609 P.2d 331 (1980).

Actions of buyer inconsistent with revocation. - Buyer's claims that it had rejected or revoked acceptance of juniper plants by telephone statement that plants were not "up to snuff" was refuted by the fact that four months after receiving them it had removed them

from their five gallon containers and had planted them in fulfillment of its contract with a third party. Oda Nursery, Inc. v. Garcia Tree & Lawn, Inc., 103 N.M. 438, 708 P.2d 1039 (1985).

"Reasonable time" within which to reject is question of fact. - The question of what is a "reasonable time" within which to rescind a sale is a question of fact which differs under the facts of each case. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Reasonable to require loss claims to be made within two days. - In general, a contract provision requiring claims of loss to be made within two days of delivery is reasonable, lawful and not unconscionable. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Four years not unreasonable time to revoke acceptance, following constant complaints. - In a suit to revoke acceptance of a contract for the sale of a mobile home, four years was not an unreasonable time for the buyer's revocation, where the buyers complained about the defects as soon as they were discovered, continually asked the seller to remedy the defects and relied upon seller's assurances that repairs would be made. Ybarra v. Modern Trailer Sales, Inc., 94 N.M. 249, 609 P.2d 331 (1980).

Proof of substantial impairment not required for rejection. - Where the buyer is simply rejecting goods, he is not required to prove substantial impairment. Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982).

Buyer to hold goods with reasonable care. - A buyer, after having given seller notice of a rejection of goods within a reasonable time, is under a duty after rejection to hold the goods with reasonable care for a time sufficient to permit the seller to remove them. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

When buyer may retain possession. - Where a buyer notifies a seller of a revocation of acceptance of goods, and receives no instructions from the seller concerning the return or disposition of the property, the buyer is entitled to retain possession of such property. O'Shea v. Hatch, 97 N.M. 409, 640 P.2d 515 (Ct. App. 1982).

Comparative liability is not part of the UCC under this section. Bowlin's, Inc. v. Ramsey Oil Co., 99 N.M. 660, 662 P.2d 661 (Ct. App. 1983).

Law reviews. - For comment, "The Miller Act in New Mexico - Materialman's Right to Recover on Prime's Surety Bond in Public Works Contracts - Notice as Condition Precedent to Action," see 9 Nat. Resources J. 295 (1969).

For annual survey of New Mexico law relating to commercial law, see 12 N.M.L. Rev. 173 (1982).

For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63 Am. Jur. 2d Products Liability §§ 521 to 525.
Resale by buyer where seller has refused to receive property rejected for breach of warranty, 24 A.L.R. 1445.
Acceptance of installment of goods as affecting buyer's right to rescind because of defects in that installment, 29 A.L.R. 1517.
Abandonment of possession as prerequisite to vendee's suit to obtain a rescission or to recover back money paid, 142 A.L.R. 582.
Buyer's return of subject of sale and acceptance of return or credit for the purchase price as affecting right to recover special damages for breach of warranty, 157 A.L.R. 1077.
Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 A.L.R.2d 1273.
Use of article by buyer as waiver of right to rescind for fraud, breach of warranty or failure of goods to comply with contract, 41 A.L.R.2d 1173.
What constitutes "substantial impairment" entitling buyer to revoke his acceptance of goods under UCC § 2-608(1), 98 A.L.R.3d 1183.
77 C.J.S. Sales §§ 225, 226.

§ 55-2-609. Right to adequate assurance of performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and until he receives such assurance may, if commercially reasonable, suspend any performance for which he has not already received the agreed return.

(2) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand, failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

History: 1953 Comp., § 50A-2-609, enacted by Laws 1961, ch. 96, § 2-609.

OFFICIAL COMMENT

Prior uniform statutory provision. See Sections 53, 54(1) (b), 55 and 63(2), Uniform Sales Act.

Purposes.1. The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, the other party is threatened with the loss of a substantial part of what he has bargained for. A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to believe that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance. Similarly, a buyer who believes that the seller's deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise.

2. Three measures have been adopted to meet the needs of commercial men in such situations. First, the aggrieved party is permitted to suspend his own performance and any preparation therefor, with excuse for any resulting necessary delay, until the situation has been clarified. "Suspend performance" under this section means to hold up performance pending the outcome of the demand, and includes also the holding up of any preparatory action. This is the same principle which governs the ancient law of stoppage and seller's lien, and also of excuse of a buyer from prepayment if the seller's actions manifest that he cannot or will not perform. (Original Act, Section 63(2).)

Secondly, the aggrieved party is given the right to require adequate assurance that the other party's performance will be duly forthcoming. This principle is reflected in the familiar clauses permitting the seller to curtail deliveries if the buyer's credit becomes impaired, which when held within the limits of reasonableness and good faith actually express no more than the fair business meaning of any commercial contract.

Third, and finally, this section provides the means by which the aggrieved party may treat the contract as broken if his reasonable grounds for insecurity are not cleared up within a reasonable time. This is the principle underlying the law of anticipatory breach, whether by way of defective part performance or by repudiation. The present section merges these three principles of law and commercial practice into a single theory of general application to all sales agreements looking to future performance.

3. Subsection (2) of the present section requires that "reasonable" grounds and "adequate" assurance as used in Subsection (1) be defined by commercial rather than legal standards. The express reference to commercial standards carries no connotation that the obligation of good faith is not equally applicable here.

Under commercial standards and in accord with commercial practice, a ground for insecurity need not arise from or be directly related to the contract in question. The law as to "dependence" or "independence" of promises within a single contract does not control the application of the present section.

Thus a buyer who falls behind in "his account" with the seller, even though the items involved have to do with separate and legally distinct contracts, impairs the seller's expectation of due performance. Again, under the same test, a buyer who requires precision parts which he intends to use immediately upon delivery, may have reasonable grounds for insecurity if he discovers that his seller is making defective deliveries of such parts to other buyers with similar needs. Thus, too, in a situation such as arose in Jay Dreher Corporation v. Delco Appliance Corporation, 93 F.2d 275 (C.C.A.2, 1937), where a manufacturer gave a dealer an exclusive franchise for the sale of his product but on two or three occasions breached the exclusive dealing clause, although there was no default in orders, deliveries or payments under the separate sales contract between the parties, the aggrieved dealer would be entitled to suspend his performance of the contract for sale under the present section and to demand assurance that the exclusive dealing contract would be lived up to. There is no need for an explicit clause tying the exclusive franchise into the contract for the sale of goods since the situation itself ties the agreements together.

The nature of the sales contract enters also into the question of reasonableness. For example, a report from an apparently trustworthy source that the seller had shipped defective goods or was planning to ship them would normally give the buyer reasonable grounds for insecurity. But when the buyer has assumed the risk of payment before inspection of the goods, as in a sales contract on C.I.F. or similar cash against documents terms, that risk is not to be evaded by a demand for assurance. Therefore no ground for insecurity would exist under this section unless the report went to a ground which would excuse payment by the buyer.

4. What constitutes "adequate" assurance of due performance is subject to the same test of factual conditions. For example, where the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known corner-cutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery involved. By the same token where a delivery has defects, even though easily curable, which interfere with easy use by the buyer, no verbal assurance can be deemed adequate which is not accompanied by replacement, repair, money-allowance or other commercially reasonable cure.

A fact situation such as arose in Corn Products Refining Co. v. Fasola, 94 N.J.L. 181, 109 A. 505 (1920) offers illustration both of reasonable grounds for insecurity and "adequate" assurance. In that case a contract for the sale of oils on 30 days' credit, 2% off for payment within 10 days, provided that credit was to be extended to the buyer only if his financial responsibility was satisfactory to the seller. The buyer had been in the

habit of taking advantage of the discount but at the same time that he failed to make his customary 10 day payment, the seller heard rumors, in fact false, that the buyer's financial condition was shaky. Thereupon, the seller demanded cash before shipment or security satisfactory to him. The buyer sent a good credit report from his banker, expressed willingness to make payments when due on the 30 day terms and insisted on further deliveries under the contract. Under this article the rumors, although false, were enough to make the buyer's financial condition "unsatisfactory" to the seller under the contract clause. Moreover, the buyer's practice of taking the cash discounts is enough, apart from the contract clause, to lay a commercial foundation for suspicion when the practice is suddenly stopped. These matters, however, go only to the justification of the seller's demand for security, or his "reasonable grounds for insecurity".

The adequacy of the assurance given is not measured as in the type of "satisfaction" situation affected with intangibles, such as in personal service cases, cases involving a third party's judgment as final, or cases in which the whole contract is dependent on one party's satisfaction, as in a sale on approval. Here, the seller must exercise good faith and observe commercial standards. This article thus approves the statement of the court in James B. Berry's Sons Co. of Illinois v. Monark Gasoline & Oil Co., Inc., 32 F.2d 74 (C.C.A.8, 1929), that the seller's satisfaction under such a clause must be based upon reason and must not be arbitrary or capricious; and rejects the purely personal "good faith" test of the Corn Products Refining Co. case, which held that in the seller's sole judgment, if for

any reason he was dissatisfied, he was entitled to revoke the credit. In the absence of the buyer's failure to take the 2% discount as was his custom, the banker's report given in that case would have been "adequate" assurance under this act, regardless of the language of the "satisfaction" clause. However, the seller is reasonably entitled to feel insecure at a sudden expansion of the buyer's use of a credit term, and should be entitled either to security or to a satisfactory explanation.

The entire foregoing discussion as to adequacy of assurance by way of explanation is subject to qualification when repeated occasions for the application of this section arise. This act recognizes that repeated delinquencies must be viewed as cumulative. On the other hand, commercial sense also requires that if repeated claims for assurance are made under this section, the basis for these claims must be increasingly obvious.

5. A failure to provide adequate assurance of performance and thereby to re-establish the security of expectation, results in a breach only "by repudiation" under Subsection (4). Therefore, the possibility is continued of retraction of the repudiation under the section dealing with that problem, unless the aggrieved party has acted on the breach in some manner.

The thirty day limit on the time to provide assurance is laid down to free the question of reasonable time from uncertainty in later litigation.

6. Clauses seeking to give the protected party exceedingly wide powers to cancel or

readjust the contract when ground for insecurity arises must be read against the fact that good faith is a part of the obligation of the contract and not subject to modification by agreement and includes, in the case of a merchant, the reasonable observance of commercial standards of fair dealing in the trade. Such clauses can thus be effective to enlarge the protection given by the present section to a certain extent, to fix the reasonable time within which requested assurance must be given, or to define adequacy of the assurance in any commercially reasonable fashion. But any clause seeking to set up arbitrary standards for action is ineffective under this article. Acceleration clauses are treated similarly in the articles on commercial paper and secured transactions.

Cross references.Point 3: Section 1-203.

Point 5: Section 2-611.

Point 6: Sections 1-203, 1-208 and Articles 3 and 9.

Definitional cross references."Aggrieved party". Section 1-201.

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Nature, construction and effect of "lay away" or "will call" plan or system, 10 A.L.R.3d 456.
77 C.J.S. Sales §§ 237 to 239, 322.

§ 55-2-610. Anticipatory repudiation.

When either party repudiates the contract with respect to a performance not yet due, the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 [55-2-703 NMSA 1978] or Section 2-711 [55-2-711 NMSA 1978]), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704 [55-2-704 NMSA 1978]).

History: 1953 Comp., § 50A-2-610, enacted by Laws 1961, ch. 96, § 2-610.

OFFICIAL COMMENT

Prior uniform statutory provision. See Sections 63(2) and 65, Uniform Sales Act.

Purposes. To make it clear that:

1. With the problem of insecurity taken care of by the preceding section and with provision being made in this article as to the effect of a defective delivery under an installment contract, anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance.

Under the present section when such a repudiation substantially impairs the value of the contract, the aggrieved party may at any time resort to his remedies for breach, or he may suspend his own performance while he negotiates with, or awaits performance by, the other party. But if he awaits performance beyond a commercially reasonable time he cannot recover resulting damages which he should have avoided.

2. It is not necessary for repudiation that performance be made literally and utterly impossible. Repudiation can result from action which reasonably indicates a rejection of the continuing obligation. And, a repudiation automatically results under the preceding section on insecurity when a party fails to provide adequate assurance of due future

performance within thirty days after a justifiable demand therefor has been made. Under the language of this section, a demand by one or both parties for more than the contract calls for in the way of counter-performance is not in itself a repudiation nor does it invalidate a plain expression of desire for future performance. However, when under a fair reading it amounts to a statement of intention not to perform except on conditions which go beyond the contract, it becomes a repudiation.

3. The test chosen to justify an aggrieved party's action under this section is the same as that in the section on breach in installment contracts - namely the substantial value of the contract. The most useful test of substantial value is to determine whether material inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated.

4. After repudiation, the aggrieved party may immediately resort to any remedy he chooses provided he moves in good faith (see Section 1-203). Inaction and silence by the aggrieved party may leave the matter open but it cannot be regarded as misleading the repudiating party. Therefore the aggrieved party is left free to proceed at any time with his options under this section, unless he has taken some positive action which in good faith requires notification to the other party before the remedy is pursued.

Cross references.Point 1: Sections 2-609 and 2-612.

Point 2: Section 2-609.

Point 3: Section 2-612.

Point 4: Section 1-203.

Definitional cross references."Aggrieved party". Section 1-201.

"Contract". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

ANNOTATION

Effect of value lost from "used" condition of goods on mitigation of damages. - The duty of the seller of a boat to mitigate damages arose after the seller was notified of the repudiation of the buyer, and where a loss in value of the boat due to its "used" condition occurred before the buyer's repudiation letter, the boat's "used" value was a proper damage for the court to consider, and was not subject to the duty to mitigate. Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit, and Credit Cards § 37.
Breach of one contract as ground for rescission of another, 27 A.L.R. 1157.
Election to rescind for fraud as barring action for damages, 35 A.L.R. 1155; 123 A.L.R. 378.
Refusal to accept crops to be grown, 44 A.L.R. 215; 108 A.L.R. 1482.
Return or tender of consideration for release or compromise of claim on contract of sale, as condition of action for rescission, 134 A.L.R. 146.
What constitutes anticipatory repudiation of sales contract under UCC § 2-610, 1 A.L.R.4th 527.
77 C.J.S. Sales §§ 79, 98 to 100; 78 C.J.S. Sales §§ 462, 464, 520, 566.

§ 55-2-611. Retraction of anticipatory repudiation.

(1) Until the repudiating party's next performance is due, he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this article (Section 2-609 [55-2-609 NMSA 1978]).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

History: 1953 Comp., § 50A-2-611, enacted by Laws 1961, ch. 96, § 2-611.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To make it clear that:

1. The repudiating party's right to reinstate the contract is entirely dependent upon the action taken by the aggrieved party. If the latter has cancelled the contract or materially changed his position at any time after the repudiation, there can be no retraction under this section.

2. Under Subsection (2) an effective retraction must be accompanied by any assurances demanded under the section dealing with right to adequate assurance. A

repudiation is of course sufficient to give reasonable ground for insecurity and to warrant a request for assurance as an essential condition of the retraction. However, after a timely and unambiguous expression of retraction, a reasonable time for the assurance to be worked out should be allowed by the aggrieved party before cancellation.

Cross reference.Point 2: Section 2-609.

Definitional cross references."Aggrieved party". Section 1-201.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Party". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 C.J.S. Sales §§ 79, 112, 113; 78 C.J.S. Sales § 566.

§ 55-2-612. "Installment contract"; breach.

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer must reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonformity does not fall within Subsection (3) and the seller gives adequate assurance of its cure, the buyer must accept that installment.

(3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole. But the aggreived party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

History: 1953 Comp., § 50A-2-612, enacted by Laws 1961, ch. 96, § 2-612.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 45(2), Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To continue prior law but to make explicit the more mercantile interpretation of many of the rules involved, so that:

1. The definition of an installment contract is phrased more broadly in this article so as to cover installment deliveries tacitly authorized by the circumstances or by the option of either party.

2. In regard to the apportionment of the price for separate payment this article applies the more liberal test of what can be apportioned rather than the test of what is clearly apportioned by the agreement. This article also recognizes approximate calculation or apportionment of price subject to subsequent adjustment. A provision for separate payment for each lot delivered ordinarily means that the price is at least roughly calculable by units of quantity, but such a provision is not essential to an "installment contract." If separate acceptance of separate deliveries is contemplated, no generalized contrast between wholly "entire" and wholly "divisible" contracts has any standing under this article.

3. This article rejects any approach which gives clauses such as "each delivery is a separate contract" their legalistically literal effect. Such contracts nonetheless call for installment deliveries. Even where a clause speaks of "a separate contract for all purposes", a commercial reading of the language under the section on good faith and commercial standards requires that the singleness of the document and the negotiation, together with the sense of the situation, prevail over any noncommercial and legalistic interpretation.

4. One of the requirements for rejection under Subsection (2) is nonconformity substantially impairing the value of the installment in question. However, an installment agreement may require accurate conformity in quality as a condition to the right to acceptance if the need for such conformity is made clear either by express provision or by the circumstances. In such a case the effect of the agreement is to define explicitly what amounts to substantial impairment of value impossible to cure. A clause requiring accurate compliance as a condition to the right to acceptance must, however, have some basis in reason, must avoid imposing hardship by surprise and is subject to waiver or to displacement by practical construction.

Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purposes of the contract. The defect

in required documents refers to such matters as the absence of insurance documents under a C.I.F. contract, falsity of a bill of lading or one failing to show shipment within the contract period or to the contract destination. Even in such cases, however, the provisions on cure of tender apply if appropriate documents are readily procurable.

5. Under Subsection (2) an installment delivery must be accepted if the nonconformity is curable and the seller gives adequate assurance of cure. Cure of nonconformity of an installment in the first instance can usually be afforded by an allowance against the price, or in the case of reasonable discrepancies in quantity either by a further delivery or a partial rejection. This article requires reasonable action by a buyer in regard to discrepant delivery and good faith requires that the buyer make any reasonable minor outlay of time or money necessary to cure an overshipment by severing out an acceptable percentage thereof. The seller must take over a cure which involves any material burden; the buyer's obligation reaches only to cooperation. Adequate assurance for purposes of Subsection (2) is measured by the same standards as under the section on right to adequate assurance of performance.

6. Subsection (3) is designed to further the continuance of the contract in the absence of an overt cancellation. The question arising when an action is brought as to a single installment only is resolved by making such action waive the right of cancellation. This involves merely a defect in one or more installments, as contrasted with the situation where there is a true repudiation within the section on anticipatory repudiation. Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such nonconformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract. If only the seller's security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the entire contract. It is clear under this article, however, that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect "waived." Prior policy is continued, putting the rule as to buyer's default on the same footing as that in regard to seller's default.

7. Under the requirement of seasonable notification of cancellation under Subsection (3), a buyer who accepts a nonconforming installment which substantially impairs the value of the entire contract should properly be permitted to withhold his decision as to whether or not to cancel pending a response from the seller as to his claim for cure or adjustment. Similarly, a seller may withhold a delivery pending payment for prior ones, at the same time delaying his decision as to cancellation. A reasonable time for notifying of cancellation, judged by commercial standards under the section on good faith, extends of course to include the time covered by any reasonable negotiation in good faith. However, during this period the defaulting party is entitled, on request, to know whether the contract is still in effect, before he can be required to perform further.

Cross references.Point 2: Sections 2-307 and 2-607.

Point 3: Section 1-203.

Point 5: Sections 2-208 and 2-609.

Point 6: Section 2-610.

Definitional cross references."Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Lot". Section 2-105.

"Notifies". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of seller to rescind or refuse further deliveries on buyer's failure to pay for installments, 14 A.L.R. 1209; 75 A.L.R. 609.
Excess of payment for one period as applicable to subsequent period under contract providing for periodical payments, 48 A.L.R. 273.
Right, upon buyer's default in payment of installment due, to recover amount not due, in absence of acceleration clause, 57 A.L.R. 825.
Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 A.L.R. 595.
Buyer's acceptance of delayed installment of goods as waiver of similar default as to later installments, 32 A.L.R.2d 1117.
77 C.J.S. Sales §§ 77, 175.

§ 55-2-613. Casualty to identified goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324 [55-2-324 NMSA 1978]) then:

(a) if the loss is total the contract is avoided; and

(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract, the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

History: 1953 Comp., § 50A-2-613, enacted by Laws 1961, ch. 96, § 2-613.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 7 and 8, Uniform Sales Act.

Changes. Rewritten, the basic policy being continued but the test of a "divisible" or "indivisible" sale or contract being abandoned in favor of adjustment in business terms.

Purposes of changes.1. Where goods whose continued existence is presupposed by the agreement are destroyed without fault of either party, the buyer is relieved from his obligation but may at his option take the surviving goods at a fair adjustment. "Fault" is intended to include negligence and not merely wilful wrong. The buyer is expressly given the right to inspect the goods in order to determine whether he wishes to avoid the contract entirely or to take the goods with a price adjustment.

2. The section applies whether the goods were already destroyed at the time of contracting without the knowledge of either party or whether they are destroyed subsequently but before the risk of loss passes to the buyer. Where under the agreement, including of course usage of trade, the risk has passed to the buyer before the casualty, the section has no application. Beyond this, the essential question in determining whether the rules of this section are to be applied is whether the seller has or has not undertaken the responsibility for the continued existence of the goods in proper condition through the time of agreed or expected delivery.

3. The section on the term "no arrival, no sale" makes clear that delay in arrival, quite as much as physical change in the goods, gives the buyer the options set forth in this section.

Cross reference.Point 3: Section 2-324.

Definitional cross references."Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Construction and effect of UCC § 2-613 governing casualty to goods identified to a contract, without fault of buyer or seller, 51 A.L.R.4th 537.
77 C.J.S. Sales §§ 4, 94, 98, 100, 247, 249, 285 to 287; 78 C.J.S. Sales § 566.

§ 55-2-614. Substituted performance.

(1) Where without fault of either party the agreed berthing, loading or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

History: 1953 Comp., § 50A-2-614, enacted by Laws 1961, ch. 96, § 2-614.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) requires the tender of a commercially reasonable substituted performance where agreed to facilities have failed or become commercially

impracticable. Under this article, in the absence of specific agreement, the normal or usual facilities enter into the agreement either through the circumstances, usage of trade or prior course of dealing.

This section appears between Section 2-613 on casualty to identified goods and the next section on excuse by failure of presupposed conditions, both of which deal with excuse and complete avoidance of the contract where the occurrence or non-occurrence of a contingency which was a basic assumption of the contract makes the expected performance impossible. The distinction between the present section and those sections lies in whether the failure or impossibility of performance arises in connection with an incidental matter or goes to the very heart of the agreement. The differing lines of solution are contrasted in a comparison of International Paper Co. v. Rockefeller, 161 App. Div. 180, 146 N.Y.S. 371 (1914) and Meyer v. Sullivan, 40 Cal. App. 723, 181 P. 847 (1919). In the former case a contract for the sale of spruce to be cut from a particular tract of land was involved. When a fire destroyed the trees growing on that tract the seller was held excused since performance was impossible. In the latter case the contract called for delivery of wheat "f.o.b. Kosmos Steamer at Seattle." The war led to cancellation of that line's sailing schedule after space had been duly engaged and the buyer was held entitled to demand substituted delivery at the warehouse on the line's loading dock. Under this article, of course, the seller would also be entitled, had the market gone the other way, to make a substituted tender in that manner.

There must, however, be a true commercial impracticability to excuse the agreed to performance and justify a substituted performance. When this is the case a reasonable substituted performance tendered by either party should excuse him from strict compliance with contract terms which do not go to the essence of the agreement.

2. The substitution provided in this section as between buyer and seller does not carry over into the obligation of a financing agency under a letter of credit, since such an agency is entitled to performance which is plainly adequate on its face and without need to look into commercial evidence outside of the documents. See Article 5, especially Sections 5-102, 5-103, 5-109, 5-110 and 5-114.

3. Under Subsection (2) where the contract is still executory on both sides, the seller is permitted to withdraw unless the buyer can provide him with a commercially equivalent return despite the governmental regulation. Where, however, only the debt for the price remains, a larger leeway is permitted. The buyer may pay in the manner provided by the regulation even though this may not be commercially equivalent provided that the regulation is not "discriminatory, oppressive or predatory."

Cross reference.Point 2: Article 5.

Definitional cross references."Buyer". Section 2-103.

"Fault". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 C.J.S. Sales §§ 165, 237 to 239, 241.

§ 55-2-615. Excuse by failure of presupposed conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section [55-2-614 NMSA 1978] on substituted performance:

(a) delay in delivery or nondelivery in whole or in part by a seller who complies with Paragraphs (b) and (c) is not a breach of his duty under a contract for sale 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 contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid;

(b) where the causes mentioned in Paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable;

(c) the seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under Paragraph (b), of the estimated quota thus made available for the buyer.

History: 1953 Comp., § 50A-2-615, enacted by Laws 1961, ch. 96, § 2-615.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting. The destruction of specific goods and the problem of the use of substituted performance on points other than delay or quantity, treated elsewhere in this article, must be distinguished from the matter covered by this section.

2. The present section deliberately refrains from any effort at an exhaustive expression of contingencies and is to be interpreted in all cases sought to be brought within its

scope in terms of its underlying reason and purpose.

3. The first test for excuse under this article in terms of basic assumption is a familiar one. The additional test of commercial impracticability (as contrasted with "impossibility," "frustration of performance" or "frustration of the venture") has been adopted in order to call attention to the commercial character of the criterion chosen by this article.

4. Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section. (See Ford & Sons, Ltd. v. Henry Leetham & Sons, Ltd., 21 Com. Cas. 55 (1915, K.B.D.).)

5. Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting. (See Davis Co. v. Hoffmann-LaRoche Chemical Works, 178 App.Div. 855, 166 N.Y.S. 179 (1917) and International Paper Co. v. Rockefeller, 161 App.Div. 180, 146 N.Y.S. 371 (1914).) There is no excuse under this section, however, unless the seller has employed all due measures to assure himself that his source will not fail. (See Canadian Industrial Alcohol Co., Ltd. v. Dunbar Molasses Co., 258 N.Y. 194, 179 N.E. 383, 80 A.L.R. 1173 (1932) and Washington Mfg. Co. v. Midland Lumber Co., 113 Wash. 593, 194 P. 777 (1921).)

In the case of failure of production by an agreed source for causes beyond the seller's control, the seller should, if possible, be excused since production by an agreed source is without more a basic assumption of the contract. Such excuse should not result in relieving the defaulting supplier from liability nor in dropping into the seller's lap an unearned bonus of damages over. The flexible adjustment machinery of this article provides the solution under the provision on the obligation of good faith. A condition to his making good the claim of excuse is the turning over to the buyer of his rights against the defaulting source of supply to the extent of the buyer's contract in relation to which excuse is being claimed.

6. In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of "excuse" or "no excuse," adjustment under the various provisions of this article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this act to use equitable principles in furtherance of

commercial standards and good faith.

7. The failure of conditions which go to convenience or collateral values rather than to the commercial practicability of the main performance does not amount to a complete excuse. However, good faith and the reason of the present section and of the preceding one may properly be held to justify and even to require any needed delay involved in a good faith inquiry seeking a readjustment of the contract terms to meet the new conditions.

8. The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. Thus the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances. (See Madeirense Do Brasil, S. A. v. Stulman-Emrick Lumber Co., 147 F.2d 399 (C.C.A., 2 Cir., 1945).) The exemption otherwise present through usage of trade under the present section may also be expressly negated by the language of the agreement. Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.

Agreement can also be made in regard to the consequences of exemption as laid down in Paragraphs (b) and (c) and the next section on procedure on notice claiming excuse.

9. The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

Exemption of the buyer in the case of a "requirements" contract is covered by the "Output and Requirements" section both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn from the circumstances, commercial understanding views it as a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply contract as conditioned on the continuance of the buyer's further contract for outlet. On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract

which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

10. Following its basic policy of using commercial practicability as a test for excuse, this section recognizes as of equal significance either a foreign or domestic regulation and disregards any technical distinctions between "law," "regulation," "order" and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller's good faith belief in the validity of the regulation is the test under this article and the best evidence of his good faith is the general commercial acceptance of the regulation. However, governmental interference cannot excuse unless it truly "supervenes" in such a manner as to be beyond the seller's assumption of risk. And any action by the party claiming excuse which causes or colludes in inducing the governmental action preventing his performance would be in breach of good faith and would destroy his exemption.

11. An excused seller must fulfill his contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. Subsections (a) and (b), therefore, explicitly permit in any proration a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for supplies. Customers at different stages of the manufacturing process may be fairly treated by including the seller's manufacturing requirements. A fortiori, the seller may also take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty, since any allocation which exceeds normal past requirements will not be reasonable. However, good faith requires, when prices have advanced, that the seller exercise real care in making his allocations, and in case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price. Save for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller.

Cross references.Point 1: Sections 2-613 and 2-614.

Point 2: Section 1-102.

Point 5: Sections 1-203 and 2-613.

Point 6: Sections 1-102, 1-203 and 2-609.

Point 7: Section 2-614.

Point 8: Sections 1-201, 2-302 and 2-616.

Point 9: Sections 1-102, 2-306 and 2-613.

Definitional cross references."Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Good faith". Section 1-201.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

ANNOTATION

Excuse by supervening governmental regulation. - Performance will be excused when made impracticable by having to comply with a supervening governmental regulation. International Minerals & Chem. Corp. v. Llano, Inc. 770 F.2d 879 (10th Cir. 1985), cert. denied, 475 U.S. 1015, 106 S. Ct. 1196, 89 L. Ed. 2d 310 (1986).

Liquor license purchaser not liable following denial of governmental approval. - Purchaser of a liquor license was not liable for breach of contract where governmental approval of the exchange, which was a condition precedent, was denied after the buyer had made a good faith effort to gain the governmental agency's approval. Nor was the buyer required to choose alternate locations for his establishment in order to obtain approval of the liquor license transfer. Dechert v. Allsup's Convenience Stores, Inc., 104 N.M. 748, 726 P.2d 1378 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Inability of seller of commodity manufactured or produced by third person to obtain it from the third person as a defense to action by buyer for breach of contract, 80 A.L.R. 1177.
Nature, construction and effect of "lay away" or "will call" plan or system, 10 A.L.R.3d 456.
Impracticability of performance of sales contract as defense under U.C.C. § 2-615, 93 A.L.R.3d 584.
77 C.J.S. Sales §§ 207, 209.

§ 55-2-616. Procedure on notice claiming excuse.

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section [55-2-615 NMSA 1978], he may by written notification to the seller as to any delivery concerned, and where the prospective

deficiency substantially impairs the value of the whole contract under the provisions of this article relating to breach of installment contracts (Section 2-612 [55-2-612 NMSA 1978]), then also as to the whole:

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller, the buyer fails so to modify the contract within a reasonable time not exceeding thirty days, the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except insofar as the seller has assumed a greater obligation under the preceding section [55-2-615 NMSA 1978].

History: 1953 Comp., § 50A-2-616, enacted by Laws 1961, ch. 96, § 2-616.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section seeks to establish simple and workable machinery for providing certainty as to when a supervening and excusing contingency "excuses" the delay, "discharges" the contract, or may result in a waiver of the delay by the buyer. When the seller notifies, in accordance with the preceding section, claiming excuse, the buyer may acquiesce, in which case the contract is so modified. No consideration is necessary in a case of this kind to support such a modification. If the buyer does not elect so to modify the contract, he may terminate it and under Subsection (2) his silence after receiving the seller's claim of excuse operates as such a termination. Subsection (3) denies effect to any contract clause made in advance of trouble which would require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances.

Cross references.Point 1: Sections 2-209 and 2-615.

Definitional cross references."Buyer". Section 2-103.

"Contract". Section 1-201.

"Installment contract". Section 2-612.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

"Termination". Section 2-106.

"Written". Section 1-201.

ANNOTATION

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Section 2-609: Right to Adequate Assurance of Performance," see 7 Nat. Resources J. 397 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 77 C.J.S. Sales §§ 83, 98, 100; 78 C.J.S. Sales §§ 565, 566.

Part 7

REMEDIES

§ 55-2-701. Remedies for breach of collateral contracts not impaired.

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this article.

History: 1953 Comp., § 50A-2-701, enacted by Laws 1961, ch. 96, § 2-701.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.Whether a claim for breach of an obligation collateral to the contract for sale requires separate trial to avoid confusion of issues is beyond the scope of this article; but contractual arrangements which as a business matter enter vitally into the contract should be considered a part thereof insofar as cross-claims or defenses are concerned.

Definitional cross references."Contract for sale". Section 2-106.

"Remedy". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67A Am. Jur. 2d Sales §§ 853 et seq., 986 et seq.
77 C.J.S. Sales §§ 349 to 351, 354, 355; 78 C.J.S. Sales §§ 387, 389, 462, 486, 520.

§ 55-2-702. Seller's remedies on discovery of buyer's insolvency.

(1) Where the seller discovers the buyer to be insolvent, he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this article (Section 2-705 [55-2-705 NMSA 1978]).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent, he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten-day limitation does not apply. Except as provided in this subsection, the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under Subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article (Section 2-403 [55-2-403 NMSA 1978]). Successful reclamation of goods excludes all other remedies with respect to them.

History: 1953 Comp., § 50A-2-702, enacted by Laws 1961, ch. 96, § 2-702.

OFFICIAL COMMENT

Prior uniform statutory provision. Subsection (1) - Sections 53(1) (b), 54(1) (c) and 57, Uniform Sales Act; Subsection (2) - none; Subsection (3) - Section 76(3), Uniform Sales Act.

Changes. Rewritten, the protection given to a seller who has sold on credit and has delivered goods to the buyer immediately preceding his insolvency being extended.

Purposes of changes and new matter. To make it clear that:

1. The seller's right to withhold the goods or to stop delivery except for cash when he discovers the buyer's insolvency is made explicit in Subsection (1) regardless of the passage of title, and the concept of stoppage has been extended to include goods in the possession of any bailee who has not yet attorned to the buyer.

2. Subsection (2) takes as its base line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller. This article makes discovery of the buyer's insolvency and demand within a ten day period a condition of the right to reclaim goods on this ground. The ten day limitation period operates from the time of receipt of the goods.

An exception to this time limitation is made when a written misrepresentation of solvency has been made to the particular seller within three months prior to the delivery.

To fall within the exception the statement of solvency must be in writing, addressed to the particular seller and dated within three months of the delivery.

3. Because the right of the seller to reclaim goods under this section constitutes preferential treatment as against the buyer's other creditors, Subsection (3) provides that such reclamation bars all his other remedies as to the goods involved. As amended 1966.

Cross references.Point 1: Sections 2-401 and 2-705.

Compare Section 2-502.

Definitional cross references."Buyer". Section 2-103.

"Buyer in ordinary course of business". Section 1-201.

"Contract". Section 1-201.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Receipt" of goods. Section 2-103.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Writing". Section 1-201.

ANNOTATION

Tender of insufficient funds checks constitutes written misrepresentation of solvency for the purposes of this section. Amoco Pipeline Co. v. Admiral Crude Oil Corp. 490 F.2d 114 (10th Cir. 1974).

And sellers' right to stop delivery. - Upon the notice given by the oil producing sellers to other seller, prior to February 10, 1972 to stop delivery of the crude oil to bankrupt

based upon the previous dishonoring by the drawee bank of bankrupt's "insufficient funds" checks to the sellers, the sellers thereby timely exercised their rights of stoppage in transitu under this section. Amoco Pipeline Co. v. Admiral Crude Oil Corp. 490 F.2d 114 (10th Cir. 1974).

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraud and Deceit § 9; 68 Am. Jur. 2d Secured Transactions §§ 8, 106.
Effect on remedies of seller of contract requiring seller to look to property alone for payment, 17 A.L.R. 714.
Seller's rights in respect of the property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 31 A.L.R. 578; 54 A.L.R. 526.
Buyer's insolvency, 58 A.L.R. 1301; 117 A.L.R. 1105.
Right to enforce vendor's lien against property purchased by municipality, 76 A.L.R. 695.
Revival of seller's lien on return of chattel to seller after delivery to buyer, and effect of such return on conditions of enforcement of lien, 118 A.L.R. 564.
78 C.J.S. Sales §§ 404, 412.

§ 55-2-703. Seller's remedies in general.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612 [55-2-612 NMSA 1978]), then also with respect to the whole undelivered balance, the aggrieved seller may:

(a) withhold delivery of such goods;

(b) stop delivery by any bailee as hereafter provided (Section 2-705 [55-2-705 NMSA 1978]);

(c) proceed under the next section [55-2-704 NMSA 1978] respecting goods still unidentified to the contract;

(d) resell and recover damages as hereafter provided (Section 2-706 [55-2-706 NMSA 1978]);

(e) recover damages for nonacceptance (Section 2-708 [55-2-708 NMSA 1978]) or in a proper case the price (Section 2-709 [55-2-709 NMSA 1978]);

(f) cancel.

History: 1953 Comp., § 50A-2-703, enacted by Laws 1961, ch. 96, § 2-703.

OFFICIAL COMMENT

Prior uniform statutory provision. No comparable index section. See Section 53, Uniform Sales Act.

Purposes.1. This section is an index section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer. This article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.

2. The buyer's breach which occasions the use of the remedies under this section may involve only one lot or delivery of goods, or may involve all of the goods which are the subject matter of the particular contract. The right of the seller to pursue a remedy as to all the goods when the breach is as to only one or more lots is covered by the section on breach in installment contracts. The present section deals only with the remedies available after the goods involved in the breach have been determined by that section.

3. In addition to the typical case of refusal to pay or default in payment, the language in the preamble, "fails to make a payment due," is intended to cover the dishonor of a check on due presentment, or the non-acceptance of a draft, and the failure to furnish an agreed letter of credit.

4. It should also be noted that this act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1-106).

Cross references.Point 2: Section 2-612.

Point 3: Section 2-325.

Point 4: Section 1-106.

Definitional cross references."Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of seller to rescind or refuse further deliveries on buyer's failure to pay for installments, 14 A.L.R. 1209; 75 A.L.R. 609.
Seller's rights in respect of property or its proceeds upon dishonor of draft or check for purchase price on a cash sale, 31 A.L.R. 578; 54 A.L.R. 526.
Right of seller as condition of delivery to insist on payment or resort to means not provided by contract to assure payment, 44 A.L.R. 443.
Factor's failure to account for proceeds of sale as affecting rights of seller and purchaser inter se, 50 A.L.R. 1301.
Pecuniary damage as essential to rescission of contract for purchase of real or personal property, 106 A.L.R. 125.
Repossession of chattels by seller upon their return or abandonment by buyer as effecting a mutual rescission or as evidence thereof, 106 A.L.R. 703.
Insolvency of buyer as justifying seller on credit in refusing to deliver except for cash, 117 A.L.R. 1105.
Seller's knowledge of purchaser's intention to put property to illegal use as defense to action for purchase price, 166 A.L.R. 1353.
Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 A.L.R.2d 701.
Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for property, 68 A.L.R.2d 1221.
78 C.J.S. Sales §§ 387 to 390, 403, 405, 412, 426, 427, 440, 462.

§ 55-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

(1) An aggrieved seller under the preceding section [55-2-703 NMSA 1978] may:

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished, an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

History: 1953 Comp., § 50A-2-704, enacted by Laws 1961, ch. 96, § 2-704.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 63(3) and 64(4), Uniform Sales Act.

Changes. Rewritten, the seller's rights being broadened.

Purposes of changes.1. This section gives an aggrieved seller the right at the time of breach to identify to the contract any conforming finished goods, regardless of their resalability, and to use reasonable judgment as to completing unfinished goods. It thus makes the goods available for resale under the resale section, the seller's primary remedy, and in the special case in which resale is not practicable, allows the action for the price which would then be necessary to give the seller the value of his contract.

2. Under this article the seller is given express power to complete manufacture or procurement of goods for the contract unless the exercise of reasonable commercial judgment as to the facts as they appear at the time he learns of the breach makes it clear that such action will result in a material increase in damages. The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture.

Cross references.Sections 2-703 and 2-706.

Definitional cross references."Aggrieved party". Section 1-201.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Fraud of buyer in ordering more than his business requires as entitling one contracting to sell to extent of buyer's requirements to maintain action for damages, 7 A.L.R. 505; 26 A.L.R.2d 1099.
Shipping goods after notice of repudiation by buyer, 27 A.L.R. 1230.
Anticipatory repudiation of contract for sale of goods by buyer as affecting time as of

which damages are to be computed, 34 A.L.R. 114.
Measure of damages, buyer's repudiation of or failure to accept goods under executory contract, 44 A.L.R. 215; 108 A.L.R. 1482.
Measure of damages, buyer's repudiation of or failure to purchase shares of stock, 44 A.L.R. 358.
Duty to minimize damages by accepting offer modified by party who has breached contract of sale, 46 A.L.R. 1192.
78 C.J.S. Sales §§ 387, 426.

§ 55-2-705. Seller's stoppage of delivery in transit or otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702 [55-2-702 NMSA 1978]) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until:

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods, the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) 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.

History: 1953 Comp., § 50A-2-705, enacted by Laws 1961, ch. 96, § 2-705.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 57-59, Uniform Sales Act; see also Sections 12, 14 and 42, Uniform Bills of Lading Act and Sections 9, 11 and 49, Uniform Warehouse Receipts Act.

Changes. This section continues and develops the above sections of the Uniform Sales Act in the light of the other uniform statutory provisions noted.

Purposes. To make it clear that:

1. Subsection (1) applies the stoppage principle to other bailees as well as carriers.

It also expands the remedy to cover the situations, in addition to buyer's insolvency, specified in the subsection. But since stoppage is a burden in any case to carriers, and might be a very heavy burden to them if it covered all small shipments in all these situations, the right to stop for reasons other than insolvency is limited to carload, truckload, planeload or larger shipments. The seller shipping to a buyer of doubtful credit can protect himself by shipping C.O.D.

Where stoppage occurs for insecurity it is merely a suspension of performance, and if assurances are duly forthcoming from the buyer the seller is not entitled to resell or divert.

Improper stoppage is a breach by the seller if it effectively interferes with the buyer's right to due tender under the section on manner of tender of delivery. However, if the bailee obeys an unjustified order to stop he may also be liable to the buyer. The measure of his obligation is dependent on the provisions of the documents of this article (Section 7-303). Subsection 3(b) therefore gives him a right of indemnity as against the seller in such a case.

2. "Receipt by the buyer" includes receipt by the buyer's designated representative, the sub-purchaser, when shipment is made direct to him and the buyer himself never receives the goods. It is entirely proper under this article that the seller, by making such direct shipment to the sub-purchaser, be regarded as acquiescing in the latter's purchase and as thus barred from stoppage of the goods as against him.

As between the buyer and the seller, the latter's right to stop the goods at any time until they reach the place of final delivery is recognized by this section.

Under Subsection (3)(c) and (d), the carrier is under no duty to recognize the stop order of a person who is a stranger to the carrier's contract. But the seller's right as against the buyer to stop delivery remains, whether or not the carrier is obligated to recognize the stop order. If the carrier does obey it, the buyer cannot complain merely because of that circumstance; and the seller becomes obligated under Subsection (3) (b) to pay the carrier any ensuing damages or charges.

3. A diversion of a shipment is not a "reshipment" under Subsection (2) (c) when it is

merely an incident to the original contract of transportation. Nor is the procurement of "exchange bills" of lading which change only the name of the consignee to that of the buyer's local agent but do not alter the destination of a reshipment.

Acknowledgment by the carrier as a "warehouseman" within the meaning of this article requires a contract of a truly different character from the original shipment, a contract not in extension of transit but as a warehouseman.

4. Subsection (3) (c) makes the bailee's obedience of a notification to stop conditional upon the surrender of any outstanding negotiable document.

5. Any charges or losses incurred by the carrier in following the seller's orders, whether or not he was obligated to do so, fall to the seller's charge.

6. After an effective stoppage under this section the seller's rights in the goods are the same as if he had never made a delivery.

Cross references.Sections 2-702 and 2-703.

Point 1: Sections 2-503 and 2-609, and Article 7.

Point 2: Section 2-103 and Article 7.

Definitional cross references."Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Notification". Section 1-201.

"Receipt" of goods. Section 2-103.

"Rights". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Acknowledgment to buyer that bailee holds goods for buyer. - Cattle seller failed to exercise his rights under this section in a timely fashion, where he failed to show that he

attempted to stop delivery before the buyer was notified by a feedlot that the cattle were being held for him. O'Brien v. Chandler, N.M. , 765 P.2d 1165 (1988).

Tender of insufficient funds checks constitutes written misrepresentation of solvency for the purposes of this section. Amoco Pipeline Co. v. Admiral Crude Oil Corp. 490 F.2d 114 (10th Cir. 1974).

And sellers' right to stop delivery. - Upon the notice given by the oil producing sellers to other seller, prior to February 10, 1972 to stop delivery of the crude oil to bankrupt based upon the previous dishonoring by the drawee bank of bankrupt's "insufficient funds" checks to the sellers, the sellers thereby timely exercised their rights of stoppage in transitu under this section. Amoco Pipeline Co. v. Admiral Crude Oil Corp. 490 F.2d 114 (10th Cir. 1974).

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 439; 78 Am. Jur. 2d Warehouses § 203.
When right of stoppage in transitu terminates, 7 A.L.R. 1374.
Right of seller to rescind or refuse further deliveries upon the buyer's failure to pay for installments, 14 A.L.R. 1209; 75 A.L.R. 609.
78 C.J.S. Sales § 403.

§ 55-2-706. Seller's resale including contract for resale.

(1) Under the conditions stated in Section 2-703 [55-2-703 NMSA 1978] on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this article (Section 2-710 [55-2-710 NMSA 1978]), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in Subsection (3) or unless otherwise agreed, resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale, the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale:

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale, the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707 [55-2-707 NMSA 1978]) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (Subsection (3) of Section 2-711 [55-2-711 NMSA 1978]).

History: 1953 Comp., § 50A-2-706, enacted by Laws 1961, ch. 96, § 2-706.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 60, Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To simplify the prior statutory provision and to make it clear that:

1. The only condition precedent to the seller's right of resale under Subsection (1) is a breach by the buyer within the section on the seller's remedies in general or insolvency. Other meticulous conditions and restrictions of the prior uniform statutory provision are disapproved by this article and are replaced by standards of commercial reasonableness. Under this section the seller may resell the goods after any breach by the buyer. Thus, an anticipatory repudiation by the buyer gives rise to any of the seller's remedies for breach, and to the right of resale. This principle is supplemented by Subsection (2) which authorizes a resale of goods which are not in existence or were not identified to the contract before the breach.

2. In order to recover the damages prescribed in Subsection (1) the seller must act "in good faith and in a commercially reasonable manner" in making the resale. This standard is intended to be more comprehensive than that of "reasonable care and judgment" established by the prior uniform statutory provision. Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708.

Under this article the seller resells by authority of law, in his own behalf, for his own benefit and for the purpose of fixing his damages. The theory of a seller's agency is thus rejected.

3. If the seller complies with the prescribed standard of duty in making the resale, he may recover from the buyer the damages provided for in Subsection (1). Evidence of market or current prices at any particular time or place is relevant only on the question of whether the seller acted in a commercially reasonable manner in making the resale.

The distinction drawn by some courts between cases where the title had not passed to the buyer and the seller has resold as owner, and cases where the title had passed and the seller had resold by virtue of his lien on the goods, is rejected.

4. Subsection (2) frees the remedy of resale from legalistic restrictions and enables the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances. By "public" sale is meant a sale by auction. A "private" sale may be effected by solicitation and negotiation conducted either directly or through a broker. In choosing between a public and private sale the character of the goods must be considered and relevant trade practices and usages must be observed.

5. Subsection (2) merely clarifies the common law rule that the time for resale is a reasonable time after the buyer's breach, by using the language "commercially reasonable." What is such a reasonable time depends upon the nature of the goods, the condition of the market and the other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees. Where a seller contemplating resale receives a demand from the buyer for inspection under the section of preserving evidence of goods in dispute, the time for resale may be appropriately lengthened.

On the question of the place for resale, Subsection (2) goes to the ultimate test, the commercial reasonableness of the seller's choice as to the place for an advantageous resale. This article rejects the theory that the seller is required to resell at the agreed place for delivery and that a resale elsewhere can be permitted only in exceptional cases.

6. The purpose of Subsection (2) being to enable the seller to dispose of the goods to the best advantage, he is permitted in making the resale to depart from the terms and conditions of the original contract for sale to any extent "commercially reasonable" in the

circumstances.

7. The provision of Subsection (2) that the goods need not be in existence to be resold applies when the buyer is guilty of anticipatory repudiation of a contract for future goods, before the goods or some of them have come into existence. In such a case the seller may exercise the right of resale and fix his damages by "one or more contracts to sell" the quantity of conforming future goods affected by the repudiation. The companion provision of Subsection (2) that resale may be made although the goods were not identified to the contract prior to the buyer's breach, likewise contemplates an anticipatory repudiation by the buyer but occurring after the goods are in existence. If the goods so identified conform to the contract, their resale will fix the seller's damages quite as satisfactorily as if they had been identified before the breach.

8. Where the resale is to be by private sale, Subsection (3) requires that reasonable notification of the seller's intention to resell must be given to the buyer. The length of notification of a private sale depends upon the urgency of the matter. Notification of the time and place of this type of sale is not required.

Subsection (4) (b) requires that the seller give the buyer reasonable notice of the time and place of a public resale so that he may have an opportunity to bid or to secure the attendance of other bidders. An exception is made in the case of goods "which are perishable or threaten to decline speedily in value."

9. Since there would be no reasonable prospect of competitive bidding elsewhere, Subsection (4) requires that a public resale "must be made at a usual place or market for public sale if one is reasonably available;" i. e., a place or market which prospective bidders may reasonably be expected to attend. Such a market may still be "reasonably available" under this subsection, though at a considerable distance from the place where the goods are located. In such a case the expense of transporting the goods for resale is recoverable from the buyer as part of the seller's incidental damages under Subsection (1). However, the question of availability is one of commercial reasonableness in the circumstances and if such "usual" place or market is not reasonably available, a duly advertised public resale may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for goods of the kind.

Paragraph (a) of Subsection (4) qualifies the last sentence of Subsection (2) with respect to resales of unidentified and future goods at public sale. If conforming goods are in existence the seller may identify them to the contract after the buyer's breach and then resell them at public sale. If the goods have not been identified, however, he may resell them at public sale only as "future" goods and only where there is a recognized market for public sale of futures in goods of the kind.

The provisions of Paragraph (c) of Subsection (4) are intended to permit intelligent bidding.

The provision of Paragraph (d) of Subsection (4) permitting the seller to bid and, of course, to become the purchaser, benefits the original buyer by tending to increase the resale price and thus decreasing the damages he will have to pay.

10. This article departs in Subsection (5) from the prior uniform statutory provision in permitting a good faith purchaser at resale to take a good title as against the buyer even though the seller fails to comply with the requirements of this section.

11. Under Subsection (6), the seller retains profit, if any, without distinction based on whether or not he had a lien since this article divorces the question of passage of title to the buyer from the seller's right of resale or the consequences of its exercise. On the other hand, where "a person in the position of a seller" or a buyer acting under the section on buyer's remedies, exercises his right of resale under the present section he does so only for the limited purpose of obtaining cash for his "security interest" in the goods. Once that purpose has been accomplished any excess in the resale price belongs to the seller to whom an accounting must be made as provided in the last sentence of Subsection (6).

Cross references.Point 1: Sections 2-610, 2-702 and 2-703.

Point 2: Section 1-201.

Point 3: Sections 2-708 and 2-710.

Point 4: Section 2-328.

Point 8: Section 2-104.

Point 9: Section 2-710.

Point 11: Sections 2-401, 2-707 and 2-711(3).

Definitional cross references."Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notification". Section 1-201.

"Person in position of seller". Section 2-707.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Notice necessary for resale. - As to the sale of goods, where no notice of resale is given, the remedy provided by this section may not be utilized. Foster v. Colorado Radio Corp. 381 F.2d 222 (10th Cir. 1967).

And notice generally. - This section permits a seller of goods to utilize the contract price less resale price remedy, but requires reasonable notice to the buyer where the intended resale is to be private, even though most of the subject matter of the contract is not goods. Foster v. Colorado Radio Corp. 381 F.2d 222 (10th Cir. 1967).

Excessive delay in a resale is enough to make the sale commercially unreasonable. Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982).

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," 8 Nat. Resources J. 176 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages §§ 509, 510.
Seller's right to recover for expenses of caring for personal property prior to its resale, 29 A.L.R. 61.
Loss of anticipated profits as damages, 32 A.L.R. 120.
Right to sell property in enforcement of lien of seller after having sued for purchase price, 38 A.L.R. 1432.
Resale of property as affecting measure of seller's damages, 44 A.L.R. 296; 119 A.L.R. 1141.
78 C.J.S. Sales §§ 387, 426.

§ 55-2-707. "Person in the position of a seller."

(1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this article withhold or stop delivery (Section 2-705 [55-2-705 NMSA 1978]) and resell (Section 2-706 [55-2-706 NMSA 1978]) and recover incidental damages (Section 2-710 [55-2-710 NMSA 1978]).

History: 1953 Comp., § 50A-2-707, enacted by Laws 1961, ch. 96, § 2-707.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 52(2), Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To make it clear that:

In addition to following in general the prior uniform statutory provision, the case of a financing agency which has acquired documents by honoring a letter of credit for the buyer or by discounting a draft for the seller has been included in the term "a person in the position of a seller."

Cross reference.Article 5, Section 2-506.

Definitional cross references."Consignee". Section 7-102.

"Consignor". Section 7-102.

"Goods". Section 2-105.

"Security interest". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 37; 68 Am. Jur. 2d Secured Transactions § 8.
Factor's liability based on delay in marketing and selling principal's goods, 3 A.L.R.3d 815.
78 C.J.S. Sales § 406.

§ 55-2-708. Seller's damages for nonacceptance or repudiation.

(1) Subject to Subsection (2) and to the provisions of this article with respect to proof of market price (Section 2-723 [55-2-723 NMSA 1978]), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at

the time and place for tender and the unpaid contract price together with any incidental damages provided in this article (Section 2-710 [55-2-710 NMSA 1978]) but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in Subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this article (Section 2-710 [55-2-710 NMSA 1978]), less due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

History: 1953 Comp., § 50A-2-708, enacted by Laws 1961, ch. 96, § 2-708; 1967, ch. 186, § 5.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 64, Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To make it clear that:

1. The prior uniform statutory provision is followed generally in setting the current market price at the time and place for tender as the standard by which damages for non-acceptance are to be determined. The time and place of tender is determined by reference to the section on manner of tender of delivery, and to the sections on the effect of such terms as FOB, FAS, CIF, C & F, Ex Ship and No Arrival, No Sale.

In the event that there is no evidence available of the current market price at the time and place of tender, proof of a substitute market may be made under the section on determination and proof of market price. Furthermore, the section on the admissibility of market quotations is intended to ease materially the problem of providing competent evidence.

2. The provision of this section permitting recovery of expected profit including reasonable overhead where the standard measure of damages is inadequate, together with the new requirement that price actions may be sustained only where resale is impractical, are designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods. The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer. It is not necessary to a recovery of "profit" to show a history of earnings, especially if a new venture is involved.

3. In all cases the seller may recover incidental damages.

Cross references.Point 1: Sections 2-319 through 2-324, 2-503, 2-723 and 2-724.

Point 2: Section 2-709.

Point 3: Section 2-710.

Definitional cross references."Buyer". Section 2-103.

"Contract". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Compiler's notes. - Laws 1967, ch. 186, § 6, is compiled as 55-3-105 NMSA 1978.

Utilization of section in jury instructions. - Where damages are not sufficiently before the jury, an instruction incorporating the mandates of this section is not improper, and a court of appeals will not condemn a trial court's utilization of a local statute in instructing on damages without substantial authority to the contrary. Jaeco Pump Co. v. Inject-O-Meter Mfg. Co. 467 F.2d 317 (10th Cir. 1972).

Court can make findings on damages caused by buyer's repudiation of the contract when there is sufficient evidence. Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Fraud of buyer in ordering more than his business requires as entitling one selling to extent of buyer's requirements to maintain action for damages, 7 A.L.R. 498; 26 A.L.R.2d 1099.
Shipping goods after notice of repudiation by buyer, 27 A.L.R. 1230.
Damages as affected by anticipatory breach of contract by buyer, 34 A.L.R. 114.
Measure of damages, buyer's repudiation of or failure to accept goods under executory contract, 44 A.L.R. 215; 108 A.L.R. 1482.
Resale of property as affecting measure of seller's damages under executory contract, 44 A.L.R. 296; 119 A.L.R. 1141.
Measure of damages, buyer's repudiation of or failure to purchase shares of stock, 44 A.L.R. 358.
Duty to minimize damages by accepting offer modified by party who has breached contract of sale, 46 A.L.R. 1192.
Stipulation as to damages in case of breach of contract for purchase of goods to be manufactured by other party, as penalty or liquidated damages, 79 A.L.R. 188.
Measure of damages for buyer's repudiation of or failure to accept goods under executory contract, 108 A.L.R. 1482.
Presumption and burden of proof as to market price or value of goods in action by seller against buyer who refuses to accept goods, 130 A.L.R. 1336.
Interest as element of damages recoverable in action for breach of contract for the sale

of a commodity, 4 A.L.R.2d 1388.
Unjustified refusal of buyer to accept goods as affecting recovery of down payment, 11 A.L.R.2d 701.
Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent, 24 A.L.R.2d 1008.
Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for property, 68 A.L.R.2d 1229.
78 C.J.S. Sales § 477.

§ 55-2-709. Action for the price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section [55-2-710 NMSA 1978], the price:

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price, he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610 [55-2-610 NMSA 1978]), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under the preceding section [55-2-708 NMSA 1978].

History: 1953 Comp., § 50A-2-709, enacted by Laws 1961, ch. 96, § 2-709.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 63, Uniform Sales Act.

Changes. Rewritten, important commercially needed changes being incorporated.

Purposes of changes. To make it clear that:

1. Neither the passing of title to the goods nor the appointment of a day certain for

payment is now material to a price action.

2. The action for the price is now generally limited to those cases where resale of the goods is impracticable except where the buyer has accepted the goods or where they have been destroyed after risk of loss has passed to the buyer.

3. This section substitutes an objective test by action for the former "not readily resalable" standard. An action for the price under Subsection (1) (b) can be sustained only after a "reasonable effort to resell" the goods "at reasonable price" has actually been made or where the circumstances "reasonably indicate" that such an effort will be unavailing.

4. If a buyer is in default not with respect to the price, but on an obligation to make an advance, the seller should recover not under this section for the price as such, but for the default in the collateral (though coincident) obligation to finance the seller. If the agreement between the parties contemplates that the buyer will acquire, on making the advance, a security interest in the goods, the buyer on making the advance has such an interest as soon as the seller has rights in the agreed collateral. See Section 9-204.

5. "Goods accepted" by the buyer under Subsection (1) (a) include only goods as to which there has been no justified revocation of acceptance, for such a revocation means that there has been a default by the seller which bars his rights under this section. "Goods lost or damaged" are covered by the section on risk of loss. "Goods identified to the contract" under Subsection (1) (b) are covered by the section on identification and the section on identification notwithstanding breach.

6. This section is intended to be exhaustive in its enumeration of cases where an action for the price lies.

7. If the action for the price fails, the seller may nonetheless have proved a case entitling him to damages for non-acceptance. In such a situation, Subsection (3) permits recovery of those damages in the same action.

Cross references.Point 4: Section 1-106.

Point 5: Sections 2-501, 2-509, 2-510 and 2-704.

Point 7: Section 2-708.

Definitional cross references."Action". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of action to recover purchase price under sale of corporate stock where title has not passed as affected by provisions of sales act, 9 A.L.R. 275.
Contract requiring seller to look to property loan for payment as affecting action for purchase price, 17 A.L.R. 714.
Repudiation of contract by buyer as affecting seller's right to ship goods and bring action to recover purchase price, 27 A.L.R. 1231.
Dishonor of draft or check for purchase price on cash sale as affecting seller's rights in respect to property or its proceeds, 31 A.L.R. 578; 54 A.L.R. 526.
Right to recover installments not due upon buyer's default in payment of installment due, in absence of acceleration clause, 57 A.L.R. 825.
Right of seller to rescind or refuse further deliveries on buyer's failure to pay for installments, where contract expressly provides remedy, 75 A.L.R. 619.
Effect of sales act on right of action to recover purchase price of corporate stock where title has not passed, 99 A.L.R. 275.
Rights of buyer in action by seller for purchase price as affected by invalidity of, or subsequent changes or developments with respect to taxes included in purchase price, 115 A.L.R. 667; 132 A.L.R. 706.
Presumptions and burden of proof as to market price or value of goods in action by seller against buyer who refuses to accept goods, 130 A.L.R. 1336.
Seller's knowledge of purchaser's intention to put property to an illegal use as defense to action for purchase price, 166 A.L.R. 1353.
Right of purchaser in making tender to deduct from agreed purchase price amount of obligations which it is the vendor's duty to satisfy, 173 A.L.R. 1309.
Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent, 24 A.L.R.2d 1008.
Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for property, 68 A.L.R.2d 1221.
Liability for purchases on credit or courtesy card, or on credit coin or plate, 15 A.L.R.3d 1086.
78 C.J.S. Sales §§ 387 to 389, 440.

§ 55-2-710. Seller's incidental damages.

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

History: 1953 Comp., § 50A-2-710, enacted by Laws 1961, ch. 96, § 2-710.

OFFICIAL COMMENT

Prior uniform statutory provision. See Sections 64 and 70, Uniform Sales Act.

Purposes. To authorize reimbursement of the seller for expenses reasonably incurred by him as a result of the buyer's breach. The section sets forth the principal normal and necessary additional elements of damage flowing from the breach but intends to allow all commercially reasonable expenditures made by the seller.

Definitional cross references."Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 37.
Right of seller upon failure of sales contract to recover from purchaser expenses of caring for personal property prior to its resale, 29 A.L.R. 61.
78 C.J.S. Sales § 477.

§ 55-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, then with respect to any goods involved and with respect to the whole if the breach goes to the whole contract (Section 2-612 [55-2-612 NMSA 1978]), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:

(a) "cover" and have damages under the next section [55-2-712 NMSA 1978] as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for nondelivery as provided in this article (Section 2-713 [55-2-713 NMSA 1978]).

(2) Where the seller fails to deliver or repudiates, the buyer may also:

(a) if the goods have been identified recover them as provided in this article (Section 2-502 [55-2-502 NMSA 1978]); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this article (Section 2-716 [55-2-716 NMSA 1978]).

(3) On rightful rejection or justifiable revocation of acceptance, a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706 [55-2-706 NMSA 1978]).

History: 1953 Comp., § 50A-2-711, enacted by Laws 1961, ch. 96, § 2-711.

OFFICIAL COMMENT

Prior uniform statutory provision. No comparable index section; Subsection (3) - Section 69(5), Uniform Sales Act.

Changes. The prior uniform statutory provision is generally continued and expanded in Subsection (3).

Purposes of changes and new matter.1. To index in this section the buyer's remedies, Subsection (1) covering those remedies permitting the recovery of money damages, and Subsection (2) covering those which permit reaching the goods themselves. The remedies listed here are those available to a buyer who has not accepted the goods or who has justifiably revoked his acceptance. The remedies available to a buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods. The buyer's right to proceed as to all goods when the breach is as to only some of the goods is determined by the section on breach in installment contracts and by the section on partial acceptance.

Despite the seller's breach, proper retender of delivery under the section on cure of improper tender or replacement can effectively preclude the buyer's remedies under this section, except for any delay involved.

2. To make it clear in Subsection (3) that the buyer may hold and resell rejected goods if he has paid a part of the price or incurred expenses of the type specified. "Paid" as used here includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note. His freedom of resale is coextensive with that of a seller under this article except that the buyer may not keep any profit resulting from the resale

and is limited to retaining only the amount of the price paid and the costs involved in the inspection and handling of the goods. The buyer's security interest in the goods is intended to be limited to the items listed in Subsection (3), and the buyer is not permitted to retain such funds as he might believe adequate for his damages. The buyer's right to cover, or to have damages for non-delivery, is not impaired by his exercise of his right of resale.

3. It should also be noted that this act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1-106).

Cross references.Point 1: Sections 2-508, 2-601(c), 2-608, 2-612 and 2-714.

Point 2: Section 2-706.

Point 3: Section 1-106.

Definitional cross references."Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Cover". Section 2-712.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Receipt" of goods. Section 2-103.

"Remedy". Section 1-201.

"Security interest". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Buyer may recover purchase price and incidental damages. - A buyer, who rightfully rejects or justifiably revokes acceptance of goods, has the right not only to rescind and recover back the purchase price paid, but, in addition, the right to recover incidental damages resulting from the seller's breach, including expenses reasonably incurred in

the care and custody of such goods. Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965).

And punitive damages for fraudulent acts. - This section permits recovery of damages in an action for rescission, and punitive damages may likewise be recovered in such action where the breach is accompanied by fraudulent acts which are wanton, malicious and intentional. Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965).

Plus damages for nondelivery when proper. - Where plaintiff purchased used automobile but then revoked acceptance of the vehicle when defendant vendor failed to deliver clear title as warranted, damages were properly measured under this section to include the purchase price of the automobile, plus damages for nondelivery, which, as set forth in 55-2-713 NMSA 1978, would be the difference between the purchase price and the market value of the vehicle with clear title. Since 55-2-608(3) NMSA 1978 states that a buyer who revokes has same rights with regard to goods involved as if he had rejected them, physical delivery of the vehicle to the plaintiff did not eliminate the recovery of nondelivery damages. Gawlick v. American Bldrs. Supply, Inc., 86 N.M. 77, 519 P.2d 313 (Ct. App. 1974).

Acceptance of partial shipment. - Notice is not a condition precedent to the remedy of "cover" for failure to make a complete delivery. Not until the buyer accepts a complete tender must he, within a reasonable time after he discovers or should have discovered any breach, notify the seller of a breach or be barred from any remedy. A buyer's mere acceptance of partial goods does not waive or otherwise affect his right to damages for the seller's failure to deliver the remainder under the contract of sale. State ex rel. Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc., 106 N.M. 539, 746 P.2d 645 (1987).

Lost profits need not be proved with mathematical certainty, but where the only basis for awarding lost profits is the difference between the suggested retail price and the cost to the distributor, the business is entirely new and the distributor produces neither proof of potential buyers nor evidence of its cost of doing business, an award of lost profits is too speculative to be upheld. Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982).

Resale under Subsection (3) security interest not wrongful exercise of ownership. - Where the buyer rightfully rejects goods in his possession, it necessarily follows that he has a security interest in the goods pursuant to Subsection (3) of this section, in the entire amount spent for the goods, and he should not be required to return them for an amount less than the entire amount. Because the security interest entitles the buyer to hold the goods and resell them, such action cannot constitute a violation of 55-2-602(2)(a) NMSA 1978, which makes any exercise of ownership by the buyer after rejection wrongful. Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982).

Excessive delay in a resale is enough to make the sale commercially unreasonable. Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982).

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67A Am. Jur. 2d Sales §§ 853 et seq., 1164 et seq.
Resale by buyer where seller has refused to receive property rejected for breach of warranty, 24 A.L.R. 1445.
Effect of action as an election of remedy or choice of substantive rights in case of fraud in sale of property, 35 A.L.R. 1153; 123 A.L.R. 378.
Assignability of right to rescind or of right to return of money or other property as incident of rescission, 110 A.L.R. 849; 162 A.L.R. 743.
Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods, 24 A.L.R.2d 717.
Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 35 A.L.R.2d 1273.
Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty, 41 A.L.R.2d 812.
Use of article by buyer as waiver of right to rescind for fraud, breach of warranty or failure of goods to comply with contract, 41 A.L.R.2d 1173.
Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for the property, 68 A.L.R.2d 1229.
77 C.J.S. Sales §§ 94, 102, 349 to 351, 354, 355; 78 C.J.S. Sales §§ 486, 487, 502, 514, 520, 566.

§ 55-2-712. "Cover"; buyer's procurement of substitute goods.

(1) After a breach within the preceding section [55-2-711 NMSA 1978] the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715 [55-2-715 NMSA 1978]), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

History: 1953 Comp., § 50A-2-712, enacted by Laws 1961, ch. 96, § 2-712.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section provides the buyer with a remedy aimed at enabling him to obtain the goods he needs thus meeting his essential need. This remedy is the buyer's equivalent of the seller's right to resell.

2. The definition of "cover" under Subsection (1) envisages a series of contracts or sales, as well as a single contract or sale; goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case and contracts on credit or delivery terms differing from the contract in breach, but again reasonable under the circumstances. The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

The requirement that the buyer must cover "without unreasonable delay" is not intended to limit the time necessary for him to look around and decide as to how he may best effect cover. The test here is similar to that generally used in this article as to reasonable time and seasonable action.

3. Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for non-delivery under the next section.

However, this subsection must be read in conjunction with the section which limits the recovery of consequential damages to such as could not have been obviated by cover. Moreover, the operation of the section on specific performance of contracts for "unique" goods must be considered in this connection for availability of the goods to the particular buyer for his particular needs is the test for that remedy and inability to cover is made an express condition to the right of the buyer to replevy the goods.

4. This section does not limit cover to merchants, in the first instance. It is the vital and important remedy for the consumer buyer as well. Both are free to use cover: the domestic or non-merchant consumer is required only to act in normal good faith while the merchant buyer must also observe all reasonable commercial standards of fair dealing in the trade, since this falls within the definition of good faith on his part.

Cross references.Point 1: Section 2-706.

Point 2: Section 1-204.

Point 3: Sections 2-713, 2-715 and 2-716.

Point 4: Section 1-203.

Definitional cross references."Buyer". Section 2-103.

"Contract". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Purchase". Section 1-201.

"Remedy". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Plaintiff's subsequent purchase of the smaller backhoe from seller was not a "cover" transaction under this section. Watson v. Tom Growney Equip., Inc., 104 N.M. 371, 721 P.2d 1302 (1986).

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages §§ 509, 510. 78 C.J.S. Sales §§ 548, 549.

§ 55-2-713. Buyer's damages for nondelivery or repudiation.

(1) Subject to the provisions of this article with respect to proof of market price (Section 2-723 [55-2-723 NMSA 1978]), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (Section 2-715 [55-2-715 NMSA 1978]), but less expenses saved in consequence of the seller's breach.

(2) Market price 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.

History: 1953 Comp., § 50A-2-713, enacted by Laws 1961, ch. 96, § 2-713.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 67(3d), Uniform Sales Act.

Changes. Rewritten.

Purposes of changes. To clarify the former rule so that:

1. The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief. So the place for measuring damages is the place of tender (or the place of arrival if the goods are rejected or their acceptance is revoked after reaching their destination) and the crucial time is the time at which the buyer learns of the breach.

2. The market or current price to be used in comparison with the contract price under this section is the price for goods of the same kind and in the same branch of trade.

3. When the current market price under this section is difficult to prove the section on determination and proof of market price is available to permit a showing of a comparable market price or, where no market price is available, evidence of spot sale prices is proper. Where the unavailability of a market price is caused by a scarcity of goods of the type involved, a good case is normally made for specific performance under this article. Such scarcity conditions, moreover, indicate that the price has risen and under the section providing for liberal administration of remedies, opinion evidence as to the value of the goods would be admissible in the absence of a market price and a liberal construction of allowable consequential damages should also result.

4. This section carries forward the standard rule that the buyer must deduct from his damages any expenses saved as a result of the breach.

5. The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered.

Cross references.Point 3: Sections 1-106, 2-716 and 2-723.

Point 5: Section 2-712.

Definitional cross references."Buyer". Section 2-103.

"Contract". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Buyer may recover purchase price and incidental damages. - A buyer, who rightfully rejects or justifiably revokes acceptance of goods, has the right not only to rescind and recover back the purchase price paid, but, in addition, the right to recover incidental damages resulting from the seller's breach, including expenses reasonably incurred in the care and custody of such goods. Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965).

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages §§ 509, 510.
Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 A.L.R. 120.
Measure of recovery by buyer where seller breaches agreement to repurchase at selling price, 50 A.L.R. 325.
Loss of, or damage to, crops as element of damages for breach of contract of sale of agricultural machinery or fertilizer, 69 A.L.R. 748.
Inability of a seller of a commodity manufactured or produced by a third person to obtain the same from the latter as a defense to an action by the buyer for breach of contract, 80 A.L.R. 1177.
Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 A.L.R. 595.
Interest as element of damages recoverable in action for breach of contract for the sale of a commodity, 4 A.L.R.2d 1388.
Recovery for expenses caused by delay in delivery where article was for special use, 17 A.L.R.2d 111.
Preparatory expenses for installation as recoverable by buyer, 17 A.L.R.2d 1342.
Necessity that buyer, relying on market price as measure of damages for seller's breach of sales contract, show that goods in question were available for market at the price shown, 20 A.L.R.2d 819.
Mental anguish as element of damages in action for breach of contract to furnish goods, 88 A.L.R.2d 1367.
Allegation of buyer's ability and willingness to perform, in action for damages for failure to deliver goods purchased, 94 A.L.R.2d 1215.
78 C.J.S. Sales § 540.

§ 55-2-714. Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (Subsection (3) of Section 2-607 [55-2-607 NMSA 1978]), he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the

seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section [55-2-715 NMSA 1978] may also be recovered.

History: 1953 Comp., § 50A-2-714, enacted by Laws 1961, ch. 96, § 2-714.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 69(6) and (7), Uniform Sales Act.

Changes. Rewritten.

Purposes of changes.1. This section deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by. In general this section adopts the rule of the prior uniform statutory provision for measuring damages where there has been a breach of warranty as to goods accepted, but goes further to lay down an explicit provision as to the time and place for determining the loss.

The section on deduction of damages from price provides an additional remedy for a buyer who still owes part of the purchase price, and frequently the two remedies will be available concurrently. The buyer's failure to notify of his claim under the section on effects of acceptance, however, operates to bar his remedies under either that section or the present section.

2. The "non-conformity" referred to in Subsection (1) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non-conformity, the buyer is permitted to recover for his loss "in any manner which is reasonable."

3. Subsection (2) describes the usual, standard and reasonable method of ascertaining damages in the case of breach of warranty but it is not intended as an exclusive measure. It departs from the measure of damages for non-delivery in utilizing the place of acceptance rather than the place of tender. In some cases the two may coincide, as where the buyer signifies his acceptance upon the tender. If, however, the non-conformity is such as would justify revocation of acceptance, the time and place of acceptance under this section is determined as of the buyer's decision not to revoke.

4. The incidental and consequential damages referred to in Subsection (3), which will

usually accompany an action brought under this section, are discussed in detail in the comment on the next section.

Cross references.Point 1: Compare Section 2-711; Sections 2-607 and 2-717.

Point 2: Section 2-106.

Point 3: Sections 2-608 and 2-713.

Point 4: Section 2-715.

Definitional cross references."Buyer". Section 2-103.

"Conform". Section 2-106.

"Goods". Section 1-201.

"Notification". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Not applicable when acceptance revoked. - Subsection (2) of this section sets forth a measure of damages for breach of warranty based on an acceptance, and does not apply where the unchallenged finding is that plaintiff's acceptance of used automobile has been revoked. The applicable provision in such situation is 55-2-711 NMSA 1978. Gawlick v. American Bldrs. Supply, Inc., 86 N.M. 77, 519 P.2d 313 (Ct. App. 1974).

In order to recover for breach of warranty, a buyer must prove four essential elements: (1) the existence of a defect; (2) that the defect was caused by the seller; (3) that the buyer notified the seller and sought repairs; and (4) that the seller failed or refused to repair or replace defective parts. Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982).

Costs of reprocessing accepted materials. - Contractor, supplied with materials which did not meet project specifications, was entitled to damages for costs incurred in reprocessing these materials. State ex rel. Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc., 106 N.M. 539, 746 P.2d 645 (1987).

Law reviews. - For annual survey of New Mexico law relating to commercial law, see 13 N.M.L. Rev. 293 (1983).

For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63 Am. Jur. 2d Products Liability § 451; 63A Am. Jur. 2d Products Liability § 967 et seq.
Judgment against seller of chattels for breach of warranty as conclusive upon prior warrantor, 8 A.L.R. 667.
Liability of seller of article not inherently dangerous for personal injuries to the buyer due to the defective or dangerous condition of the article, 13 A.L.R. 1176; 74 A.L.R. 343; 168 A.L.R. 1054.
Right of dealer against his vendor in case of breach of warranty as to article purchased for resale and resold, 22 A.L.R. 133; 64 A.L.R. 883.
Resale by buyer where seller has refused to receive property rejected for breach of warranty, 24 A.L.R. 1445.
Right of seller to ship goods after notice of repudiation by buyer, 27 A.L.R. 1230.
Applicability of provision in contract of sale for return of article, where article delivered does not answer to description, 30 A.L.R. 321.
Automobile or truck, right of action for breach of warranty, 34 A.L.R. 549; 43 A.L.R. 648.
Effect of action as an election of remedy or choice of substantive rights in case of fraud in sale of property, 35 A.L.R. 1153; 123 A.L.R. 378.
Liability of seller of serum or vaccine matter for use on livestock for defects in quality thereof, 39 A.L.R. 399.
Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty, 41 A.L.R. 812.
Use of article by buyer as waiver of right to rescind for fraud, breach of warranty or failure of goods to comply with contract, 77 A.L.R. 1165; 41 A.L.R.2d 1173.
Waiver of warranty on aeroplane, 83 A.L.R. 406; 99 A.L.R. 173.
Effect of express provision of contract limiting obligation in case of breach of warranty to replacement of defective article or part under Uniform Sales Act, 106 A.L.R. 1466.
Breach of warranty as to title, as within statutory provision requiring notice of breach of warranty on sale of goods, 114 A.L.R. 707.
Damages for breach of warranty, 130 A.L.R. 753.
Buyer's return of subject of sale and acceptance of return of or credit for the purchase price as affecting right to recover special damages for breach of warranty, 157 A.L.R. 1077.
Barred claim of breach of warranty as subject of setoff, counterclaim or cross action, 1 A.L.R.2d 671.
Measure of damages in action for breach of warranty of title to personal property as the value of the property or the price plus interest, 13 A.L.R.2d 1372.
Necessity that buyer, relying on market price, as measure of damages for seller's breach of sale contract, show that goods in question were available for market at price shown, 20 A.L.R.2d 819.
Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 33 A.L.R.2d 511.
Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 A.L.R.2d 1273.
Construction, application and effect of statutory provisions requiring notice of breach of warranty on sale of goods, 41 A.L.R.2d 812; 53 A.L.R.2d 270.
Use of article by buyer as waiver of right to rescind for fraud, breach of warranty or

failure of goods to comply with contract, 41 A.L.R.2d 1173.
Who may enforce guarantee, 41 A.L.R.2d 1213.
Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 A.L.R.2d 270.
Extent of liability of seller of livestock infested with communicable disease, 87 A.L.R.2d 1317.
Prospective buyer's release of prospective seller from liability for injuries resulting from trial use or inspection of product for sale, 93 A.L.R.3d 1296.
Measures of damages in action for breach of warranty of title to personal property under U.C.C. § 2-714, 94 A.L.R.3d 583.
78 C.J.S. Sales § 540.

§ 55-2-715. Buyer's incidental and consequential damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include:

(a) any loss resulting from general or particular requirements and needs of which the seller 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.

History: 1953 Comp., § 50A-2-715, enacted by Laws 1961, ch. 96, § 2-715.

OFFICIAL COMMENT

Prior uniform statutory provisions. Subsection (2) (b) - Sections 69(7) and 70, Uniform Sales Act.

Changes. Rewritten.

Purposes of changes and new matter.1. Subsection (1) is intended to provide reimbursement for the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked, or in connection with effecting cover where the breach of the contract lies in non-conformity or non-delivery of the goods. The incidental damages listed are not intended to be exhaustive but are merely illustrative of the typical kinds of incidental damage.

2. Subsection (2) operates to allow the buyer, in an appropriate case, any consequential damages which are the result of the seller's breach. The "tacit agreement" test for the recovery of consequential damages is rejected. Although the older rule at common law which made the seller liable for all consequential damages of which he had "reason to know" in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise. Subparagraph (2) carries forward the provisions of the prior uniform statutory provision as to consequential damages resulting from breach of warranty, but modifies the rule by requiring first that the buyer attempt to minimize his damages in good faith, either by cover or otherwise.

3. In the absence of excuse under the section on merchant's excuse by failure of presupposed conditions, the seller is liable for consequential damages in all cases where he had reason to know of the buyer's general or particular requirements at the time of contracting. It is not necessary that there be a conscious acceptance of an insurer's liability on the seller's part, nor is his obligation for consequential damages limited to cases in which he fails to use due effort in good faith.

Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge.

Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy.

4. The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.

5. Subsection (2) (b) states the usual rule as to breach of warranty, allowing recovery for injuries "proximately" resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.

6. In the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know within the meaning of Subsection (2) (a).

Cross references.Point 1: Section 2-608.

Point 3: Sections 1-203, 2-615 and 2-719.

Point 4: Section 1-106.

Definitional cross references."Cover". Section 2-712.

"Goods". Section 1-201.

"Person". Section 1-201.

"Receipt" of goods. Section 2-103.

"Seller". Section 2-103.

ANNOTATION

Buyer may recover purchase price and incidental damages. - A buyer, who rightfully rejects or justifiably revokes acceptance of goods, has the right not only to rescind and recover back the purchase price paid, but, in addition, the right to recover incidental damages resulting from the seller's breach, including expenses reasonably incurred in the care and custody of such goods. Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965).

Failure to timely furnish materials. - The highway department assessed a contractor $21,000 in liquidated damages for its delay in completing a project. The liquidated damage provision had been incorporated in a purchase order agreement between the contractor and a supplier, and the damages had resulted from the supplier's failure to timely furnish materials. This was a proper case, in a later suit against the supplier, for an award of consequential damages. State ex rel. Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc., 106 N.M. 539, 746 P.2d 645 (1987).

Law reviews. - For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22 Am. Jur. 2d Damages §§ 456 to 459; 63A Am. Jur. 2d Products Liability § 967 et seq.
Right of dealer against his vendor in case of breach of warranty as to article, 22 A.L.R. 133; 64 A.L.R. 883.
Loss of profits as element of damages for fraud of seller as to quality of goods purchased for resale, 28 A.L.R. 354.
Loss of anticipated profits as damages, 32 A.L.R. 120.
Loss of or damage to crop as element of damages for breach of contract of sale or warranty of agricultural machinery or fertilizer, 69 A.L.R. 748.
Use of article by buyer as waiver of right to rescind for fraud, breach of warranty or failure of goods to comply with contract, 77 A.L.R. 1165; 41 A.L.R.2d 1173.
Liability of seller for special damages based on resale by buyer, as affected by his knowledge or ignorance of the resale, 88 A.L.R. 1439.
Damages for breach of warranty, 130 A.L.R. 753.
Buyer's return of subject of sale and acceptance of return of or credit for the purchase price as affecting right to recover special damages for breach of warranty, 157 A.L.R.

1077.
Barred claim of breach of warranty as subject of setoff, counterclaim or cross action, 1 A.L.R.2d 671.
Interest as element of damages recoverable in action for breach of contract for the sale of a commodity, 4 A.L.R.2d 1388.
Damages for breach of warranty of title as value, or price plus interest, 13 A.L.R.2d 1372.
Preparatory expenses as recoverable in action for defects in seed, 17 A.L.R.2d 1344.
Recovery for loss of good will occasioned by use of unfit materials, 28 A.L.R.2d 591.
Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury, 75 A.L.R.2d 39.
Extent of liability of seller of livestock infested with communicable disease, 87 A.L.R.2d 1317.
Prospective buyer's release of prospective seller from liability for injuries resulting from trial use or inspection of product for sale, 93 A.L.R.3d 1296.
Buyer's incidental and consequential damages from seller's breach under UCC § 2-715, 96 A.L.R.3d 299.
Bystander recovery for emotional distress at witnessing another's injury under strict products liability or breach of warranty, 31 A.L.R.4th 162.
Damages for breach of contract as affected by income tax considerations, 50 A.L.R.4th 452.
78 C.J.S. Sales § 540.

§ 55-2-716. Buyer's right to specific performance or replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

History: 1953 Comp., § 50A-2-716, enacted by Laws 1961, ch. 96, § 2-716.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 68, Uniform Sales Act.

Changes. Rephrased.

Purposes of changes. To make it clear that:

1. The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.

2. In view of this article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances".

3. The legal remedy of replevin is given the buyer in cases in which cover is reasonably unavailable and goods have been identified to the contract. This is in addition to the buyer's right to recover identified goods on the seller's insolvency (Section 2-502).

4. This section is intended to give the buyer rights to the goods comparable to the seller's rights to the price.

5. If a negotiable document of title is outstanding, the buyer's right of replevin relates of course to the document not directly to the goods. See Article 7, especially Section 7-602.

Cross references.Point 3: Section 2-502.

Point 4: Section 2-709.

Point 5: Article 7.

Definitional cross references."Buyer". Section 2-103.

"Goods". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Specific performance proper even though goods not unique. - Where the evidence shows that no seller was willing to make a long-term contract with the buyer on any basis other than the market price at the time of delivery and there was no way to predict the price the buyer might have to pay, specific performance is a proper remedy, even though the goods involved are not "unique" in the traditional sense of that term. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions § 36; 71 Am. Jur. 2d Specific Performance § 153.
Specific performance, or injunction against breach, of contract for sale of tangible personal property, 152 A.L.R. 4.
Specific performance of contract which expressly leaves open for future agreement or negotiation the terms of payment for property, 68 A.L.R.2d 1221.
Specific performance of sale of goods under UCC § 2-716, 26 A.L.R.4th 294.
77 C.J.S. Replevin §§ 47 to 52; 78 C.J.S. Sales §§ 486, 514; 81 C.J.S. Specific Performance § 65.

§ 55-2-717. Deduction of damages from the price.

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

History: 1953 Comp., § 50A-2-717, enacted by Laws 1961, ch. 96, § 2-717.

OFFICIAL COMMENT

Prior uniform statutory provision. See Section 69(1) (a), Uniform Sales Act.

Purposes.1. This section permits the buyer to deduct from the price damages resulting from any breach by the seller and does not limit the relief to cases of breach of warranty as did the prior uniform statutory provision. To bring this provision into application the breach involved must be of the same contract under which the price in question is claimed to have been earned.

2. The buyer, however, must give notice of his intention to withhold all or part of the price if he wishes to avoid a default within the meaning of the section on insecurity and right to assurances. In conformity with the general policies of this article, no formality of

notice is required and any language which reasonably indicates the buyer's reason for holding up his payment is sufficient.

Cross reference.Point 2: Section 2-609.

Definitional cross references."Buyer". Section 2-103.

"Notifies". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of purchaser in making tender to deduct from purchase price amount of obligations which it is the vendor's duty to satisfy, 173 A.L.R. 1309.
77 C.J.S. Sales § 240.

§ 55-2-718. Liquidation or limitation of damages; deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds:

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with Subsection (1); or

(b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under Subsection (2) is subject to offset to the extent that the seller establishes:

(a) a right to recover damages under the provisions of this article other than Subsection (1); and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods, their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of Subsection

(2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this article on resale by an aggrieved seller (Section 2-706 [55-2-706 NMSA 1978]).

History: 1953 Comp., § 50A-2-718, enacted by Laws 1961, ch. 96, § 2-718.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Under Subsection (1) liquidated damage clauses are allowed where the amount involved is reasonable in the light of the circumstances of the case. The subsection sets forth explicitly the elements to be considered in determining the reasonableness of a liquidated damage clause. A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

2. Subsection (2) refuses to recognize a forfeiture unless the amount of the payment so forfeited represents a reasonable liquidation of damages as determined under Subsection (1). A special exception is made in the case of small amounts (20% of the price or $500, whichever is smaller) deposited as security. No distinction is made between cases in which the payment is to be applied on the price and those in which it is intended as security for performance. Subsection (2) is applicable to any deposit or down or part payment. In the case of a deposit or turn in of goods resold before the breach, the amount actually received on the resale is to be viewed as the deposit rather than the amount allowed the buyer for the trade in. However, if the seller knows of the breach prior to the resale of the goods turned in, he must make reasonable efforts to realize their true value, and this is assured by requiring him to comply with the conditions laid down in the section on resale by an aggrieved seller.

Cross references.Point 1: Section 2-302.

Point 2: Section 2-706.

Definitional cross references."Aggrieved party". Section 1-201.

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Notice". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63 Am. Jur. 2d Products Liability § 450 et seq.
Return of deposit or advance payment if the order is not accepted, 1 A.L.R. 1513.
Money in possession of seller before contract was made as part payment, 131 A.L.R. 1252; 170 A.L.R. 245.
Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 A.L.R.2d 701.
Contractual liquidated damages provisions under UCC Article 2, 98 A.L.R.3d 586.
25 C.J.S. Damages § 113.

§ 55-2-719. Contractual modification or limitation of remedy.

(1) Subject to the provisions of Subsections (2) and (3) of this section and of the preceding section [55-2-718 NMSA 1978] on liquidation and limitation of damages:

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act [this chapter].

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

History: 1953 Comp., § 50A-2-719, enacted by Laws 1961, ch. 96, § 2-719.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this article in an unconscionable manner is subject to deletion and in that event the remedies made available by this article are applicable as if the stricken clause had never existed. Similarly, under Subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this article.

2. Subsection (1) (b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

3. Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.

Cross references.Point 1: Section 2-302.

Point 3: Section 2-316.

Definitional cross references."Agreement". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

ANNOTATION

Law reviews. - For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63 Am. Jur. 2d Products Liability §§ 301, 450 et seq.; 63A Am. Jur. 2d Products Liability § 976; 68 Am. Jur. 2d Secured Transactions § 111.
Validity, construction and application under Uniform Sales Act of express provision of contract limiting obligation in case of breach of warranty to replacing defective article or part, 106 A.L.R. 1466.
Prospective buyer's release of prospective seller from liability for injuries resulting from trial use or inspection of product for sale, 93 A.L.R.3d 1296.
Construction and effect of new motor vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts, 2 A.L.R.4th 576.
Unconscionability, under UCC § 2-302 or § 2-719(3), of disclaimer of warranties or limitation or exclusion of damages in contract subject to UCC Article 2 (Sales), 38 A.L.R.4th 25.
77 C.J.S. Sales §§ 57, 59, 62, 335, 337, 338.

§ 55-2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach.

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

History: 1953 Comp., § 50A-2-720, enacted by Laws 1961, ch. 96, § 2-720.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purpose.This section is designed to safeguard a person holding a right of action from any unintentional loss of rights by the ill-advised use of such terms as "cancellation", "rescission", or the like. Once a party's rights have accrued they are not to be lightly impaired by concessions made in business decency and without intention to forego them. Therefore, unless the cancellation of a contract expressly declares that it is "without reservation of rights", or the like, it cannot be considered to be a renunciation under this section.

Cross reference.Section 1-107.

Definitional cross references."Cancellation". Section 2-106.

"Contract". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 A.L.R.2d 1273.
77 C.J.S. Sales §§ 88, 115 to 117; 78 C.J.S. Sales § 566.

§ 55-2-721. Remedies for fraud.

Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

History: 1953 Comp., § 50A-2-721, enacted by Laws 1961, ch. 96, § 2-721.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To correct the situation by which remedies for fraud have been more circumscribed than the more modern and mercantile remedies for breach of warranty. Thus the remedies for fraud are extended by this section to coincide in scope with those for non-fraudulent breach. This section thus makes it clear that neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible.

Definitional cross references."Contract for sale". Section 2-106.

"Goods". Section 1-201.

"Remedy". Section 1-201.

ANNOTATION

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraud and Deceit § 9.
Use of article by buyer as waiver of right to rescind for fraud, breach of warranty or failure of goods to comply with contract, 77 A.L.R. 1165; 41 A.L.R.2d 1173.
Finance company's liability in connection with consumer fraud practices of party selling goods or services, 18 A.L.R.4th 824.
Computer sales and leases: breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief, 37 A.L.R.4th 110.
77 C.J.S. Sales § 37.

§ 55-2-722. Who can sue third parties for injury to goods.

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract:

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted, a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

(c) either party may with the consent of the other sue for the benefit of whom it may concern.

History: 1953 Comp., § 50A-2-722, enacted by Laws 1961, ch. 96, § 2-722.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To adopt and extend somewhat the principle of the statutes which provide for suit by the real party in interest. The provisions of this section apply only after identification of the goods. Prior to that time only the seller has a right of action. During the period between identification and final acceptance (except in the case of revocation of acceptance) it is possible for both parties to have the right of action. Even after final acceptance both parties may have the right of action if the seller retains possession or otherwise retains an interest.

Definitional cross references."Action". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

ANNOTATION

Law reviews. - For article, "Special Property Under the Uniform Commercial Code: A New Concept in Sales," see 4 Nat. Resources J. 98 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 69 Am. Jur. 2d Secured Transactions §§ 264, 265, 267.
Recovery of value of use of property wrongfully attached, 45 A.L.R.2d 1221.
77 C.J.S. Sales § 285.

§ 55-2-723. Proof of market price; time and place.

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 [55-2-708 NMSA 1978] or Section 2-713 [55-2-713 NMSA 1978]) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this article is not readily available, the price prevailing within any reasonable time before or after the time described or at any other place 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 cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

History: 1953 Comp., § 50A-2-723, enacted by Laws 1961, ch. 96, § 2-723.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To eliminate the most obvious difficulties arising in connection with the determination of market price, when that is stipulated as a measure of damages by some provision of this article. Where the appropriate market price is not readily available the court is here granted reasonable leeway in receiving evidence of prices current in other comparable markets or at other times comparable to the one in question. In accordance with the general principle of this article against surprise, however, a party intending to offer evidence of such a substitute price must give suitable notice to the other party.

This section is not intended to exclude the use of any other reasonable method of

determining market price or of measuring damages if the circumstances of the case make this necessary.

Definitional cross references."Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Usage of trade". Section 1-205.

ANNOTATION

To resolve conflicts over missing or unclear terms, the U.C.C. allows substitution of a price or financing term by "using commercial judgment or usage of trade." The only term that cannot be supplied by the court is the quantity term. Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Presumption and burden of proof as to market price or value of goods in action by seller against buyer who refuses to accept goods, 130 A.L.R. 1336.
Necessity that buyer, relying on market price as measure of damages for seller's breach of contract of sale, show that goods in question were available for market at price shown, 20 A.L.R.2d 819.
78 C.J.S. Sales § 478.

§ 55-2-724. Admissibility of market quotations.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

History: 1953 Comp., § 50A-2-724, enacted by Laws 1961, ch. 96, § 2-724.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To make market quotations admissible in evidence while providing for a challenge of the material by showing the circumstances of its preparation.

No explicit provision as to the weight to be given to market quotations is contained in this section, but such quotations, in the absence of compelling challenge, offer an adequate basis for a verdict.

Market quotations are made admissible when the price or value of goods traded "in any established market" is in issue. The reason of the section does not require that the market be closely organized in the manner of a produce exchange. It is sufficient if transactions in the commodity are frequent and open enough to make a market established by usage in which one price can be expected to affect another and in which an informed report of the range and trend of prices can be assumed to be reasonably accurate.

This section does not in any way intend to limit or negate the application of similar rules of admissibility to other material, whether by action of the courts or by statute. The purpose of the present section is to assure a minimum of mercantile administration in this important situation and not to limit any liberalizing trend in modern law.

Definitional cross reference."Goods". Section 2-105.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 32 C.J.S. Evidence § 717; 78 C.J.S. Sales § 471.

§ 55-2-725. Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.

(3) Where 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 breach, such 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 which have accrued before this act [this chapter] becomes effective.

History: 1953 Comp., § 50A-2-725, enacted by Laws 1961, ch. 96, § 2-725.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.

Subsection (1) permits the parties to reduce the period of limitation. The minimum period is set at one year. The parties may not, however, extend the statutory period.

Subsection (2), providing that the cause of action accrues when the breach occurs, states an exception where the warranty extends to future performance.

Subsection (3) states the saving provision included in many state statutes and permits an additional short period for bringing new actions, where suits begun within the four year period have been terminated so as to leave a remedy still available for the same breach.

Subsection (4) makes it clear that this article does not purport to alter or modify in any respect the law on tolling of the statute of limitations as it now prevails in the various jurisdictions.

Definitional cross references."Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Agreement". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Term". Section 1-201.

"Termination". Section 2-106.

ANNOTATION

Effective dates. - Laws 1961, ch. 96, § 10-101, makes the act effective on January 1, 1962.

The United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights. United States v. Bunker Livestock Comm'n, Inc. 437 F. Supp. 1079 (D.N.M. 1977).

Law reviews. - For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," see 8 Nat. Resources J. 176 (1968).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Products Liability § 909 et seq.; 69 Am. Jur. 2d Secured Transactions §§ 248, 546.
What constitutes warranty explicitly extending to "future performance" for purposes of U.C.C. § 2-725(2), 93 A.L.R.3d 690.
What statute of limitations governs action arising out of transaction consummated by use of credit card, 2 A.L.R.4th 677.
Application, to security aspects of sales contract, of UCC § 2-725 limiting time for bringing actions for breach of sales contract, 16 A.L.R.4th 1335.
What statute of limitations applies to actions for personal injuries based on breach of implied warranty under UCC provisions governing sales (UCC § 2-725(1)), 20 A.L.R.4th 915.
54 C.J.S. Limitation of Actions § 61; 78 C.J.S. Sales §§ 448, 524.

Article 3

Commercial Paper

Part 1

Short Title, Form And Interpretation

Sec.

Part 2

Transfer And Negotiation

Part 3

Rights Of A Holder

Part 4

Liability Of Parties

Part 5

Presentment, Notice Of Dishonor And Protest

Part 6

Discharge

Part 7

Advice Of International Sight Draft

Part 8

Miscellaneous

Part 1

SHORT TITLE, FORM AND INTERPRETATION

§ 55-3-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code - Commercial Paper.

History: 1953 Comp., § 50A-3-101, enacted by Laws 1961, ch. 96, § 3-101.

OFFICIAL COMMENT

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 42.

§ 55-3-102. Definitions and index of definitions.

(1) In this article, unless the context otherwise requires:

(a) "issue" means the first delivery of an instrument to a holder or a remitter;

(b) an "order" is a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession;

(c) a "promise" is an undertaking to pay and must be more than an acknowledgment of an obligation;

(d) "secondary party" means a drawer or endorser;

(e) "instrument" means a negotiable instrument; and

(f) "day" as shown on the face of a documentary draft means banking day unless otherwise specified.

(2) Other definitions applying to this article and the sections in which they appear are:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

"Acceptance".
.....Section 55-3-410 NMSA 1978;
"Accommodation party".
.....Section 55-3-415 NMSA 1978;
"Alteration".
.....Section 55-3-407 NMSA 1978;
"Certificate of deposit".
.....Section 55-3-104 NMSA 1978;
"Certification".
.....Section 55-3-411 NMSA 1978;
"Check".
.....Section 55-3-104 NMSA 1978;
"Definite time".
.....Section 55-3-109 NMSA 1978;
"Dishonor".
.....Section 55-3-507 NMSA 1978;
"Draft".
.....Section 55-3-104 NMSA 1978;

"Holder in due course".
.....Section 55-3-302 NMSA 1978;
"Negotiation".
.....Section 55-3-202 NMSA 1978;
"Note".
.....Section 55-3-104 NMSA 1978;
"Notice of dishonor".
.....Section 55-3-508 NMSA 1978;
"On demand".
.....Section 55-3-108 NMSA 1978;
"Presentment".
.....Section 55-3-504 NMSA 1978;
"Protest".
.....Section 55-3-509 NMSA 1978;
"Restrictive indorsement".
.....Section 55-3-205 NMSA 1978; and
"Signature".
.....Section 55-3-401 NMSA 1978;
(3) The following definitions in other articles apply to this article:
"Account".
.....Section 55-4-104 NMSA 1978;
"Banking day".
.....Section 55-4-104 NMSA 1978;
"Clearing house".
.....Section 55-4-104 NMSA 1978;
"Collecting bank".
.....Section 55-4-105 NMSA 1978;
"Customer".
.....Section 55-4-105 [55-4-104] NMSA 1978;
"Depositary bank".
.....Section 55-4-105 NMSA 1978;
"Documentary draft".
.....Section 55-4-104 NMSA 1978;
"Intermediary bank".
.....Section 55-4-105 NMSA 1978;
"Item".
.....Section 55-4-104 NMSA 1978;
"Midnight deadline".
.....Section 55-4-104 NMSA 1978; and
"Payor bank".
.....Section 55-4-105 NMSA 1978.
(4) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

History: 1953 Comp., § 50A-3-102, enacted by Laws 1961, ch. 96, § 3-102; 1987, ch. 102, § 1.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 1(5), 128 and 191, Uniform Negotiable Instruments Law.

Changes. See below.

Purposes of changes.1. The definition of "issue" in Section 191 of the original act has been clarified in two respects. The Section 191 definition required that the instrument delivered be "complete in form" inconsistently with the provisions of Sections 14 and 15 (relating to incomplete instruments) of the original act. The "complete in form" language has therefore been deleted. Furthermore the Section 191 definition required that the delivery be "to a person who takes as a holder," thus raising difficulties in the case of the remitter (see Comment 3 to Sec. 3-302) who may not be a party to the instrument and thus not a holder. The definition in Subsection (1) (a) of this section thus provides that the delivery may be to a holder or to a remitter.

2. The definitions of "order" [Subsection (b)] and "promise" [Subsection (c)] are new, but state principles clearly recognized by the courts. In the case of orders the dividing line between "a direction to pay" and "an authorization or request" may not be self-evident in the occasional unusual, and therefore non-commercial, case. The prefixing of words of courtesy to the direction - as "please pay" or "kindly pay" - should not lead to a holding that the direction has degenerated into a mere request. On the other hand informal language - such as "I wish you would pay" - would not qualify as an order and such an instrument would be non-negotiable. The definition of "promise" is intended to make it clear that a mere I.O.U. is not a negotiable instrument, and to change the result in occasional cases which have held that "Due Currier & Barker seventeen dollars and fourteen cents, value received." and "I borrowed from P. Shemonia the sum of five hundred dollars with four per cent interest; the borrowed money ought to be paid within four months from the above date" were promises sufficient to make the instruments into notes.

3. The last sentence of Subsection (1) (b) ("order") permits the order to be addressed to one or more persons (as drawees) in the alternative, recognizing the practice of corporations issuing dividend checks and of other drawers who for commercial convenience name a number of drawees, usually in different parts of the country. The section on presentment provides that presentment may be made to any one of such drawees. Drawees in succession are not permitted because the holder should not be required to make more than one presentment, and upon the first dishonor should have his recourse against the drawer and indorsers.

4. Comments on the definitions indexed follow the sections in which the definitions are contained.

Cross reference.Point 3: Section 3-504(3) (a).

Definitional cross references."Bank". Section 1-201.

"Delivery". Section 1-201.

"Holder". Section 1-201.

"Money". Section 1-201.

"Person". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, in Subsection (1) added Paragraph (f) and, in Subsections (2) and (3), substituted the appropriate NMSA 1978 section references for the UCC references.

Law reviews. - For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision'," see 4 Nat. Resources J. 398 (1964).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

For comment, "Negotiable Instruments - A Cause of Action on a Cashier's Check Accrues from the Date of Issuance," see 4 N.M. L. Rev. 253 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 48, 114, 139, 140, 269, 525, 589, 609.
Construction and effect of U.C.C. Article 3, dealing with commercial paper, 23 A.L.R.3d 932.
10 C.J.S. Bills and Notes § 9; 82 C.J.S. Statutes § 315.

§ 55-3-103. Limitations on scope of article.

(1) This article does not apply to money, documents of title or investment securities.

(2) The provisions of this article are subject to the provisions of the article on bank deposits and collections (Article 4) and secured transactions (Article 9).

History: 1953 Comp., § 50A-3-103, enacted by Laws 1961, ch. 96, § 3-103.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This article is restricted to commercial paper - that is to say, to drafts, checks, certificates of deposit and notes as defined in Section 3-104(2). Subsection (1) expressly excludes any money, as defined in this act (Section 1-201), even though the money may be in the form of a bank note which meets all the requirements of Section 3-104(1). Money is of course negotiable at common law or under separate statutes, but no provision of this article is applicable to it. Subsection (1) also expressly excludes documents of title and investment securities which fall within Articles 7 and 8, respectively. To this extent the section follows decisions which held that interim certificates calling for the delivery of securities were not negotiable instruments under the original statute. Such paper is now covered under Article 8, but is not within any section of this article. Likewise, bills of lading, warehouse receipts and other documents of title which fall within Article 7 may be negotiable under the provision of that article, but are not covered by any section of this article.

2. Instruments which fall within the scope of this article may also be subject to other articles of the code. Many items in course of bank collection will of course be negotiable instruments, and the same may be true of collateral pledged as security for a debt. In such cases this article, which is general, is, in case of conflicting provisions, subject to the articles which deal specifically with the type of transaction or instrument involved: Article 4 (bank deposits and collections) and Article 9 (secured transactions). In the case of a negotiable instrument which is subject to Article 4 because it is in course of collection or to Article 9 because it is used as collateral, the provisions of this article continue to be applicable except insofar as there may be conflicting provisions in the bank collection or secured transactions article.

An instrument which qualifies as "negotiable" under this article may also qualify as a "security" under Article 8. It will be noted that the formal requisites of negotiability (Section 3-104) go to matters of form exclusively; the definition of "security" on the other hand (Section 8-102) looks principally to the manner in which an instrument is used ("commonly dealt in upon securities exchanges . . . or commonly recognized . . . as a medium for investment"). If an instrument negotiable in form under Section 3-104 is, because of the manner of its use, a "security" under Section 8-102, Article 8 and not this article applies. See Subsection (1) of this section and Section 8-102(1) (b).

Cross references.Point 1: Articles 7 and 8; Sections 1-201, 3-104(1) and (2) and 3-107.

Point 2: Articles 4 and 9; Sections 3-104 and 8-102.

Definitional cross references."Document of title". Section 1-201.

"Money". Section 1-201.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 47. 10 C.J.S. Bills and Notes § 10.

§ 55-3-104. Form of negotiable instruments; "draft"; "check"; "certificate of deposit"; "note".

(1) Any writing to be a negotiable instrument within this article must:

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is:

(a) a "draft" ("bill of exchange") if it is an order;

(b) a "check" if it is a draft drawn on a bank and payable on demand;

(c) a "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;

(d) a "note" if it is a promise other than a certificate of deposit.

(3) As used in other articles of this act [chapter], and as the context may require, the terms "draft," "check," "certificate of deposit" and "note" may refer to instruments which are not negotiable within this article as well as to instruments which are so negotiable.

History: 1953 Comp., § 50A-3-104, enacted by Laws 1961, ch. 96, § 3-104.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 1, 5, 10, 126, 184 and 185, Uniform Negotiable Instruments Law.

Changes. Parts of original sections combined and reworded; new provisions and original Section 10 omitted.

Purposes of changes and new matter. The changes are intended to bring together in one section related provisions and definitions formerly widely separated.

1. Under Subsection (1) (b) any writing, to be a negotiable instrument within this article, must be payable in money. In a few states there are special statutes, enacted at an early date when currency was less sound and barter was prevalent, which make promises to pay in commodities negotiable. Even under these statutes commodity notes are now little used and have no general circulation. This article makes no attempt to provide for such paper, as it is a matter of purely local concern. Even if retention of the old statutes is regarded in any state as important, amendment of this section may not be necessary, since "within this article" in Subsection (1) leaves open the possibility that some writings may be made negotiable by other statutes or by judicial decision. The same is true as to any new type of paper which commercial practice may develop in the future.

2. While a writing cannot be made a negotiable instrument within this article by contract or by conduct, nothing in this section is intended to mean that in a particular case a court may not arrive at a result similar to that of negotiability by finding that the obligor is estopped by his conduct from asserting a defense against a bona fide purchaser. Such an estoppel rests upon ordinary principles of the law of simple contract; it does not depend upon negotiability, and it does not make the writing negotiable for any other purpose. But a contract to build a house or to employ a workman, or equally a security agreement does not become a negotiable instrument by the mere insertion of a clause agreeing that it shall be one.

3. The words "no other promise, order, obligation or power" in Subsection (1) (b) are an expansion of the first sentence of the original Section 5. Section 3-112 permits an instrument to carry certain limited obligations or powers in addition to the simple promise or order to pay money. Subsection (1) of this section is intended to say that it cannot carry others.

4. Any writing which meets the requirements of Subsection (1) and is not excluded under Section 3-103 is a negotiable instrument, and all sections of this article apply to it, even though it may contain additional language beyond that contemplated by this section. Such an instrument is a draft, a check, a certificate of deposit or a note as defined in Subsection (2). Traveler's checks in the usual form, for instance, are negotiable instruments under this article when they have been completed by the identifying signature.

5. This article omits the original Section 10, which provided that the instrument need not follow the language of the act if it "clearly indicates an intention to conform" to it. The provision has served no useful purpose, and it has been an encouragement to bad drafting and to liberality in holding questionable paper to be negotiable. The omission is not intended to mean that the instrument must follow the language of this section, or that one term may not be recognized as clearly the equivalent of another, as in the case of "I undertake" instead of "I promise," or "Pay to holder" instead of "Pay to bearer." It does mean that either the language of the section or a clear equivalent must be found, and that in doubtful cases the decision should be against negotiability.

6. Subsection (3) is intended to make clear the same policy expressed in Section 3-805.

Cross references.Sections 3-105 through 3-112, 3-401, 3-402 and 3-403.

Point 1: Section 3-107.

Point 3: Section 3-112.

Point 4: Sections 3-103 and 3-805.

Point 6: Section 3-805.

Definitional cross references."Bank". Section 1-201.

"Bearer". Section 1-201.

"Definite time". Section 3-109.

"Money". Section 1-201.

"On demand". Section 3-108.

"Order". Section 3-102.

"Promise". Section 3-102.

"Signed". Section 1-201.

"Term". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

I. General Consideration.

No cure available to meet section's requirements. - An instrument which in and of itself did not meet the requirements of this section cannot be made negotiable for Article 3 purposes by reference to another document which purports to cure the defects in the note's negotiability. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

However, defective note negotiable under ordinary contract law. - Even though a note or instrument is not a "negotiable instrument" for Article 3 purposes, it may nevertheless be negotiable between the parties involved under ordinary contract law. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

For comment, "Negotiable Instruments - A Cause of Action on a Cashier's Check Accrues from the Date of Issuance," see 4 N.M. L. Rev. 253 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 457, 538; 11 Am. Jur. 2d Bills and Notes §§ 6, 8, 13, 14, 16, 21, 55, 56, 138, 152, 156, 166, 169, 191, 209.
Place of signature, 20 A.L.R. 394.
Negotiability of instrument payable in "current funds," or "currency," 36 A.L.R. 1358.
Validity and effect of note payable to maker without words of negotiability, 42 A.L.R. 1067; 50 A.L.R. 426.
Negotiability as affected by provisions for extension of time, 77 A.L.R. 1085.
Negotiability as affected by option of maker to pay or of holder to require something in lieu of payment of money, 100 A.L.R. 824.
Negotiability as affected by provisions of instrument in relation to collateral other than mortgage, 102 A.L.R. 1095.
Negotiability as affected by option of maker to pay or of holder to require something in lieu of payment of money, 104 A.L.R. 1378.
What constitutes unconditional promise to pay under Uniform Commercial Code § 3-104(1)(b), 88 A.L.R.3d 1100.
Bank's liability for payment or withdrawal on less than required number of signatures, 7 A.L.R.4th 655.
Provision in draft or note directing payment "on acceptance" as affecting negotiability, 19 A.L.R.4th 1268.
Effect on negotiability of instrument, under terms of UCC § 3-104(1), of statements expressly limiting negotiability or transferability, 58 A.L.R.4th 632.
10 C.J.S. Bills and Notes §§ 5 to 11, 82.

II. Scope of "a Writing.".

Look only at instrument to test negotiability. - To be a negotiable instrument, a writing "must" meet the definition set out in this section. Moreover, it is clear that in order to

determine whether an instrument meets that definition only the instrument itself may be looked to, not other documents, even when other documents are referred to in the instrument. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

Including notations and terms on back of note. - Notations and terms on the back of a note, made contemporaneously with the execution of the note and intended to be part of the note's contract of payment, constitute as much a part of the note as if they were incorporated on its face. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

III. Unconditional Promise or Order to Pay Sum Certain.

Restrictions may cancel negotiability. - The words that a note may not be transferred, pledged or otherwise assigned without the written consent of the drawer, even though they appeared on the back of the note, effectively cancelled any implication of negotiability provided by the words "pay to the order of " on the face of the note. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

IV. Payable on Demand or at Definite Time.

Negotiability unaffected by extension proviso in note. - A provision in a note for extensions at or after maturity can have no effect upon the negotiability of the note, since the note at maturity ceases to be negotiable. First Nat'l Bank v. Stover, 21 N.M. 453, 155 P. 905, 1916D L.R.A. 1280 (1915) (decided under former law).

V. Writings in Compliance with Requirements of Section.

"Bill of Exchange" defined. - An order to a firm to pay to a company a definite sum of money to be charged to the signer, with the notation that it was "Balance on stock purchased from me," and properly signed, was a bill of exchange. Clayton Townsite Co. v. Clayton Drug Co., 20 N.M. 185, 147 P. 460 (1915) (decided under former law).

And cashier's check defined. - A cashier's check is a draft drawn by the bank upon itself which is accepted by the act of issuance. A cashier's check is a primary obligation of the bank, and is an obligation to pay which ordinarily cannot be countermanded. It is issued by an authorized officer of a bank, directed to another person, evidencing the fact that the payee is authorized to demand and receive from the bank, upon presentation, the amount of money represented by the check. Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (Ct. App.), rev'd on other grounds, 85 N.M. 511, 514 P.2d 30 (1973).

§ 55-3-105. When promise or order unconditional.

(1) A promise or order otherwise unconditional is not made conditional by the fact that the instrument:

(a) is subject to implied or constructive conditions; or

(b) states its consideration, whether performed or promised, or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or "as per" such transaction; or

(c) refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to prepayment or acceleration; or

(d) states that it is drawn under a letter of credit; or

(e) states that it is secured, whether by mortgage, reservation of title or otherwise; or

(f) indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or

(g) is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or

(h) is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

(2) A promise or order is not unconditional if the instrument:

(a) states that it is subject to or governed by any other agreement; or

(b) states that it is to be paid only out of a particular fund or source except as provided in this section.

History: 1953 Comp., § 50A-3-105, enacted by Laws 1961, ch. 96, § 3-105; 1967, ch. 186, § 6.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 3, Uniform Negotiable Instruments Law.

Changes. Completely revised.

Purposes of changes. The section is intended to make it clear that, so far as negotiability is affected, the conditional or unconditional character of the promise or order is to be determined by what is expressed in the instrument itself; and to permit certain specific limitations upon the terms of payment.

1. Paragraph (a) of Subsection (1) rejects the theory of decisions which have held that a recital in an instrument that it is given in return for an executory promise gives rise to an implied condition that the instrument is not to be paid if the promise is not performed, and that this condition destroys negotiability. Nothing in the section is intended to imply that language may not be fairly construed to mean what it says, but implications, whether of law or fact, are not to be considered in determining negotiability.

2. Paragraph (b) of Subsection (1) is an amplification of Section 3(2) of the original act. The final clause is intended to resolve a conflict in the decisions over the effect of such language as "This note is given for payment as per contract for the purchase of goods of even date, maturity being in conformity with the terms of such contract." It adopts the general commercial understanding that such language is intended as a mere recital of the origin of the instrument and a reference to the transaction for information, but is not meant to condition payment according to the terms of any other agreement.

3. Paragraph (c) of Subsection (1) likewise is intended to resolve a conflict, and to reject cases in which a reference to a separate agreement was held to mean that payment of the instrument must be limited in accordance with the terms of the agreement, and hence was conditioned by it. Such a reference normally is inserted for the purpose of making a record or giving information to anyone who may be interested, and in the absence of any express statement to that effect is not intended to limit the terms of payment. Inasmuch as rights as to prepayment or acceleration has to do with a "speed-up" in payment and since notes frequently refer to separate agreements for a statement of these rights, such reference does do not destroy negotiability even though it has mild aspects of incorporation by reference. The general reasoning with respect to Subparagraph (c) also applies to a draft which on its face states that it is drawn under a letter of credit (Subparagraph (d)). Paragraphs (c) and (d) therefore adopt the position that negotiability is not affected. If the reference goes further and provides that payment must be made according to the terms of the agreement, it falls under Paragraph (a) of Subsection (2) [As amended 1962].

4. Paragraph (e) of Subsection (1) is intended to settle another conflict in the decisions, over the effect of "title security notes" and other instruments which recite the security given. It rejects cases which have held that the mere statement that the instrument is secured, by reservation of title or otherwise, carries the implied condition that payment is to be made only if the security agreement is fully performed. Again such a recital normally is included only for the purpose of making a record or giving information, and is not intended to condition payment in any way. The provision adopts the position of the great majority of the courts.

5. Paragraph (f) of Subsection (1) is a rewording of Section 3(1) of the original act.

6. Paragraph (g) of Subsection (1) is new. It is intended to permit municipal corporations or other governments or governmental agencies to draw checks or to issue other short-term commercial paper in which payment is limited to a particular fund or to the

proceeds of particular taxes or other sources of revenue. The provision will permit some municipal warrants to be negotiable if they are in proper form. Normally such warrants lack the words "order" or "bearer," or are marked "Not Negotiable," or are payable only in serial order, which makes them conditional.

7. Paragraph (h) of Subsection (1) is new. It adopts the policy of decisions holding that an instrument issued by an unincorporated association is negotiable although its payment is expressly limited to the assets of the association, excluding the liability of individual members; and recognizing as negotiable an instrument issued by a trust estate without personal liability of the trustee. The policy is extended to a partnership and to any estate. The provision affects only the negotiability of the instrument, and is not intended to change the law of any state as to the liability of a partner, trustee, executor, administrator, or any other person on such an instrument.

8. Paragraph (a) of Subsection (2) retains the generally accepted rule that where an instrument contains such language as "subject to terms of contract between maker and payee of this date," its payment is conditioned according to the terms of the agreement and the instrument is not negotiable. The distinction is between a mere recital of the existence of the separate agreement or a reference to it for information, which under Paragraph (c) of Subsection (1) will not affect negotiability, and any language which, fairly construed, requires the holder to look to the other agreement for the terms of payment. The intent of the provision is that an instrument is not negotiable unless the holder can ascertain all of its essential terms from its face. In the specific instance of rights as to prepayment or acceleration, however, there may be a reference to a separate agreement without destroying negotiability [As amended 1962].

9. Paragraph (b) of Subsection (2) restates the last sentence of Section 3 of the original act. As noted above, exceptions are made by Paragraphs (g) and (h) of Subsection (1) in favor of instruments issued by governments or governmental agencies, or by a partnership, unincorporated association, trust or estate.

Cross reference.Section 3-104.

Definitional cross references."Account". Section 4-104.

"Agreement". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Order". Section 3-102.

"Promise". Section 3-102.

ANNOTATION

Compiler's notes. - Laws 1967, ch. 186, § 7, is compiled as 55-3-112 NMSA 1978.

Not conditional to direct charge of particular account. - The inclusion in a check, order or bill of exchange of a direction to charge the amount to a particular account does not make it payable conditionally. Hanna v. McCrory, 19 N.M. 183, 141 P. 996 (1914) (decided under former law).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 54, 72, 141, 147, 151.
Provision in draft or note directing payment "on acceptance" as affecting negotiability, 19 A.L.R.4th 1268.
10 C.J.S. Bills and Notes § 85.

§ 55-3-106. Sum certain.

(1) The sum payable is a sum certain even though it is to be paid:

(a) with stated interest or by stated installments; or

(b) with stated different rates of interest before and after default or a specified date; or

(c) with a stated discount or addition if paid before or after the date fixed for payment; or

(d) with exchange or less exchange, whether at a fixed rate or at the current rate; or

(e) with costs of collection or an attorney's fee or both upon default.

(2) Nothing in this section shall validate any term which is otherwise illegal.

History: 1953 Comp., § 50A-3-106, enacted by Laws 1961, ch. 96, § 3-106.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 2 and 6(5), Uniform Negotiable Instruments Law.

Changes. Reworded.

Purposes of changes. The new language is intended to clarify doubts arising under the original section as to interest, discounts or additions, exchange, costs and attorney's fees, and acceleration or extension.

1. The section rejects decisions which have denied negotiability to a note with a term providing for a discount for early payment on the ground that at the time of issue the amount payable was not certain. It is sufficient that at any time of payment the holder is able to determine the amount then payable from the instrument itself with any necessary computation. Thus a demand note bearing interest at six per cent is negotiable. A stated discount or addition for early or late payment does not affect the certainty of the sum so long as the computation can be made, nor do different rates of interest before and after default or a specified date. The computation must be one which can be made from the instrument itself without reference to any outside source, and this section does not make negotiable a note payable with interest "at the current rate."

2. Paragraph (d) recognizes the occasional practice of making the instrument payable with exchange deducted rather than added.

3. In Paragraph (e) "upon default" is substituted for the language of the original Section 2(5) in order to include any default in payment of interest or installments.

4. The section contains no specific language relating to the effect of acceleration clauses on the certainty of the sum payable. Section 2(3) of the original act contained a saving clause for provisions accelerating principal on default in payment of an installment or of interest, which led to doubt as to the effect of other accelerating provisions. This article (Section 3-109, Definite Time) broadly validates acceleration clauses; it is not necessary to state the matter in this section as well. The disappearance of the language referred to in old Section 2(3) means merely that it was regarded as surplusage.

5. Most states have usury laws prohibiting excessive rates of interest. In some states there are statutes or rules of law invalidating a term providing for increased interest after maturity, or for costs and attorney's fees. Subsection (2) is intended to make it clear that this section is concerned only with the effect of such terms upon negotiability, and is not meant to change the law of any state as to the validity of the term itself.

Cross references.Section 3-104.

Point 4: Section 3-109.

Definitional cross reference."Term". Section 1-201.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 159, 160 to 163, 165.
Negotiability as affected by provision in relation to interest or discount, 2 A.L.R. 139; 51

A.L.R. 294; 58 A.L.R. 1281.
Validity and effect of anticipatory provision in contract in relation to rate of interest in the event of default, 12 A.L.R. 367.
Negotiability as affected by provision for attorney fees, 91 A.L.R. 693.
Validity of provision in promissory note or other evidence of indebtedness for payment, as attorneys' fees, expenses and cost of collection, of specified percentage of note, 17 A.L.R.2d 288.
Negotiability of instrument providing for variable rate of interest under UCC § 3-106, 69 A.L.R.4th 1127.
10 C.J.S. Bills and Notes § 105.

§ 55-3-107. Money.

(1) An instrument is payable in money if the medium of exchange in which it is payable is money at the time the instrument is made. An instrument payable in "currency" or "current funds" is payable in money.

(2) A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the day of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.

History: 1953 Comp., § 50A-3-107, enacted by Laws 1961, ch. 96, § 3-107.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 6(5), Uniform Negotiable Instruments Law.

Changes. Completely rewritten.

Purposes of changes and new matter. To make clear when an instrument is payable in money and to state rules applicable to instruments drawn payable in a foreign currency.

1. The term "money" is defined in Section 1-201 as "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency." That definition rejects the narrow view of some early cases that "money" is limited to legal tender. Legal tender acts do no more than designate a particular kind of money which the obligee will be required to accept in discharge of an obligation. It rejects also the contention sometimes advanced that "money" includes any medium of exchange current and accepted in the particular community, whether it be gold dust, beaver pelts or cigarettes in occupied Germany. Such unusual "currency" is necessarily of uncertain and fluctuating value, and an instrument intended to pass generally in commerce as

negotiable may not be made payable therein.

The test adopted is that of the sanction of government, which recognizes the circulating medium as a part of the official currency of that government. In particular the provision adopts the position that an instrument expressing the amount to be paid in sterling, francs, lire or other recognized currency of a foreign government is negotiable even though payable in the United States.

2. The provision on "currency" or "current funds" accepts the view of the great majority of the decisions, that "currency" or "current funds" means that the instrument is payable in money.

3. Either the amount to be paid or the medium of payment may be expressed in terms of a particular kind of money. A draft passing between Toronto and Buffalo may, according to the desire and convenience of the parties, call for payment of 100 United States dollars or of 100 Canadian dollars; and it may require either sum to be paid in either currency. Under this section an instrument in any of these forms is negotiable, whether payable in Toronto or in Buffalo.

4. As stated in the preceding paragraph the intention of the parties in making an instrument payable in a foreign currency may be that the medium of payment shall be either dollars measured by the foreign currency or the foreign currency in which the instrument is drawn. Under Subsection (2) the presumption is, unless the instrument otherwise specifies, that the obligation may be satisfied by payment in dollars in an amount determined by the buying sight rate for the foreign currency on the day the instrument becomes payable. Inasmuch as the buying sight rate will fluctuate from day to day, it might be argued that an instrument expressed in a foreign currency but actually payable in dollars is not for a "sum certain." Subsection (2) makes it clear that for the purposes of negotiability under this article such an instrument, despite exchange fluctuations, is for a sum certain.

Cross references.Section 3-104.

Point 1: Section 1-201.

Point 4: Section 4-212(6).

Definitional cross references."Instrument". Section 3-102.

"Money". Section 1-201.

"Order". Section 3-102.

"Promise". Section 3-102.

"Purchase". Section 1-201.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 152 to 154, 976, 977.
10 C.J.S. Bills and Notes § 93.

§ 55-3-108. Payable on demand.

Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated.

History: 1953 Comp., § 50A-3-108, enacted by Laws 1961, ch. 96, § 3-108.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 7, Uniform Negotiable Instruments Law.

Changes. Reworded, final sentence of original section omitted.

Purposes of changes. Except for the omission of the final sentence this section restates the substance of original Section 7. The final sentence dealt with the status of a person issuing, accepting or indorsing an instrument after maturity and provided that as to such a person the instrument was payable on demand. That language implied that the ordinary rules relating to demand instruments as to due course, holding, presentment, notice of dishonor and so on were applicable. This article abandons that concept which served no special purpose except to trap the unwary. Under Section 3-302 (Holder in Due Course) and in view of the deletion from this section of the final sentence of original Section 7 there is no longer the possibility that one taking time paper after maturity may acquire due course rights against a post-maturity indorser. Section 3-501(4), however, provides that the indorser after maturity is not entitled to presentment, notice of dishonor or protest.

Cross references.Sections 3-104, 3-302 and 3-501(4).

Definitional cross reference."Instrument". Section 3-102.

ANNOTATION

Maturity of sight instruments. - Sight instruments are demand instruments and mature, not on the date drawn, but at any time after the date when demand for payment is made. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 59, 166 to 169, 171, 176 to 178, 186, 486.
Transferee of demand note as a purchaser before maturity, 10 A.L.R.3d 1199.
10 C.J.S. Bills and Notes § 96.

§ 55-3-109. Definite time.

(1) An instrument is payable at a definite time if by its terms it is payable:

(a) on or before a stated date or at a fixed period after a stated date; or

(b) at a fixed period after sight; or

(c) at a definite time subject to any acceleration; or

(d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(2) An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred.

History: 1953 Comp., § 50A-3-109, enacted by Laws 1961, ch. 96, § 3-109.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 4 and 17(3), Uniform Negotiable Instruments Law.

Changes. Reworded; new provisions; rule of original Section 4(3) reversed.

Purposes of changes and new matter. To remove uncertainties arising under the original section, and to eliminate commercially unacceptable instruments.

1. Subsection (2) reverses the rule of the original Section 4(3) as to instruments payable after events certain to happen but uncertain as to time. Almost the only use of such instruments has been in the anticipation of inheritance or future interests by borrowing on post-obituary notes. These have been much more common in England than in the United States. They are at best questionable paper, not acceptable in general commerce, with no good reason for according them free circulation as negotiable instruments. As in the case of the occasional note payable "one year after the war" or at

a similar uncertain date, they are likely to be made under unusual circumstances suggesting good reason for preserving defenses of the maker. They are accordingly eliminated.

2. With this change "definite time" is substituted for "fixed or determinable future time." The time of payment is definite if it can be determined from the face of the instrument.

3. An undated instrument payable "thirty days after date" is not payable at a definite time, since the time of payment cannot be determined on its face. It is, however, an incomplete instrument within the provisions of Section 3-115 dealing with such instruments and may be completed by dating it. It is then payable at a definite time.

4. Paragraph (c) of Subsection (1) resolves a conflict in the decisions on the negotiability of instruments containing acceleration clauses as to the meaning and effect of "on or before a fixed or determinable future time" in the original Section 4(2). (Instruments expressly stated to be payable "on or before" a given date are dealt with in Subsection (1)(a). So far as certainty of time of payment is concerned a note payable at a definite time but subject to acceleration is no less certain than a note payable on demand, whose negotiability never has been questioned. It is in fact more certain, since it at least states a definite time beyond which the instrument cannot run. Objections to the acceleration clause must be based rather on the possibility of abuse by the holder, which has nothing to do with negotiability and is not limited to negotiable instruments. That problem is now covered by Section 1-208.

Subsection (1) (c) is intended to mean that the certainty of time of payment or the negotiability of the instrument is not affected by any acceleration clause, whether acceleration be at the option of the maker or the holder, or automatic upon the occurrence of some event, and whether it be conditional or unrestricted. If the acceleration term itself is uncertain it may fail on ordinary contract principles, but the instrument then remains negotiable and is payable at the definite time.

The effect of acceleration clauses upon a holder in due course is covered by the new definition of the holder in due course (Section 3-302) and by the section on notice to purchaser (Subsection (3) of Section 3-304). If the purchaser is not aware of any acceleration, his delay in making presentment may be excused under the section dealing with excused presentment (Subsection (1) of Section 3-511).

5. Paragraph (d) of Subsection (1) is new. It adopts the generally accepted rule that a clause providing for extension at the option of the holder, even without a time limit, does not affect negotiability since the holder is given only a right which he would have without the clause. If the extension is to be at the option of the maker or acceptor or is to be automatic, a definite time limit must be stated or the time of payment remains uncertain and the instrument is not negotiable. Where such a limit is stated, the effect upon certainty of time of payment is the same as if the instrument were made payable at the ultimate date with a term providing for acceleration.

The construction and effect of extension clauses is covered by Paragraph (f) of Section 3-118 on ambiguous terms and rules of construction, to which reference should be made.

Cross references.Section 3-104.

Point 3: Section 3-115.

Point 4: Sections 1-208, 3-118(f), 3-304(3) and 3-511(1).

Point 5: Section 3-118(f).

Definitional cross references."Holder". Section 1-201.

"Instrument". Section 3-102.

"Term". Section 1-201.

ANNOTATION

Negotiability not destroyed by acceleration clause. - Where mortgage provided that upon default in payments the entire indebtedness might be declared at once due and payable, the negotiability of promissory notes, which it secured, was not destroyed. Durham v. Rasco, 30 N.M. 16, 227 P. 599, 34 A.L.R. 838 (1924) (decided under former law).

Nor by extension of time proviso. - A provision in a promissory note that any of the parties to it may extend the note without the knowledge or consent of the other parties, retaining the liability of all parties, does not render it nonnegotiable. First Nat'l Bank v. Stover, 21 N.M. 453, 155 P. 905, 1916D L.R.A. 1280 (1915) (decided under former law).

Law reviews. - For article, "Breach of the Peace and New Mexico's Uniform Commercial Code," see 4 Nat. Resources J. 85 (1964).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 88, 166, 169 to 178, 186.
Validity of instrument for payment of money as affected by mere fact that payment is postponed until death, 2 A.L.R. 1471.
Negotiability of instrument as affected by incompleteness of the attempt to fix due date, 19 A.L.R. 508.
Negotiability as affected by provisions for extension of time, 77 A.L.R. 1085.
Provision for post-mortem payment or performance as affecting instrument's character

and validity as a contract, 1 A.L.R.2d 1219.
10 C.J.S. Bills and Notes § 96.

§ 55-3-110. Payable to order.

(1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names a payee. It may be payable to the order of:

(a) the maker or drawer; or

(b) the drawee; or

(c) a payee who is not maker, drawer or drawee; or

(d) two or more payees together or in the alternative; or

(e) an estate, trust or fund, in which case it is payable to the order of the representative of such estate, trust or fund or his successors; or

(f) an office, or an officer by his title as such in which case it is payable to the principal but the incumbent of the office or his successors may act as if he or they were the holder; or

(g) a partnership or unincorporated association, in which case it is payable to the partnership or association and may be indorsed or transferred by any person thereto authorized.

(2) An instrument not payable to order is not made so payable by such words as "payable upon return of this instrument properly indorsed."

(3) An instrument made payable both to order and to bearer is payable to order unless the bearer words are handwritten or typewritten.

History: 1953 Comp., § 50A-3-110, enacted by Laws 1961, ch. 96, § 3-110.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 8, Uniform Negotiable Instruments Law.

Changes. Reworded, new provisions.

Purposes of changes and new matter. The changes are intended to remove uncertainties arising under the original section.

1. Paragraph (d) of Subsection (1) replaces the original Subsections (4) and (5). It eliminates the word "jointly," which has carried a possible implication of a right of survivorship. Normally an instrument payable to "A and B" is intended to be payable to the two parties as tenants in common, and there is no survivorship in the absence of express language to that effect. The instrument may be payable to "A or B," in which case it is payable to either A or B individually. It may even be made payable to "A and/or B," in which case it is payable either to A or to B singly, or to the two together. The negotiation, enforcement and discharge of the instrument in all such cases are covered by the section on instruments payable to two or more persons (Sec. 3-116).

2. Paragraph (e) of Subsection (1) is intended to change the result of decisions which have held that an instrument payable to the order of the estate of a decedent was payable to bearer, on the ground that the name of the payee did not purport to be that of any person. The intent in such cases is obviously not to make the instrument payable to bearer, but to the order of the representative of the estate. The provision extends the same principle to an instrument payable to the order of "Tilden Trust," or "Community Fund." So long as the payee can be identified, it is not necessary that it be a legal entity; and in each case the instrument is treated as payable to the order of the appropriate representative or his successor.

3. Under Paragraph (f) of Subsection (1) an instrument may be made payable to the office itself ("Swedish Consulate") or to the officer by his title as such ("Treasurer of City Club"). In either case it runs to the incumbent of the office and his successors. The effect of instruments in such a form is covered by the section on instruments payable with words of description (Sec. 3-117).

4. Vestigial theories relating to the lack of "legal entity" of partnerships and various forms of unincorporated associations - such as labor unions and business trusts - make it the part of wisdom to specify that instruments made payable to such groups are order paper payable as designated and not bearer paper (Subsection (1) (g)). As in the case of incorporated associations, any person having authority from the partnership or association to whose order the instrument is payable may indorse or otherwise deal with the instrument.

5. Subsection (2) is intended to change the result of cases holding that "payable upon return of this certificate properly indorsed" indicated an intention to make the instrument payable to any indorsee and so must be construed as the equivalent of "Pay to order." Ordinarily the purpose of such language is only to insure return of the instrument with indorsement in lieu of a receipt, and the word "order" is omitted with the intention that the instrument shall not be negotiable.

6. Subsection (3) is directed at occasional instruments reading "Pay to the order of John Doe or bearer." Such language usually is found only where the drawer has filled in the name of the payee on a printed form, without intending the ambiguity or noticing the word "bearer." Under such circumstances the name of the specified payee indicates an

intent that the order words shall control. If the word "bearer" is handwritten or typewritten, there is sufficient indication of an intent that the instrument shall be payable to bearer. Instruments payable to "order of bearer" are covered not by this section but by the following Section 3-111.

Cross references.Sections 3-104 and 3-111.

Point 1: Section 3-116.

Points 2, 3 and 4: Section 3-117.

Definitional cross references."Bearer". Section 1-201.

"Conspicuous". Section 1-201.

"Instrument". Section 3-102.

"Negotiation". Section 3-202.

"Person". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 105, 107, 113, 116 to 118, 124 to 127, 322, 328.
Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank, 69 A.L.R.4th 778.
10 C.J.S. Bills and Notes § 123.

§ 55-3-111. Payable to bearer.

An instrument is payable to bearer when by its terms it is payable to:

(a) bearer or the order of bearer; or

(b) a specified person or bearer; or

(c) "cash" or the order of "cash," or any other indication which does not purport to designate a specific payee.

History: 1953 Comp., § 50A-3-111, enacted by Laws 1961, ch. 96, § 3-111.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 9, Uniform Negotiable Instruments Law.

Changes. Reworded; original Subsections (3) and (5) omitted here but covered by sections on impostors and signature in name of payee (Section 3-405) and on special and blank indorsements (Section 3-204).

Purposes of changes. The rewording is intended to remove uncertainties.

1. Language such as "order of bearer" usually results when a printed form is used and the word "bearer" is filled in. Subsection (a) rejects the view that the instrument is payable to order, and adopts the position that "bearer" is the unusual word and should control. Compare Comment 6 to Section 3-110.

2. Paragraph (c) is reworded to remove any possible implication that "Pay to the order of . . . . ." makes the instrument payable to bearer. It is an incomplete order instrument, and falls under Section 3-115. Likewise "Pay Treasurer of X Corporation" does not mean pay bearer, even though there may be no such officer. Instruments payable to the order of an estate, trust, fund, partnership, unincorporated association or office are covered by the preceding section. This subsection applies only to such language as "Pay Cash," "Pay to the order of cash," "Pay bills payable," "Pay to the order of one keg of nails," or other words which do not purport to designate any specific payee.

3. Under Section 40 of the original act an instrument payable to bearer on its face remained bearer paper negotiable by delivery although subsequently specially indorsed. It should be noted that Section 3-204 on special indorsement reverses this rule and allows the special indorsement to control.

Cross references.Sections 3-104, 3-405 and 3-204.

Point 2: Sections 3-110(1) (a) and (f) and 3-115.

Point 3: Section 3-204.

Definitional cross references."Bearer". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Liability on check drawn to fictitious payee. - A check drawn to a fictitious payee is the same as if it were made payable to bearer; and, since an endorsement on such paper is not necessary to its validity or negotiability, a bank is not liable for paying on a forged endorsement on bearer paper. Airco Supply Co. v. Albuquerque Nat'l Bank, 68 N.M. 195, 360 P.2d 386 (1961).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 86, 106, 124.
Instrument payable to "estate" as within rule that an instrument payable to order of fictitious or nonexistent person is payable to bearer, 60 A.L.R. 610.
Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank, 69 A.L.R.4th 778.
10 C.J.S. Bills and Notes § 123.

§ 55-3-112. Terms and omissions not affecting negotiability.

(1) The negotiability of an instrument is not affected by:

(a) the omission of a statement of any consideration or of the place where the instrument is drawn or payable; or

(b) a statement that collateral has been given to secure obligations either on the instrument or otherwise of an obligor on the instrument or that in the case of default on those obligations the holder may realize on or dispose of the collateral; or

(c) a promise or power to maintain or protect collateral or to give additional collateral; or

(d) a term authorizing a confession of judgment on the instrument if it is not paid when due; or

(e) a term purporting to waive the benefit of any law intended for the advantage or protection of any obligor; or

(f) a term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer; or

(g) a statement in a draft drawn in a set of parts (Section 3-801 [55-3-801 NMSA 1978]) to the effect that the order is effective only if no other part has been honored.

(2) Nothing in this section shall validate any term which is otherwise illegal.

History: 1953 Comp., § 50A-3-112, enacted by Laws 1961, ch. 96, § 3-112; 1967, ch. 186, § 7.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 5 and 6, Uniform Negotiable Instruments Law.

Changes. Reworded; new provisions; Subsection (4) of original Section 5 omitted. Subsection (4) of the original Section 6 is now covered by Section 3-113, and Subsection (5) by Section 3-107.

Purposes of changes and new matter. The changes are intended to remove uncertainties arising under the original sections. Subsection (4) of the original Section 5 is omitted because it has been important only in connection with bonds and other investment securities now covered by Article 8 of this act. An option to require something to be done in lieu of payment of money is uncommon and not desirable in commercial paper.

This section permits the insertion of certain obligations and powers in addition to the simple promise or order to pay money. Under Section 3-104, dealing with form of negotiable instruments, the instrument may not contain any other promise, order, obligation or power.

1. Paragraph (b) of Subsection (1) permits a clause authorizing the sale or disposition of collateral given to secure obligations either on the instrument or otherwise of an obligor on the instrument upon any default in those obligations, including a default in payment of an installment or of interest. It is not limited, as was the original Section 5(1), to default at maturity. The reference to obligations of an obligor on the instrument is intended to recognize so-called cross collateral provisions that appear in collateral note forms used by banks and others throughout the United States and to permit the use of these provisions without destroying negotiability. Paragraph (c) is new. It permits a clause, apparently not within the original section, containing a promise or power to maintain or protect collateral or to give additional collateral, whether on demand or on some other condition. Such terms frequently are accompanied by a provision for acceleration if the collateral is not given, which is now permitted by the section on what constitutes a definite time. Section 1-208 should be consulted as to the construction to be given such clauses under this act.

2. As under the original Section 5(2), Paragraph (d) is intended to mean that a confession of judgment may be authorized only if the instrument is not paid when due, and that otherwise negotiability is affected. The use of judgment notes is confined to two or three states, and in others the judgment clauses are made illegal or ineffective either by special statutes or by decision. Subsection (2) is intended to say that any such local rule remains unchanged, and that the clause itself may be invalid, although the negotiability of the instrument is not affected.

3. As in the case of the original Section 5(3), Paragraph (e) applies not only to any waiver of the benefits of this article, such as presentment, notice of dishonor or protest, but also to a waiver of the benefits of any other law such as a homestead exemption. Again Subsection (2) is intended to mean that any rule which invalidates the waiver itself is not changed, and that while negotiability is not affected, a waiver of the statute of limitations contained in an instrument may be invalid.

This paragraph is to be read together with Subsection (1) of Section 3-104 on form of negotiable instruments. A waiver cannot make the instrument negotiable within this article where it does not comply with the requirements of that section.

4. Paragraph (f) is new. The effect of a clause of acknowledgement of satisfaction upon negotiability has been uncertain under the original section.

5. Paragraph (g) is intended to insure that a condition arising from the statement in question will not adversely affect negotiability.

Cross references.Sections 3-104 and 3-105.

Point 1: Sections 1-208 and 3-109(1) (c).

Point 3: Section 3-104.

Definitional cross references."Draft". Section 3-104.

"Instrument". Section 3-102.

"On demand". Section 3-108.

"Promise". Section 3-102.

"Term". Section 1-201.

ANNOTATION

Cross-references. - For cognovit notes defined, penalty, see 39-1-18 NMSA 1978.

Compiler's notes. - Laws 1967, ch. 186, § 8, is compiled as 55-3-122 NMSA 1978.

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

For comment, "Negotiable Instruments - A Cause of Action on a Cashier's Check Accrues from the Date of Issuance," see 4 N.M. L. Rev. 253 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 55, 59, 89, 90, 148, 159, 192, 195, 197, 199, 201 to 206.
Reference to extrinsic agreements as affecting negotiability of bill or note, 14 A.L.R. 1126; 33 A.L.R. 1174; 37 A.L.R. 655; 61 A.L.R. 815; 104 A.L.R. 1378.
Negotiability of bill or note as affected by provision authorizing confession of judgment, 117 A.L.R. 673.
Negotiability of paper as affected by provisions therein relating to future contingent fund or security for its payment, 134 A.L.R. 946.
10 C.J.S. Bills and Notes § 83.

§ 55-3-113. Seal.

An instrument otherwise negotiable is within this article even though it is under a seal.

History: 1953 Comp., § 50A-3-113, enacted by Laws 1961, ch. 96, § 3-113.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 6(4), Uniform Negotiable Instruments Law.

Changes. Reworded.

Purposes of changes. The revised wording is intended to change the result of decisions holding that while a seal does not affect the negotiability of an instrument it may affect it in other respects falling within the statute, such as the conclusiveness of consideration. The section is intended to place sealed instruments on the same footing as any other instruments so far as all sections of this article are concerned. It does not affect any other statutes or rules of law relating to sealed instruments except insofar as, in the case of negotiable instruments, they are inconsistent with this article. Thus a sealed instrument which is within this article may still be subject to a longer statute of limitations than negotiable instruments not under seal, or to such local rules of procedure as that it may be enforced by an action of special assumpsit.

Cross reference.Section 3-104.

Definitional cross reference."Instrument". Section 3-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 213, 238.
Seal as affecting validity, 53 A.L.R. 1173; 97 A.L.R. 617.
10 C.J.S. Bills and Notes § 75.

§ 55-3-114. Date, antedating, postdating.

(1) The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.

(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

(3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.

History: 1953 Comp., § 50A-3-114, enacted by Laws 1961, ch. 96, § 3-114.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 6(1), 11, 12 and 17(3), Uniform Negotiable Instruments Law.

Changes. Reworded; new provision and parts of original Section 12 omitted.

Purposes of changes and new matter. The rewording is intended to remove uncertainties arising under the original sections.

1. The reference to an "illegal or fraudulent purpose" in the original Section 12 is omitted as inaccurate and misleading. Any fraud or illegality connected with the date of an instrument does not affect its negotiability, but is merely a defense under Sections 3-306 and 3-307 to the same extent as any other fraud or illegality. The provision in the same section as to acquisition of title upon delivery is also omitted, as obvious and unnecessary.

2. Subsection (2) is new. An undated instrument payable "thirty days after date" is uncertain as to time of payment, and does not fall within Section 3-109(1) (a) on definite time. It is, however, an incomplete instrument, and the date may be inserted as provided in the section dealing with such instruments (Section 3-115). When the instrument has been dated, this subsection follows decisions under the original act in providing that the time of payment is to be determined from the stated date, even though the instrument is antedated or postdated. An antedated instrument may thus be due before it is issued. As to the liability of indorsers in such a case, see Section 3-501(4), on indorsement after maturity.

3. Subsection (3) extends the original Section 11 to any signature on an instrument. As to the meaning of "presumed," see Section 1-201.

Cross references.Point 1: Sections 3-306 and 3-307.

Point 2: Sections 3-109(1) (a), 3-115 and 3-501(4).

Point 3: Section 1-201.

Definitional cross references."Instrument". Section 3-102.

"Issue". Section 3-102.

"On demand". Section 3-108.

"Presumed". Section 1-201.

"Signature". Section 3-401.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 553; 11 Am. Jur. 2d Bills and Notes §§ 88, 208, 285 to 287; 12 Am. Jur. 2d Bills and Notes § 1165.
Right of transferee of postdated check, 21 A.L.R. 234.
Bank's liability for paying postdated check, 76 A.L.R.2d 1301.
Extent of bank's liability for paying postdated check, 31 A.L.R.4th 329.
10 C.J.S. Bills and Notes §§ 13, 245 to 250.

§ 55-3-115. Incomplete instruments.

(1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.

(2) If the completion was unauthorized the rules as to material alteration apply (Section 3-407 [55-3-407 NMSA 1978]), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.

History: 1953 Comp., § 50A-3-115, enacted by Laws 1961, ch. 96, § 3-115.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 13, 14, and 15, Uniform Negotiable Instruments Law.

Changes. Condensed and reworded; original Section 13 and parts of Section 14 omitted and rule of Section 15 reversed.

Purposes of changes.1. The original sections were lengthy and confusing. Section 13 is eliminated because it has suggested some uncertain distinction between undated instruments and those incomplete in other respects, and has carried the inference that only a holder may fill in the date. An instrument lacking in an essential date is merely one kind of incomplete instrument, to be treated like any other. The third sentence of Section 14, providing that the instrument must be filled up strictly in accordance with the authority given and within a reasonable time, is eliminated as entirely superfluous, since any authority must always be exercised in accordance with its limitations, and expires within a reasonable time unless a time limit is fixed.

2. The language "signed while still incomplete in any necessary respect" in Subsection (1) is substituted for "wanting in any material particular" in the original Section 14, in order to make it entirely clear that a complete writing which lacks an essential element of an instrument and contains no blanks or spaces or anything else to indicate that what is missing is to be supplied, does not fall within the section. "Necessary" means necessary to a complete instrument. It will always include the promise or order, the designation of the payee, and the amount payable. It may include the time of payment where a blank is left for that time to be filled in; but where it is clear that no time is intended to be stated the instrument is complete, and is payable on demand under Section 3-108. It does not include the date of issue, which under Section 3-114(1) is not essential, unless the instrument is made payable at a fixed period after that date.

3. This section omits the second sentence of the original Section 14, providing that "a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount." This had utility only in connection with the ancient practice of signing blank paper to be filled in later as an acceptance, at a time when communications were slow and difficult. The practice has been obsolete for nearly a century. It affords obvious opportunity for fraud, and should not be encouraged by express sanction in the statute. The omission is not intended, however, to mean that any person may not be authorized to write in an instrument over a signature either before or after delivery.

4. Subsection (2) states the rule generally recognized by the courts, that any unauthorized completion is an alteration of the instrument which stands on the same footing as any other alteration. Reference is therefore made to Section 3-407 where the effect of alteration is stated. Subsection (3) of that section provides that a subsequent holder in due course may in all cases enforce the instrument as completed, and replaces the final sentence of the original Section 14.

5. The language "even though the paper was not delivered" reverses the rule of the original Section 15, which provides that where an incomplete instrument has not been delivered it will not, if completed, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery. Since under this article (Sections 3-305 and 3-407) neither non-delivery nor unauthorized completion is a defense against a holder in due course, it has always been illogical that the two

together should invalidate the instrument in his hands. A holder in due course sees and takes the same paper, whether it was complete when stolen or completed afterward by the thief, and in each case he relies in good faith on the maker's signature. The loss should fall upon the party whose conduct in signing blank paper has made the fraud possible, rather than upon the innocent purchaser. The result is consistent with the theory of decisions holding the drawer of a check stolen and afterwards filled in to be estopped from setting up the non-delivery against an innocent party.

A similar provision protecting a depositary bank which pays an item in good faith is contained in Section 4-401. The policy of that section should apply in favor of drawees other than banks.

6. The language on burden of establishing unauthorized completion is substituted for the "prima facie authority" of the original Section 14. It follows the generally accepted rule that the full burden of proof by a preponderance of the evidence is upon the party attacking the completed instrument. "Burden of establishing" is defined in Section 1-201.

Cross references.Point 2: Sections 3-108 and 3-114(1).

Point 4: Section 3-407.

Point 5: Sections 3-305(2), 3-407(3) and 4-401.

Point 6: Section 1-201.

Definitional cross references."Alteration". Section 3-407.

"Burden of establishing". Section 1-201.

"Delivery". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Signed". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 73 to 79, 81, 87, 88, 666; 12 Am. Jur. 2d Bills and Notes §§ 1160, 1297.
Liability of one who signs commercial paper in blank to be used for his own benefit where it is wrongfully used by an agent or employee, 43 A.L.R. 198.
Effect of payee of bill or note, executed in blank as to amount, filling it in for an amount in excess of that authorized, 75 A.L.R. 1389.

Bank's liability for payment or withdrawal on less than required number of signatures, 7 A.L.R.4th 655.
10 C.J.S. Bills and Notes § 136.

§ 55-3-116. Instruments payable to two or more persons.

An instrument payable to the order of two or more persons:

(a) if in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it;

(b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

History: 1953 Comp., § 50A-3-116, enacted by Laws 1961, ch. 96, § 3-116.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 41, Uniform Negotiable Instruments Law.

Changes. Revised in wording and substance.

Purposes of changes. The changes are intended to make clear the distinction between an instrument payable to "A or B" and one payable to "A and B." The first names either A or B as payee, so that either of them who is in possession becomes a holder as that term is defined in Section 1-201 and may negotiate, enforce or discharge the instrument. The second is payable only to A and B together, and as provided in the original section both must indorse in order to negotiate the instrument, although one may of course be authorized to sign for the other. Likewise both must join in any action to enforce the instrument, and the rights of one are not discharged without his consent by the act of the other.

If the instrument is payable to "A and/or B," it is payable in the alternative to A, or to B, or to A and B together, and it may be negotiated, enforced or discharged accordingly.

Cross reference.Section 1-201.

Definitional cross references."Instrument". Section 3-102.

"Person". Section 1-201.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 117, 321, 324, 901; 12 Am. Jur. 2d Bills and Notes § 1089.
Endorsement by one of several joint payees or endorsees not partners, 38 A.L.R. 799.
Necessity of express agreement between endorsers to be jointly and not successively liable in order to give a right of contribution as between themselves, 90 A.L.R. 305.
Bank's liability to nonsigning payee for payment of check drawn to joint payees without obtaining endorsement by both, 47 A.L.R.3d 537.
10 C.J.S. Bills and Notes § 128.

§ 55-3-117. Instruments payable with words of description.

An instrument made payable to a named person with the addition of words describing him:

(a) as agent or officer of a specified person is payable to his principal but the agent or officer may act as if he were the holder;

(b) as any other fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him;

(c) in any other manner is payable to the payee unconditionally and the additional words are without effect on subsequent parties.

History: 1953 Comp., § 50A-3-117, enacted by Laws 1961, ch. 96, § 3-117.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 42, Uniform Negotiable Instruments Law.

Changes. Revised and extended.

Purposes of changes.1. Subsection (a) extends the policy of the original Section 42, which covered only cashiers and fiscal officers of banks and corporations, to any case where a payee is named with words describing him as agent or officer of another named person. The intent is to include all such descriptions as "John Doe, Treasurer of Town of Framingham," "John Doe, President Home Telephone Co.," "John Doe, Secretary of City Club," or "John Doe, agent of Richard Roe." In all such cases it is commercial understanding that the description is not added for mere identification but for the purpose of making the instrument payable to the principal, and that the agent or officer is named as payee only for convenience in enabling him to cash the check.

2. Subsection (b) covers such descriptions as "John Doe, Trustee of Smithers Trust," "John Doe, Administrator of the Estate of Richard Roe," or "John Doe, Executor under Will of Richard Roe." In such cases the instrument is payable to the individual named, and he may negotiate it, enforce it or discharge it, but he remains subject to any liability

for breach of his obligation as a fiduciary. Any subsequent holder of the instrument is put on notice of the fiduciary position, and under the section on notice to purchaser (Section 3-304) is not a holder in due course if he takes with notice that John Doe has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit, or otherwise in breach of duty.

3. Any other words of description, such as "John Doe, 1121 Main Street," "John Doe, Attorney," or "Jane Doe, unremarried widow," are to be treated as mere identification, and not in any respect as a condition of payment. The same is true of any description of the payee as "Treasurer," "President," "Agent," "Trustee," "Executor," or "Administrator," which does not name the principal or beneficiary. In all such cases the person named may negotiate, enforce or discharge the instrument if he is otherwise identified, even though he does not meet the description. Any subsequent party dealing with the instrument may disregard the description and treat the paper as payable unconditionally to the individual, and is fully protected in the absence of independent notice of other facts sufficient to affect his position.

Cross reference.Point 2: Section 3-304(2).

Definitional cross references."Holder". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 115, 330, 468, 902; 12 Am. Jur. 2d Bills and Notes § 1082.
10 C.J.S. Bills and Notes § 121.

§ 55-3-118. Ambiguous terms and rules of construction.

The following rules apply to every instrument:

(a) where there is doubt whether the instrument is a draft or a note the holder may treat it as either. A draft drawn on the drawer is effective as a note;

(b) handwritten terms control typewritten and printed terms, and typewritten control printed;

(c) words control figures except that if the words are ambiguous figures control;

(d) unless otherwise specified a provision for interest means interest at the judgment rate at the place of payment from the date of the instrument, or if it is undated from the date of issue;

(e) unless the instrument otherwise specifies two or more persons who sign as maker, acceptor or drawer or indorser and as a part of the same transaction are jointly and severally liable even though the instrument contains such words as "I promise to pay";

(f) unless otherwise specified consent to extension authorizes a single extension for not longer than the original period. A consent to extension, expressed in the instrument, is binding on secondary parties and accommodation makers. A holder may not exercise his option to extend an instrument over the objection of a maker or acceptor or other party who in accordance with Section 3-604 [55-3-604 NMSA 1978] tenders full payment when the instrument is due.

History: 1953 Comp., § 50A-3-118, enacted by Laws 1961, ch. 96, § 3-118.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 17 and 68, Uniform Negotiable Instruments Law.

Changes. Reworded; new provisions and original Subsections (3) and (6) of Section 17 omitted. The original Section 17(3) is covered, so far as the question can arise, by Sections 3-109(1) (a) and 3-114 of this Article. The original Section 17(6) is now covered by Section 3-402.

Purposes of changes and new matter.1. The purpose of this section is to protect holders and to encourage the free circulation of negotiable paper by stating rules of law which will preclude a resort to parol evidence for any purpose except reformation of the instrument. Except as to such reformation, these rules cannot be varied by any proof that any party intended the contrary.

2. Subsection (a): The language of the original Section 17(5) is changed to make it clear that the provision is not limited to ambiguities of phrasing, but extends to any case where the form of the instrument leaves its character as a draft or a note in doubt.

3. Subsection (b): The original Section 17(4) is revised to cover typewriting because of its frequent use in instruments, particularly in promissory notes.

4. Subsection (c): The rewording of the original Section 17(1) is intended to make it clear that figures control only where the words are ambiguous and the figures are not.

5. Subsection (d): The revision of the original Section 17(2) is intended to make it clear that where the instrument provides for payment "with interest" without specifying the rate, the judgment rate of interest of the place of payment is to be taken as intended.

6. Subsection (e): This subsection combines and revises the original Section 17(7) and the last sentence of the original Section 68. The rule applies to any two or more persons who sign in the same capacity, whether as makers, drawers, acceptors or indorsers. It applies only where such parties sign as a part of the same transaction; successive indorsers are, of course, liable severally but not jointly.

7. Subsection (f): This provision is new. It has reference to such clauses as "The makers and indorsers of this note consent that it may be extended without notice to them." Such terms usually are inserted to obtain the consent of the indorsers and any accommodation maker to extension which might otherwise discharge them under Section 3-606 dealing with impairment of recourse or collateral. An extension in accord with these terms binds secondary parties. The holder may not force an extension on a maker or acceptor who makes due tender; the holder is not free to refuse payment and keep interest running on a good note or other instrument by extending it over the objection of a maker or acceptor or other party who in accordance with Section 3-604 tenders full payment when the instrument is due. Where consent to extension has been given, the subsection provides that unless otherwise specified the consent is to be construed as authorizing only one extension for not longer than the original period of the note.

Cross references.Sections 3-109, 3-114, 3-402 and 3-606.

Point 7: Sections 3-604 and 3-606.

Definitional cross references."Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Note". Section 3-104.

"Person". Section 1-201.

"Promise". Section 3-102.

"Signed". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Joint liability of husband and wife on note. - A wife who joins with her husband on a note is jointly and severally liable and may be legally bound to pay the entire debt. A judgment on a joint and several note signed by both husband and wife is collectible from the community property or the separate property of either or both. Commerce Bank & Trust v. Jones, 83 N.M. 236, 490 P.2d 678 (1971).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

For comment, "Negotiable Instruments - A Cause of Action on a Cashier's Check Accrues from the Date of Issuance," see 4 N.M. L. Rev. 253 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 23, 63, 65, 158, 306, 587, 589, 593, 601, 629, 939; 12 Am. Jur. 2d Bills and Notes § 1241.
Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 20 A.L.R. 421; 54 A.L.R. 702; 75 A.L.R. 1519; 105 A.L.R. 1346.
Validity and effect of note payable to maker without words of negotiability, 50 A.L.R. 426.
Determination of date in typewritten document, 106 A.L.R. 732.
Time from which interest is recoverable on demand note or like demand instrument containing no provision as to interest, 45 A.L.R.2d 1202.
10 C.J.S. Bills and Notes § 43.

§ 55-3-119. Other writings affecting instrument.

(1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.

(2) A separate agreement does not affect the negotiability of an instrument.

History: 1953 Comp., § 50A-3-119, enacted by Laws 1961, ch. 96, § 3-119.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. This section is new. It is intended to resolve conflicts as to the effect of a separate writing upon a negotiable instrument.

1. This article does not attempt to state general rules as to when an instrument may be varied or affected by parol evidence, except to the extent indicated by the comment to the preceding section. This section is limited to the effect of a separate written

agreement executed as a part of the same transaction. The separate writing is most commonly an agreement creating or providing for a security interest such as a mortgage, chattel mortgage, conditional sale or pledge. It may, however, be any type of contract, including an agreement that upon certain conditions the instrument shall be discharged or is not to be paid, or even an agreement that it is a sham and not to be enforced at all. Nothing in this section is intended to validate any such agreement which is fraudulent or void as against public policy, as in the case of a note given to deceive a bank examiner.

2. Other parties, such as an accommodation indorser, are not affected by the separate writing unless they were also parties to it as a part of the transaction by which they became bound on the instrument.

3. The section applies to negotiable instruments the ordinary rule that writings executed as a part of the same transaction are to be read together as a single agreement. As between the immediate parties a negotiable instrument is merely a contract, and is no exception to the principle that the courts will look to the entire contract in writing. Accordingly a note may be affected by an acceleration clause, a clause providing for discharge under certain conditions, or any other relevant term in the separate writing. "May be modified or affected" does not mean that the separate agreement must necessarily be given effect. There is still room for construction of the writing as not intended to affect the instrument at all, or as intended to affect it only for a limited purpose such as foreclosure or other realization of collateral. If there is outright contradiction between the two, as where the note is for $1,000 but the accompanying mortgage recites that it is for $2,000, the note may be held to stand on its own feet and not to be affected by the contradiction.

4. Under this article a purchaser of the instrument may become a holder in due course although he takes it with knowledge that it was accompanied by a separate agreement, if he has no notice of any defense or claim arising from the terms of the agreement. If any limitation in the separate writing in itself amounts to a defense or claim, as in the case of an agreement that the note is a sham and cannot be enforced, a purchaser with notice of it cannot be a holder in due course. The section also covers limitations which do not in themselves give notice of any present defense or claim, such as conditions providing that under certain conditions the note shall be extended for one year. A purchaser with notice of such limitations may be a holder in due course, but he takes the instrument subject to the limitation. If he is without such notice, he is not affected by such a limiting clause in the separate writing.

5. Subsection (2) rejects decisions which have carried the rule that contemporaneous writings must be read together to the length of holding that a clause in a mortgage affecting a note destroyed the negotiability of the note. The negotiability of an instrument is always to be determined by what appears on the face of the instrument alone, and if it is negotiable in itself a purchaser without notice of a separate writing is in no way affected by it. If the instrument itself states that it is subject to or governed by

any other agreement, it is not negotiable under this article; but if it merely refers to a separate agreement or states that it arises out of such an agreement, it is negotiable.

Cross references.Point 1: Section 3-119.

Point 4: Section 3-304(4) (b).

Point 5: Section 3-105(2) (a) and (1) (c).

Definitional cross references."Agreement". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Rights". Section 1-201.

"Term". Section 1-201.

"Written" and "writing". Section 1-201.

ANNOTATION

No cure available to make defective note negotiable under code. - An instrument which in and of itself did not meet the requirements of 55-3-104 NMSA 1978 cannot be made negotiable for Article 3 purposes by reference to another document which purports to cure the defects in the note's negotiability. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

However still negotiable under ordinary contract law. - Even though a note or instrument is not a "negotiable instrument" for Article 3 purposes, it may nevertheless be negotiable between the parties involved under ordinary contract law. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

Extension note generally not novation. - An extension note extending only the due date does not constitute a novation unless a contrary intention is shown. Where the original note contains a provision allowing reasonable attorney's fees for collection, this provision is not altered by the extension note. First Nat'l Bank v. Niccum, 649 F.2d 763 (10th Cir. 1981).

Stock transfer agreement. - All documents executed as part of a stock transfer agreement are to be considered together and the terms of all such documents are binding upon even a holder in due course with notice of them. Color World TV Rental, Inc. v. White, 25 Bankr. 652 (Bankr. D.N.M. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 54, 62, 70 to 72, 147, 460; 12 Am. Jur. 2d Bills and Notes § 1241.
Reference to extrinsic agreement as affecting negotiability of bill, note or trade acceptance, 104 A.L.R. 1378.
10 C.J.S. Bills and Notes §§ 44 to 46, 141, 142.

§ 55-3-120. Instruments "payable through" bank.

An instrument which states that it is "payable through" a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.

History: 1953 Comp., § 50A-3-120, enacted by Laws 1961, ch. 96, § 3-120.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. Insurance, dividend or payroll checks, and occasionally other types of instruments, are sometimes made payable "through" a particular bank. This section states the commercial understanding as to the effect of such language. The bank is not named as drawee, and it is not ordered or even authorized to pay the instrument out of the drawer's account or any other funds of the drawer in its hands. Neither is it required to take the instrument for collection in the absence of special agreement to that effect. It is merely designated as a collecting bank through which presentment is properly made to the drawee.

Definitional cross references."Bank". Section 1-201.

"Collecting bank". Section 4-105.

"Instrument". Section 3-102.

"Presentment". Section 3-504.

ANNOTATION

Drawer of draft must expressly write words on instrument itself. - To make a draft payable "through" or "at" a bank, and thus designate the bank as a mere conduit for payment and not as a "payor" bank directly ordered to pay, the drawer of the draft must expressly write the words "through," "pay through," "at," "payable at," or similar words before the name of the bank on the instrument itself. A party who is not the drawer cannot, without authority from the drawer, add these words to the instrument, and saying "payable thru" on some attached document has no effect on the terms set out in

the instrument itself. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 495, 710; 11 Am. Jur. 2d Bills and Notes § 111.
9 C.J.S. Banks and Banking § 216; 10 C.J.S. Bills and Notes § 32.

§ 55-3-121. Instruments payable at bank.

A note or acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it.

History: 1953 Comp., § 50A-3-121, enacted by Laws 1961, ch. 96, § 3-121.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 87, Uniform Negotiable Instruments Law.

Changes. Alternative sections offered.

Purposes of changes. The original Section 87 has been amended so extensively that no uniformity has been achieved; and in many parts of the country it has been consistently disregarded in practice.

The original section represents the commercial and banking practice of New York and the surrounding states, according to which a note or acceptance made payable at a bank is treated as the equivalent of a draft drawn on the bank. The bank is not only authorized but ordered to make payment out of the account of the maker or acceptor when the instrument falls due, and it is expected to do so without consulting him. In the western and southern states a contrary understanding prevails. The note or acceptance payable at a bank is treated as merely designating a place of payment, as if the instrument were made payable at the office of an attorney. The bank's only function is to notify the maker or acceptor that the instrument has been presented and to ask for his instructions; and in the absence of specific instructions it is not regarded as required or even authorized to pay. Notwithstanding the original section western and southern banks have consistently followed the practice of asking for instructions and treating a direction not to pay as a revocation, equivalent to a direction to stop payment.

Both practices are well established, and the division is along geographical lines. A change in either practice might lead to undesirable consequences for holders, banks or depositors. The instruments involved are chiefly promissory notes, which infrequently cross state lines. There is no great need for uniformity. This section therefore offers alternative provisions, the first of which states the New York commercial understanding, and the second that of the south and west.

Cross reference.Section 3-502.

Definitional cross references."Acceptance". Section 3-410.

"Account". Section 4-104.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Order". Section 3-102.

ANNOTATION

Compiler's notes. - New Mexico adopted Alternative B of 3-121 of the 1972 Official Text of the U.C.C.

Drawer of draft must expressly write words on instrument itself. - To make a draft payable "through" or "at" a bank, and thus designate the bank as a mere conduit for payment and not as a "payor" bank directly ordered to pay, the drawer of the draft must expressly write the words "through," "pay through," "at," "payable at," or similar words before the name of the bank on the instrument itself. A party who is not the drawer cannot, without authority from the drawer, add these words to the instrument, and saying "payable thru" on some attached document has no effect on the terms set out in the instrument itself. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 495; 11 Am. Jur. 2d Bills and Notes § 111.
9 C.J.S. Banks and Banking § 225.

§ 55-3-122. Accrual of cause of action.

(1) A cause of action against a maker or an acceptor accrues:

(a) in the case of a time instrument on the day after maturity;

(b) in the case of a demand instrument upon its date or, if no date is stated, on the date

of issue.

(2) A cause of action against the obligor of a demand or time certificate of deposit accrues upon demand, but demand on a time certificate may not be made until on or after the date of maturity.

(3) A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand.

(4) Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment:

(a) in the case of a maker, acceptor or other primary obligor of a demand instrument, from the date of demand;

(b) in all other cases from the date of accrual of the cause of action.

History: 1953 Comp., § 50A-3-122, enacted by Laws 1961, ch. 96, § 3-122; 1967, ch. 186, § 8.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purpose.1. This section is new. It follows the generally accepted rule that action may be brought on a demand note immediately upon issue, without demand, since presentment is not required to charge the maker under the original act or under this article. An exception is made in the case of certificates of deposit for the reason that banking custom and expectation is that demand will be made before any liability is incurred by the bank, and the additional reason that such certificates are issued with the understanding that they will be held for a considerable length of time, which in many instances exceeds the period of the statute of limitations. As to makers and acceptors of time instruments generally, the cause of action accrues on the day after maturity. As to drawers of drafts (including checks) and all indorsers, the cause of action accrues, in conformity with their underlying contract on the instrument (Sections 3-413 and 3-414), only upon demand made, typically in the form of a notice of dishonor, after the instrument has been presented to and dishonored by the person designated on the instrument to pay it.

2. Closely related to the accrual of a cause of action is the question of when interest begins to run where the instrument is blank on the point. A term in the instrument providing for interest controls. (See Section 3-118(d) for the construction of a term which provides for interest but does not specify the rate or the time from which it runs.) In the absence of such a term and except in the case of a maker, acceptor or other primary obligor of a demand instrument Subsection (4) states the rule that interest at the

judgment rate runs from the date the cause of action accrues. In the case of a primary obligor of a demand instrument, interest runs from the date of demand although the cause of action (Subsection (1) (a)) accrues on the stated date of the instrument or on issue. There has been a conflict in the decisions as to when "legal" interest begins to run on a demand note. Some courts have taken the view that, since the note is due when issued without demand, it should follow that interest runs from the same date. On the other hand it is clear that there is no default until after demand by the holder and thus no reason for the imposition of the penalty on the maker. Subsection (4), therefore, adopts the position of the majority of the courts that on a demand note interest runs only from demand. This same rule is applied to acceptors and other primary obligors on a demand instrument.

Cross references.Point 1: Sections 3-501, 3-413 and 3-414.

Point 2: Section 3-118(d).

Definitional cross references."Action". Section 1-201.

"Certificate of deposit". Section 3-102.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Notice of dishonor". Section 3-508.

"On demand". Section 3-108.

ANNOTATION

Compiler's notes. - Laws 1967, ch. 186, § 9, is compiled as 55-3-403 NMSA 1978.

Statute of limitations on cashier's check. - The statute of limitations as to an action against a certifying bank or bank issuing a cashier's check runs from the date of the check, or if undated, from the date of issue, rather than from the making of a demand for payment. Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (Ct. App.), rev'd, 85 N.M. 511, 514 P.2d 30 (1973) (adopting court of appeals' dissenting opinion).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

For comment, "Negotiable Instruments - A Cause of Action on a Cashier's Check Accrues from the Date of Issuance," see 4 N.M. L. Rev. 253 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 466, 602; 11 Am. Jur. 2d Bills and Notes § 286; 12 Am. Jur. 2d Bills and Notes §§ 1032, 1044, 1048, 1050, 1055, 1056.
Rate of interest after maturity of obligation which fixes rate of interest expressly until maturity, 16 A.L.R.2d 902.
Time for which interest is recoverable on demand note or like demand instrument containing no provision as to interest, 45 A.L.R.2d 1202.
10 C.J.S. Bills and Notes §§ 245, 529.

Part 2

TRANSFER AND NEGOTIATION

§ 55-3-201. Transfer; right to indorsement.

(1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

(2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.

(3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

History: 1953 Comp., § 50A-3-201, enacted by Laws 1961, ch. 96, § 3-201.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 27, 49 and 58, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and new provisions.

Purposes of changes and new matter. To make it clear that:

1. The section applies to any transfer, whether by a holder or not. Any person who transfers an instrument transfers whatever rights he has in it. The transferee acquires those rights even though they do not amount to "title."

2. The transfer of rights is not limited to transfers for value. An instrument may be transferred as a gift, and the donee acquires whatever rights the donor had.

3. A holder in due course may transfer his rights as such. The "shelter" provision of the last sentence of the original Section 58 is merely one illustration of the rule that anyone may transfer what he has. Its policy is to assure the holder in due course a free market for the paper, and that policy is continued in this section. The provision is not intended and should not be used to permit any holder who has himself been a party to any fraud or illegality affecting the instrument, or who has received notice of any defense or claim against it, to wash the paper clean by passing it into the hands of a holder in due course and then repurchasing it. The operation of the provision is illustrated by the following examples:

(a) A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes as a holder in due course. After the instrument is overdue B gives it to C, who has notice of the fraud. C succeeds to B's rights as a holder in due course, cutting off the defense.

(b) A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes as a holder in due course. A then repurchases the instrument from B. A does not succeed to B's rights as a holder in due course, and remains subject to the defense of fraud.

(c) A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes with notice of the fraud. B negotiates it to C, a holder in due course, and then repurchases the instrument from C. B does not succeed to C's rights as a holder in due course, and remains subject to the defense of fraud.

(d) The same facts as (c), except that B had no notice of the fraud when he first acquired the instrument, but learned of it while he was a holder and with such knowledge negotiated to C. B does not succeed to C's rights as a holder in due course, and his position is not improved by the negotiation and repurchase.

4. The rights of a transferee with respect to collateral for the instrument are determined by Article 9 (Secured Transactions).

5. Subsection (2) restates original Section 27 and is intended to make it clear that a transfer of a limited interest in the instrument passes the rights of the transferor to the extent of the interest given. Thus a transferee for security acquires all such rights subject of course to the provisions of Article 9 (Secured Transactions).

6. Subsection (3) applies only to the transfer for value of an instrument payable to order or specially indorsed. It has no application to a gift, or to an instrument payable or indorsed to bearer or indorsed in blank. The transferee acquires, in the absence of any agreement to the contrary, the right to have the indorsement of the transferor. This right

is now made enforceable by an action for specific performance. Unless otherwise agreed, it is a right to the general indorsement of the transferor with full liability as indorser, rather than to an indorsement without recourse. The question commonly arises where the purchaser has paid in advance and the indorsement is omitted fraudulently or through oversight; a transferor who is willing to indorse only without recourse or unwilling to indorse at all should make his intentions clear. The agreement for the transferee to take less than an unqualified indorsement need not be an express one, and the understanding may be implied from conduct, from past practice or from the circumstances of the transaction.

7. Subsection (3) follows the second sentence of the original Section 49 in providing that there is no effective negotiation until the indorsement is made. Until that time the purchaser does not become a holder, and if he receives earlier notice of defense against or claim to the instrument he does not qualify as a holder in due course under Section 3-302(1) (c).

8. The final clause of Subsection (3), which is new, is intended to make it clear that the transferee without indorsement of an order instrument is not a holder and so is not aided by the presumption that he is entitled to recover on the instrument provided in Section 3-307(2). The terms of the obligation do not run to him, and he must account for his possession of the unindorsed paper by proving the transaction through which he acquired it. Proof of a transfer to him by a holder is proof that he has acquired the rights of a holder and that he is entitled to the presumption.

Cross references.Sections 3-202 and 3-416.

Point 5: Article 9.

Point 7: Section 3-302(1) (c).

Point 8: Section 3-307(2).

Definitional cross references."Bearer". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Negotiation". Section 3-202.

"Notice". Section 1-201.

"Party". Section 1-201.

"Presumption". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

ANNOTATION

Defense on transfer without endorsement. - Where a promissory note is payable to a given person or order, and is transferred to another by such person, without endorsement, such note is subject to any defense which existed against the note in the hands of the original payee. Hill v. Hart, 23 N.M. 226, 167 P. 710 (1917) (decided under former law).

Rights of accommodation maker on note. - Where a note and mortgage are assigned to an accommodation maker who then paid up the note, the accommodation maker succeeds to the payee's rights and may sue the maker on the note, and the note was not discharged when paid by the accommodation maker. Simson v. Bilderbeck, Inc., 76 N.M. 667, 417 P.2d 803 (1966).

And notes deemed security without formal assignment. - Evidence justified finding that notes, secured by senior mortgage and in possession of bank which advanced money with which to pay the notes, were held by it as security against junior mortgage, though not formally assigned to the bank. Citizens' Bank v. Brown, 38 N.M. 310, 32 P.2d 755 (1934) (decided under former law).

Law reviews. - For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision' " see 4 Nat. Resources J. 398 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Assignments § 102; 11 Am. Jur. 2d Bills and Notes §§ 337, 371, 373, 375, 376, 405, 421, 422, 649; 12 Am. Jur. 2d Bills and Notes §§ 1023, 1197.
Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 A.L.R. 163.
Gift of note to maker by delivery or surrender of instrument, 63 A.L.R.2d 264.
10 C.J.S. Bills and Notes §§ 232, 304.

§ 55-3-202. Negotiation.

(1) Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery.

(2) An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.

(3) An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment.

(4) Words of assignment, condition, waiver, guaranty, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement.

History: 1953 Comp., § 50A-3-202, enacted by Laws 1961, ch. 96, § 3-202.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 30, 31 and 32, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and new provisions.

Purposes of changes and new matter. To make it clear that:

1. Negotiation is merely a special form of transfer, the importance of which lies entirely in the fact that it makes the transferee a holder as defined in Section 1-201. Any negotiation carries a transfer of rights as provided in the section on transfer (Subsections (1) and (2) of Section 3-201).

2. Any instrument which has been specially indorsed can be negotiated only with the indorsement of the special indorsee as provided in Section 3-204 on special indorsement. An instrument indorsed in blank may be negotiated by delivery alone, provided that it bears the indorsement of all prior special indorsees.

3. Subsection (2) follows decisions holding that a purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not sufficient for negotiation. The indorsement must be on the instrument itself or on a paper intended for the purpose which is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge.

4. The cause of action on an instrument cannot be split. Any indorsement which purports to convey to any party less than the entire amount of the instrument is not effective for negotiation. This is true of either "Pay A one-half," or "Pay A two-thirds and B one-third," and neither A nor B becomes a holder. On the other hand an indorsement reading merely "Pay A and B" is effective, since it transfers the entire cause of action to A and B as tenants in common.

The partial indorsement does, however, operate as a partial assignment of the cause of action. The provision makes no attempt to state the legal effect of such an assignment, which is left to the local law. In a jurisdiction in which a partial assignee has any rights,

either at law or in equity, the partial indorsee has such rights; and in any jurisdiction where a partial assignee has no rights the partial indorsee has none.

5. Subsection (4) is intended to reject decisions holding that the addition of such words as "I hereby assign all my right, title and interest in the within note" prevents the signature from operating as an indorsement. Such words usually are added by laymen out of an excess of caution and a desire to indicate formally that the instrument is conveyed, rather than with any intent to limit the effect of the signature.

6. Subsection (4) is also intended to reject decisions which have held that the addition of "I guarantee payment" indicates an intention not to indorse but merely to guarantee. Any signature with such added words is an indorsement, and if it is made by a holder is effective for negotiation; but the liability of the indorser may be affected by the words of guarantee as provided in the section on the contract of a guarantor (Section 3-416).

Cross references.Section 3-417.

Point 1: Sections 1-201 and 3-201(1) and (2).

Point 2: Section 3-204.

Point 6: Section 3-416.

Definitional cross references."Bearer". Section 1-201.

"Delivery". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Written". Section 1-201.

ANNOTATION

A negotiable instrument may be assigned or transferred without a writing. Goode v. Harris, 77 N.M. 178, 420 P.2d 767 (1966).

Law reviews. - For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision' " see 4 Nat. Resources J. 398 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 314 to 317, 320, 323, 325, 328, 351, 353, 360, 367; 12 Am. Jur. 2d Bills and Notes § 1026. Production of paper purporting to be endorsed in blank by payee or by a special endorsee, as prima facie evidence of plaintiff's title, 11 A.L.R. 952; 85 A.L.R. 304. Endorsement of bill or note in form of guaranty of payment, 21 A.L.R. 1375; 33 A.L.R.

97; 46 A.L.R. 1516.
Endorsement without words of negotiability, of note payable to maker, as affecting its validity and effect, 42 A.L.R. 1067; 50 A.L.R. 426.
Effect of assignment endorsed on back of commercial paper, 44 A.L.R. 1353.
Construction and application of provision in respect to endorsements which purport to transfer part only of amount payable, 63 A.L.R. 499.
Authority of bank cashier to endorse and transfer commercial paper, 37 A.L.R.2d 508.
Authority of corporate officers to endorse and transfer commercial paper, 37 A.L.R.2d 523.
Endorsement of negotiable instrument by writing not on instrument itself, 19 A.L.R.3d 1297.
10 C.J.S. Bills and Notes §§ 13, 197.

§ 55-3-203. Wrong or misspelled name.

Where an instrument is made payable to a person under a misspelled name or one other than his own he may indorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument.

History: 1953 Comp., § 50A-3-203, enacted by Laws 1961, ch. 96, § 3-203.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 43, Uniform Negotiable Instruments Law.

Changes. Reworded.

Purposes of changes. To make it clear that:

1. The party whose name is wrongly designated or misspelled may make an indorsement effective for negotiation by signing in his true name only. This is not commercially satisfactory, since any subsequent purchaser may be left in doubt as to the state of the title; but whether it is done intentionally or through oversight, the party transfers his rights and is liable on his indorsement, and there is a negotiation if identity exists.

2. He may make an effective indorsement in the wrongly designated or misspelled name only. This again is not commercially satisfactory, since his liability as an indorser may require proof of identity.

3. He may indorse in both names. This is the proper and desirable form of indorsement, and any person called upon to pay an instrument or under contract to purchase it may protect his interest by demanding indorsement in both names, and is not in default if such demand is refused.

Cross reference.Section 3-401(2).

Definitional cross references."Instrument". Section 3-102.

"Person". Section 1-201.

"Signature". Section 3-401.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 352.
Mistake in name in endorsement of check, preventing payment thereof before failure of drawee, 21 A.L.R. 1556.
10 C.J.S. Bills and Notes § 208.

§ 55-3-204. Special indorsement; blank indorsement.

(1) A special indorsement specifies the person to whom or to whose order it makes the instrument payable. Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement.

(2) An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed.

(3) The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

History: 1953 Comp., § 50A-3-204, enacted by Laws 1961, ch. 96, § 3-204.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 9(5), 33, 34, 35, 36 and 40, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and rule of Section 40 reversed.

Purposes of changes.The last sentence of Subsection (1) reverses the rule of the original Section 40, under which an instrument drawn payable to bearer and specially indorsed could be further negotiated by delivery alone. The principle here adopted is that the special indorser, as the owner even of a bearer instrument, has the right to direct the payment and to require the indorsement of his indorsee as evidence of the satisfaction of his own obligation. The special indorsee may of course make it payable to bearer again by himself indorsing in blank.

Cross reference.Section 3-202.

Definitional cross references."Bearer". Section 1-201.

"Delivery". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Signature". Section 3-401.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 360, 361, 395.
10 C.J.S. Bills and Notes §§ 212, 213.

§ 55-3-205. Restrictive indorsements.

An indorsement is restrictive which either:

(a) is conditional; or

(b) purports to prohibit further transfer of the instrument; or

(c) includes the words "for collection," "for deposit," "pay any bank," or like terms signifying a purpose of deposit or collection; or

(d) otherwise states that it is for the benefit or use of the indorser or of another person.

History: 1953 Comp., § 50A-3-205, enacted by Laws 1961, ch. 96, § 3-205.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 36 and 39, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and new provisions.

Purposes of changes and new matter.1. This section is intended to provide a definition of restrictive indorsements which will include the varieties of indorsement described in original Sections 36 and 39. The separate mention of conditional indorsements, those prohibiting transfer, indorsements in the bank deposit or collection process, and other indorsements to a fiduciary, permits separate treatment in subsequent sections where

policy so requires.

2. This is part of a series of changes of the prior uniform statutory provisions effected by Sections 3-102, 3-205, 3-206, 3-304, 3-419, 3-603, and in Article 4, Sections 4-203 and 4-205. The purpose of the changes is generally to require a taker or payor under restrictive indorsement to apply or pay value given consistently with the indorsement, but to provide certain exceptions applying to banks in the collection process (other than depositary banks), and to some other takers and payors.

Cross references.Sections 3-102, 3-202(2), 3-205, 3-206, 3-304, 3-419, 3-603, 4-203 and 4-205.

Definitional cross references."Instrument". Section 3-102.

"Person". Section 1-201.

ANNOTATION

This section and 55-3-206 NMSA 1978 displace preexisting law in the entire area of the effect of restrictive indorsements. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

Codified restrictive indorsements exclude common-law exceptions. - The codification of the law of restrictive indorsements contained in the UCC is sufficiently comprehensive and detailed to exclude common-law exceptions which are not mentioned. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

New Mexico does not recognize any doctrine of waiver of restrictive indorsements. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

Words "deposit to the account of" clearly constitute restrictive indorsement. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

Law reviews. - For annual survey of New Mexico law relating to commercial law, see 12 N.M.L. Rev. 173 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 362, 368. Undertaking of one who endorses a note without recourse, 2 A.L.R. 216; 91 A.L.R. 399. Endorsement, "To order of any bank or banker," as a restrictive endorsement, 10 A.L.R. 709.
10 C.J.S. Bills and Notes § 214.

§ 55-3-206. Effect of restrictive indorsement.

(1) No restrictive indorsement prevents further transfer or negotiation of the instrument.

(2) An intermediary bank, or a payor bank which is not the depositary bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment.

(3) Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words "for collection," "for deposit," "pay any bank," or like terms (Subparagraphs (a) and (c) of Section 3-205 [55-3-205 NMSA 1978]) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of Section 3-302 [55-3-302 NMSA 1978] on what constitutes a holder in due course.

(4) The first taker under an indorsement for the benefit of the indorser or another person (Subparagraph (d) of Section 3-205 [55-3-205 NMSA 1978]) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such taker is a holder in due course if he otherwise complies with the requirements of Section 3-302 [55-3-302 NMSA 1978] on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsement unless he has knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty (Subsection (2) of Section 3-304 [55-3-304 NMSA 1978]).

History: 1953 Comp., § 50A-3-206, enacted by Laws 1961, ch. 96, § 3-206.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 36, 37, 39 and 47, Uniform Negotiable Instruments Law.

Changes. Completely revised.

Purposes of changes.1. Subsections (1) and (2) apply to all four classes of restrictive indorsements defined in Section 3-205. Conditional indorsements and indorsements for deposit or collection, defined in Paragraphs (a) and (c) of Section 3-205, are also subject to Subsection (3); and trust indorsements as defined in Paragraph (d) of Section 3-205 are subject to Subsection (4). This section negates the implication which has sometimes been found in the original Sections 37 and 47, that under a restrictive indorsement neither the indorsee nor any subsequent taker from him could become a holder in due course. By omitting the original Section 47, this article also avoids any implication that a discharge is effective against a holder in due course. See Section 3-602.

2. Under Subsection (1) an indorsement reading "Pay A only," or any other indorsement

purporting to prohibit further transfer, is without effect for that purpose. Such indorsements have rarely appeared in reported American cases. Ordinarily further negotiation will be contemplated by the indorser, if only for bank collection. The indorsee becomes a holder, and the indorsement does not of itself give notice to subsequent parties of any defense or claim of the indorser. Hence this section gives such an indorsement the same effect as an unrestricted indorsement.

3. Subsection (2) permits an intermediary bank (Sections 3-102(3) and 4-105) or a payor bank which is not a depositary bank (Sections 3-102(3) and 4-105) to disregard any restrictive indorsement except that of the bank's immediate transferor. Such banks ordinarily handle instruments, especially checks, in bulk and have no practicable opportunity to consider the effect of restrictive indorsements. Subsection (2) does not affect the rights of the restrictive indorser against parties outside the bank collection process or against the first bank in the collection process; such rights are governed by Subsections (3) and (4) and Section 3-603.

4. Conditional indorsements are treated by this section like indorsements for deposit or collection. Under Subsection (3) any transferee under such an indorsement except an intermediary bank becomes a holder for value to the extent that he acts consistently with the indorsement in paying or applying any value given by him for or on the security of the instrument. Contrary to the original Section 39, Subsection (3) permits a transferee under a conditional indorsement to become a holder in due course free of the conditional indorser's claim.

5. Of the indorsements covered by this section those "for collection," "for deposit" and "pay any bank" are overwhelmingly the most frequent. Indorsements "for collection" or "for deposit" may be either special or blank; indorsements "pay any bank" are governed by Section 4-201(2). Instruments so indorsed are almost invariably destined to be lodged in a bank for collection. Subsection (3) requires any transferee other than an intermediary bank to act consistently with the purpose of collection, and Section 3-603 lays down a similar rule for payors not covered by Subsection (2).

6. Subsection (4), applying to trust indorsements other than those for deposit or collection (Paragraph (d) of Section 3-205) is similar to Subsection (3); but in Subsection (4) the duty to act consistently with the indorsement is limited to the first taker under it. If an instrument is indorsed "Pay T in trust for B" or "Pay T for B" or "Pay T for account of B" or "Pay T as agent for B," whether B is the indorser or a third person, T is of course subject to liability for any breach of his obligation as fiduciary. But trustees commonly and legitimately sell trust assets in transactions entirely outside the bank collection process; the trustee therefore has power to negotiate the instrument and make his transferee a holder in due course. Whether transferees from T have notice of a breach of trust such as to deny them the status of holders in due course is governed by the section on notice to purchasers (Section 3-304); the trust indorsement does not of itself give such notice. Payors are immunized either by Subsection (2) of this section or by Section 3-603: payment to the trustee or to a purchaser from the trustee is "consistent with the terms" of the trust indorsement under Section 3-603(1) (b).

7. Several sections of Article 3 and Article 4 are explicitly made subject to the rules stated in this section. See Sections 3-306, 3-419, 4-203 and 4-205.

Cross references.Point 1: Sections 3-205 and 3-602.

Point 2: Section 3-205(b).

Point 3: Sections 3-102(3), 3-419(4), 3-603, 4-105 and 4-205 (2).

Point 4: Section 3-205(a).

Point 5: Sections 3-205, 3-603 and 4-201.

Point 6: Sections 3-205, 3-304 and 3-603.

Point 7: Sections 3-306, 3-419, 4-203 and 4-205.

Definitional cross references."Bank". Section 1-201.

"Depositary bank". Sections 3-102(3) and 4-105.

"Holder in due course". Section 3-302.

"Intermediary bank". Sections 3-102(3) and 4-105.

"Negotiation". Sections 3-102(2) and 3-202.

"Payor bank". Sections 3-102(3) and 4-105.

"Restrictive indorsement". Section 3-205.

"Transfer". Section 3-201.

ANNOTATION

This section and 55-3-205 NMSA 1978 displace preexisting law in the entire area of the effect of restrictive indorsements. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

Codified restrictive indorsements exclude common-law exceptions. - The codification of the law of restrictive indorsements contained in the UCC is sufficiently comprehensive and detailed to exclude common-law exceptions which are not mentioned. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

New Mexico does not recognize any doctrine of waiver of restrictive indorsements. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

This section imposes duty upon bank to pay consistent with restrictive indorsement, and this duty gives rise to liability for the bank if it fails to do so. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 5, 368, 408, 468.
Endorsement, "To the order of any bank or banker," as a restrictive endorsement, 10 A.L.R. 709.
Maker's endorsement of note payable to himself without words of negotiability, 42 A.L.R. 1067; 50 A.L.R. 426.
For deposit only, endorser's liability on endorsement to original, or subsequent, endorsee, 60 A.L.R. 866.
Endorsement "for deposit only" as affecting right of holder of paper against drawer or maker who would have a good defense as against payee, 75 A.L.R. 1415.
Sale or negotiation for value of commercial paper after it has been endorsed by the holder with a restrictive endorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course, 149 A.L.R. 318.
10 C.J.S. Bills and Notes § 214.

§ 55-3-207. Negotiation effective although it may be rescinded.

(1) Negotiation is effective to transfer the instrument although the negotiation is:

(a) made by an infant, a corporation exceeding its powers or any other person without capacity; or

(b) obtained by fraud, duress or mistake of any kind; or

(c) part of an illegal transaction; or

(d) made in breach of duty.

(2) Except as against a subsequent holder in due course such negotiation is in an appropriate case subject to rescission, the declaration of a constructive trust or any other remedy permitted by law.

History: 1953 Comp., § 50A-3-207, enacted by Laws 1961, ch. 96, § 3-207.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 22, 58 and 59, Uniform Negotiable Instruments Law.

Changes. Completely revised.

Purposes of changes. To make it clear that:

1. The original Section 22, which covered only negotiation by an infant or a corporation, is extended by this section to include other negotiations which may be rescinded. The provision applies even though the party's lack of capacity, or the illegality, is of a character which goes to the essence of the transaction and makes it entirely void, and even though the party negotiating has incurred no liability and is entitled to recover the instrument and have his indorsement cancelled.

2. It is inherent in the character of negotiable paper that any person in possession of an instrument which by its terms runs to him is a holder, and that anyone may deal with him as a holder. The principle finds its most extreme application in the well settled rule that a holder in due course may take the paper even from a thief and be protected against the claim of the rightful owner. Where there is actual negotiation, even in an entirely void transaction, it is no less effective. The policy of this provision, as well as of the last sentence of the original Section 59, is that any person to whom an instrument is negotiated is a holder until the instrument has been recovered from his possession; and that any person who negotiates an instrument thereby parts with all his rights in it until such recovery. The remedy of any such claimant is to recover the paper by replevin or otherwise; to impound it or to enjoin its enforcement, collection or negotiation; to recover its proceeds from the holder; or to intervene in any action brought by the holder against the obligor. As provided in the section on the rights of one not a holder in due course (Section 3-306) his claim is not a defense to the obligor unless he himself defends the action.

3. Negotiation under this article always includes delivery. (Section 3-202, and see Section 1-201(14)). Acquisition of possession by a thief can therefore never be negotiation under this section. But delivery by the thief to another person may be.

4. Nothing in this section is intended to impose any liability on the party negotiating. He may assert any defense available to him under Sections 3-305, 3-306 and 3-307.

5. A holder in due course takes the instrument free from all claims to it on the part of any person (Section 3-305(1)). Against him there can be no rescission or other remedy, even though the prior negotiation may have been fraudulent or illegal in its essence and entirely void. As against any other party the claimant may have any remedy permitted by law. This section is not intended to specify what that remedy may be, or to prevent any court from imposing conditions or limitations such as prompt action or return of the consideration received. All such questions are left to the law of the particular jurisdiction. Subsection (2) of Section 3-207 gives no right where it would not otherwise exist. The section is intended to mean that any remedies afforded by the local law are cut off only by a holder in due course, and that other parties, such as a bona fide purchaser with notice that the instrument is overdue, take it subject to the claim as provided in

Paragraph (a) of the section on the rights of one not a holder in due course (Section 3-306).

Cross references.Point 2: Sections 1-201 and 3-306(d).

Point 3: Sections 1-201 and 3-202.

Point 4: Sections 3-305, 3-306 and 3-307.

Point 5: Sections 3-305(1) and 3-306(a).

Definitional cross references."Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Negotiation". Section 3-202.

"Person". Section 1-201.

"Remedy". Section 1-201.

ANNOTATION

Endorser of corporate paper does not lose his rights and status as such by the mere circumstance that he happens to be an officer and director. Pacific Nat'l Agrl. Credit Corp. v. Hagerman, 39 N.M. 549, 51 P.2d 857 (1935) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 333, 367, 371, 722.
Refusal to pay debt as economic duress or business compulsion avoiding compromise or release, 9 A.L.R.4th 942.
10 C.J.S. Bills and Notes § 220.

§ 55-3-208. Reacquisition.

Where an instrument is returned to or reacquired by a prior party he may cancel any endorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his indorsement has been canceled is discharged as against subsequent holders in due course as well.

History: 1953 Comp., § 50A-3-208, enacted by Laws 1961, ch. 96, § 3-208.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 48, 50 and 121, Uniform Negotiable Instruments Law.

Changes. Parts of original sections combined and rephrased.

Purposes of changes. No change in the substance of the law is intended. "Returned to or reacquired by" is substituted for "negotiated back to" in the original Section 50 in order to make it clear that the section applies to a return by an indorsee who does not himself indorse. "Discharged" is substituted for the original language to make it clear that the discharge of the intervening party is included within the rule of the section on effect of discharge against a holder in due course (Section 3-602) and is not effective against a subsequent holder in due course who takes without notice of it.

The reacquirer may keep the instrument himself or he may further negotiate it. On further negotiation he may or may not cancel intervening indorsements. In any case intervening indorsers are discharged as to the reacquirer, since if he attempted to enforce it against them they would have an action back against him. Where the reacquirer negotiates without cancelling the intervening indorsements, the section provides that such indorsers are discharged except against subsequent holders in due course. The intervening indorser whose indorsement is stricken is, in conformity with Section 3-605, discharged even as against subsequent holders in due course.

Cross references.Sections 3-602, 3-603(2) and 3-605.

Definitional cross references."Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 319, 393, 529.
Effect of endorsement and delivery of note to comakers, 51 A.L.R. 936.
10 C.J.S. Bills and Notes §§ 215, 470.

Part 3

RIGHTS OF A HOLDER

§ 55-3-301. Rights of a holder.

The holder of an instrument whether or not he is the owner may transfer or negotiate it

and, except as otherwise provided in Section 3-603 [55-3-603 NMSA 1978] on payment or satisfaction, discharge it or enforce payment in his own name.

History: 1953 Comp., § 50A-3-301, enacted by Laws 1961, ch. 96, § 3-301.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 51, Uniform Negotiable Instruments Law.

Changes. Reworded. The provision in the original Section 51 as to discharge by payment is now covered by Section 3-603(1).

Purposes of changes. The section is revised to state in one provision all the rights of a holder, and to make it clear that every holder has such rights. The only limitations are those found in Section 3-603 on payment or satisfaction. That section provides (with stated exceptions) that payment to a holder discharges the liability of the party paying even though made with knowledge of a claim of another person to the instrument, unless the adverse claimant posts indemnity or procures the issuance of appropriate legal process restraining the payment. Thus payment to a holder in an adverse claim situation would not give discharge if the adverse claimant had followed either of the procedures provided for in the "unless" clause of Section 3-603; nor would a discharge result from payment in two other specific situations described in Section 3-603.

Cross references.Sections 1-201, 3-307 and 3-603(1).

Definitional cross references."Holder". Section 1-201.

"Instrument". Section 3-102.

"Rights". Section 1-201.

ANNOTATION

When recovery allowed on note. - Where real estate broker executed note to secure purchasers of lodge against amounts in excess of contract price that they might be required to pay to clear title, and purchasers paid or obligated themselves to pay amount in excess of contract price, purchasers were entitled to recover excess from broker. Brock v. Adams, 79 N.M. 17, 439 P.2d 234 (1968).

And when ownership of note presumed. - The payee of a promissory note who has possession thereof is presumed to be the owner, even though his endorsement appears thereon, and it will be presumed that the note was never transferred, or that it had been retransferred to him. Tompkins v. Rain, 26 N.M. 631, 195 P. 800 (1921) (decided under former law).

It is unnecessary for the plaintiff, who is payee in the note in suit, to allege that he owns

the same, as such fact is presumed. First Nat'l Bank v. Lutz, 28 N.M. 615, 216 P. 505 (1923) (decided under former law).

Payee in possession of instrument. - A negotiable instrument payee is always a holder if the payee has the instrument in his possession, since the payee is the person to whom the instrument was issued. Edwards v. Mesch, 107 N.M. 704, 763 P.2d 1169 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 328, 370, 371, 901, 964; 12 Am. Jur. 2d Bills and Notes § 1070.
Right of transferee of note to sue on original claim for which note was given, 11 A.L.R. 449.
Possession of bill or note as essential to maintain action thereon as "holder," 102 A.L.R. 460.
Rights of holder in due course of promissory note as affected by violation of statute as to doing business under an assumed or fictitious name or designation not showing the names of persons interested, 42 A.L.R.2d 548.
Right of one who has transferred paper as collateral security to maintain action thereon in his own name, 43 A.L.R.3d 824.
10 C.J.S. Bills and Notes §§ 206, 224, 452, 471.

§ 55-3-302. Holder in due course.

(1) A holder in due course is a holder who takes the instrument:

(a) for value; and

(b) in good faith; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

(2) A payee may be a holder in due course.

(3) A holder does not become a holder in due course of an instrument:

(a) by purchase of it at judicial sale or by taking it under legal process; or

(b) by acquiring it in taking over an estate; or

(c) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.

(4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased.

History: 1953 Comp., § 50A-3-302, enacted by Laws 1961, ch. 96, § 3-302.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 52, Uniform Negotiable Instruments Law.

Changes. Reworded and new provisions.

Purposes of changes and new matter. The changes are intended to remove uncertainties arising under the original section.

1. The language "without notice that it is overdue" is substituted for that of the original Subsection (2) in order to make it clear that the purchaser of an instrument which is in fact overdue may be a holder in due course if he takes it without notice that it is overdue. Such notice is covered by the section on notice to purchaser (Section 3-304).

2. Subsection (2) is intended to settle the long continued conflict over the status of the payee as a holder in due course. This conflict has turned very largely upon the word "negotiated" in the original Section 52(4), which is now eliminated. The position here taken is that the payee may become a holder in due course to the same extent and under the same circumstances as any other holder. This is true whether he takes the instrument by purchase from a third person or directly from the obligor. All that is necessary is that the payee meet the requirements of this section. In the following cases, among others, the payee is a holder in due course:

a. A remitter, purchasing goods from P, obtains a bank draft payable to P and forwards it to P, who takes it for value, in good faith and without notice as required by this section.

b. The remitter buys the bank draft payable to P, but it is forwarded by the bank directly to P, who takes it in good faith and without notice in payment of the remitter's obligation to him.

c. A and B sign a note as comakers. A induces B to sign by fraud, and without authority from B delivers the note to P, who takes it for value, in good faith and without notice.

d. A defrauds the maker into signing an instrument payable to P. P pays A for it in good faith and without notice, and the maker delivers the instrument directly to P.

e. D draws a check payable to P and gives it to his agent to be delivered to P in payment of D's debt. The agent delivers it to P, who takes it in good faith and without notice in payment of the agent's debt to P. But as to this case see Section 3-304(2), which may apply.

f. D draws a check payable to P but blank as to the amount, and gives it to his agent to be delivered to P. The agent fills in the check with an excessive amount, and P takes it

for value, in good faith and without notice.

g. D draws a check blank as to the name of the payee, and gives it to his agent to be filled in with the name of A and delivered to A. The agent fills in the name of P, and P takes the check in good faith, for value and without notice.

3. Subsection (3) is intended to state existing case law. It covers a few situations in which the purchaser takes the instrument under unusual circumstances which indicate that he is merely a successor in interest to the prior holder and can acquire no better rights. (If such prior holder was himself a holder in due course, the purchaser succeeds to that status under Section 3-201 on Transfer.) The provision applies to a purchaser at an execution sale, a sale in bankruptcy or a sale by a state bank commissioner of the assets of an insolvent bank. It applies equally to an attaching creditor or any other person who acquires the instrument by legal process, even under an antecedent claim; and equally to a representative, such as an executor, administrator, receiver or assignee for the benefit of creditors, who takes over the instrument as part of an estate, even though he is representing antecedent creditors.

Subsection (3) (c) applies to bulk purchases lying outside of the ordinary course of business of the seller. It applies, for example, when a new partnership takes over for value all of the assets of an old one after a new member has entered the firm, or to a reorganized or consolidated corporation taking over in bulk the assets of the predecessor. It has particular application to the purchase by one bank of a substantial part of the paper held by another bank which is threatened with insolvency and seeking to liquidate its assets.

4. A purchaser of a limited interest-as a pledgee in a security transaction-may become a holder in due course, but he may enforce the instrument over defenses only to the extent of his interest, and defenses good against the pledgor remain available insofar as the pledgor retains an equity in the instrument. This is merely a special application of the general rule (Section 1-201) that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. Section 27 of the original act contained a similar provision.

Cross references.Sections 1-201, 3-303, 3-305 and 3-306.

Point 1: Section 3-304(5).

Point 3: Section 3-201.

Point 4: Section 1-201.

Definitional cross references."Good faith". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Notice of dishonor". Section 3-508.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 3-303.

ANNOTATION

I. General Consideration.

Holder's burden when maker shows fraud. - Where the maker shows fraud in the inception of the instrument, the burden on the holder to show that he is a holder in due course may be removed by showing that he acquired title in accordance with this section. Gebby v. Carrillo, 25 N.M. 120, 177 P. 894 (1918) (decided under former law).

And clear evidence needed for verdict. - To justify directing a verdict in favor of the holder, or in setting aside a verdict against holder, the bona fides of the holder must be established without substantial evidence to impeach it, and by evidence so clear as to leave no room for difference of opinion concerning it among fair-minded men. Gebby v. Carrillo, 25 N.M. 120, 177 P. 894 (1918) (decided under former law).

Bank issuing cashier's check. - In issuing a cashier's check, a bank acts as both drawer and drawee, since a cashier's check constitutes a draft drawn by the bank upon itself, and upon the subsequent presentment of the check, the bank is not a holder in due course. Casarez v. Garcia, 99 N.M. 508, 660 P.2d 598 (Ct. App. 1983).

Law reviews. - For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision'," see 4 Nat. Resources J. 398 (1964).

For comment, "Assignments - Maker's Defenses Cut Off - Uniform Commercial Code §

9-206," see 5 Nat. Resources J. 408 (1965).

For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 337, 339, 376, 397, 403, 414, 418, 419, 424, 426, 486, 495, 498; 12 Am. Jur. 2d Bills and Notes § 1326.
Crediting the proceeds of negotiable paper to holder's deposit account as constituting bank a holder in due course, 6 A.L.R. 252; 59 A.L.R.2d 1173.
Effect of fraud in the inception of a bill or note to throw upon a subsequent holder the burden of proving that he is a holder in due course, 18 A.L.R. 18; 34 A.L.R. 300; 57 A.L.R. 1083.
One taking bill or note as a gift or in consideration of love and affection as a holder for value or in due course protected against defenses between prior parties, 48 A.L.R. 237.
Endorsee of bill or note based on executed consideration, who knows of circumstances which might result in rescission as between original parties, as holder in due course, 59 A.L.R. 1026.
Application of proceeds of negotiable paper to antecedent debt, as constituting bank a holder in due course, 59 A.L.R.2d 1194.
Notice which has been forgotten as affecting status as holder in due course, 89 A.L.R.2d 1330.
Payee as holder in due course, 2 A.L.R.3d 1151.
Who is holder of instrument for "value" under UCC § 3-303, 97 A.L.R.3d 1114.
What constitutes taking instrument in good faith, and without notice of infirmities or defenses, to support holder-in-due-course status, under U.C.C. § 3-302, 36 A.L.R.4th 212.
10 C.J.S. Bills and Notes § 301.

II. Holder For Value.

Additional credit deemed sufficient value. - Where credit was requested by appellant on behalf of the corporation, and appellee extended it on the condition that appellant and corporation as accommodation maker and maker, respectively, execute a note in favor of appellee for the entire amount of the open account plus the amount of additional credit requested, appellee was deemed to be a holder for value as the additional credit was extended to the corporation in reliance on appellant's promise to execute the note. Hutchison v. Boney, 72 N.M. 194, 382 P.2d 525 (1963).

And executory contract. - Where the consideration for a note is an executory contract, knowledge of the transaction by a purchaser of the note, who acquires it by transfer before its maturity, will not prevent recovery thereon upon subsequent failure of consideration, by a breach of the executory contract. Azar v. Slack, 29 N.M. 528, 224 P. 398 (1924) (decided under former law).

III. Holder Without Notice.

Generally. - Where the president of a bank alone discounted notes for it, and as such discounted a note which he had made as treasurer of a corporation, and his authority to make it is denied, the bank was not a holder for value without notice. Oak Grove & Sierra Verde Cattle Co. v. Foster, 7 N.M. 650, 41 P. 522 (1895) (decided under former law).

Where note was in conventional form except that it provided that this note is not binding on any of the signers until signed by not less than 10 men, but was unconditionally delivered to payee when only seven men had signed it, it was invalid and payee was not holder in due course, even though three more men signed it after such delivery. Wood v. Eminger, 44 N.M. 636, 107 P.2d 557 (1940) (decided under former law).

The buyer of air conditioner under conditional sales contract was not "estopped" from denying liability for unpaid portion of purchase price evidenced by installment note, and from claiming damages for breach of warranty, because prior to acquisition of the note by a holder in due course who simultaneously acquired rights under the sale contract, the buyer had written in a letter that conditioner was satisfactory, where no evidence was introduced to show that the holder-purchaser relied upon the buyer's letter in making the purchase. State Nat'l Bank v. Cantrell, 47 N.M. 389, 143 P.2d 592, 152 A.L.R. 1216 (1943) (decided under former law).

§ 55-3-303. Taking for value.

A holder takes the instrument for value:

(a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

(b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

(c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person.

History: 1953 Comp., § 50A-3-303, enacted by Laws 1961, ch. 96, § 3-303.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 25, 26, 27 and 54, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and original Section 26 omitted.

Purposes of changes. The changes are intended to remove uncertainties arising under the original act.

1. The original Section 26 which had reference to the liability of accommodation parties is omitted as erroneous and misleading, since a holder who does not himself give value cannot qualify as a holder in due course in his own right merely because value has previously been given for the instrument.

2. In this article value is divorced from consideration (Section 3-408). The latter is important only on the question of whether the obligation of a party can be enforced against him; while value is important only on the question of whether the holder who has acquired that obligation qualifies as a particular kind of holder.

3. Paragraph (a) resolves an apparent conflict between the original Section 54 and the first sentence of the original Section 25, by requiring that the agreed consideration shall actually have been given. An executory promise to give value is not itself value, except as provided in Paragraph (c). The underlying reason of policy is that when the purchaser learns of a defense against the instrument or of a defect in the title he is not required to enforce the instrument, but is free to rescind the transaction for breach of the transferor's warranty (Section 3-417). There is thus not the same necessity for giving him the status of a holder in due course, cutting off claims and defenses, as where he has actually paid value. A common illustration is the bank credit not drawn upon, which can be and is revoked when a claim or defense appears.

4. Paragraph (a) limits the language of the original Section 27, eliminating the attaching creditor or any other person who acquires a lien by legal process. Any such lienor has been uniformly held not to be a holder in due course.

5. Paragraph (b) restates the last sentence of the original Section 25. It adopts the generally accepted rule that the holder takes for value when he takes the instrument as security for an antecedent debt, even though there is no extension of time or other concession, and whether or not the debt is due. The provision extends the same rule to any claim against any person; there is no requirement that the claim arise out of contract. In particular the provision is intended to apply to an instrument given in payment of or as security for the debt of a third person, even though no concession is made in return.

6. Paragraph (c) is new, but states generally recognized exceptions to the rule that an executory promise is not value. A negotiable instrument is value because it carries the possibility of negotiation to a holder in due course, after which the party who gives it cannot refuse to pay. The same reasoning applies to any irrevocable commitment to a third person, such as a letter of credit issued when an instrument is taken.

Cross references.Sections 3-302 and 3-415.

Point 1: Section 3-415.

Point 2: Section 3-408.

Point 3: Section 3-417.

Definitional cross references."Holder". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Security interest". Section 1-201.

ANNOTATION

Presumption of consideration unless evidence to contrary. - Upon proof of execution of a note consideration is presumed to exist and when evidence is offered which shows or tends to show lack of consideration, it is then incumbent upon the holder to show by a fair preponderance of the evidence that there was consideration. Hutchison v. Boney, 72 N.M. 194, 382 P.2d 525 (1963).

And additional credit deemed sufficient value. - Where credit was requested by appellant on behalf of the corporation, and appellee extended it on the condition that appellant and corporation as accommodation maker and maker, respectively, execute a note in favor of appellee for the entire amount of the open account plus the amount of additional credit requested, appellee was deemed to be a holder for value as the additional credit was extended to the corporation in reliance on appellant's promise to execute the note. Hutchison v. Boney, 72 N.M. 194, 382 P.2d 525 (1963).

When failure of consideration defense against bona fide purchaser. - In order for a defense of failure of consideration to be available against a bona fide purchaser, before maturity, there must be proof that the failure occurred prior to the transfer of the note. Azar v. Slack, 29 N.M. 528, 224 P. 398 (1924) (decided under former law).

Law reviews. - For comment, "Assignments - Maker's Defenses Cut Off - Uniform Commercial Code § 9-206," see 5 Nat. Resources J. 408 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 215, 241, 334, 337 to 339, 347, 348, 428, 498.
One taking bill or note as gift, or in consideration of love and affection, as a holder for value, 48 A.L.R. 237.
Exchange of negotiable paper as supporting status as holder in due course, 69 A.L.R. 408.

Unperformed obligation as value, as regards one's status as a bona fide purchaser freed from prior equities, 124 A.L.R. 1259.
Application of proceeds of negotiable paper to antecedent debt, as constituting bank a holder in due course, 59 A.L.R.2d 1194.
Who is holder of instrument for "value" under UCC § 3-303, 97 A.L.R.3d 1114.
10 C.J.S. Bills and Notes §§ 315, 316, 327; 11 C.J.S. Bills and Notes § 654.

§ 55-3-304. Notice to purchaser.

(1) The purchaser has notice of a claim or defense if:

(a) the instrument is so incomplete, bears such visible evidence of forgery or alteration or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or

(b) the purchaser has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.

(2) The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.

(3) The purchaser has notice that an instrument is overdue if he has reason to know:

(a) that any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series; or

(b) that acceleration of the instrument has been made; or

(c) that he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue. A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be thirty days.

(4) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim:

(a) that the instrument is antedated or postdated;

(b) that it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defense or claim has arisen from the terms thereof;

(c) that any party has signed for accommodation;

(d) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion;

(e) that any person negotiating the instrument is or was a fiduciary;

(f) that there has been default in payment of interest on the instrument or in payment of any other instrument, except one of the same series.

(5) The filing or recording of a document does not of itself constitute notice within the provisions of this article to a person who would otherwise be a holder in due course.

(6) To be effective notice must be received at such time and in such manner as to give a reasonable opportunity to act on it.

History: 1953 Comp., § 50A-3-304, enacted by Laws 1961, ch. 96, § 3-304.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 45, 52, 53, 55 and 56, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and new provisions.

Purposes of changes and new matter. The original sections are expanded, with the addition of specific provisions intended to remove uncertainties in the existing law.

1. "Notice" is defined in Section 1-201.

2. Paragraph (a) of Subsection (1) replaces the provision in the original Section 52(1) requiring that the instrument be "complete and regular on its face." An instrument may be blank as to some unnecessary particular, may contain minor erasures, or even have an obvious change in the date, as where "January 2, 1948" is changed to "January 2, 1949," without even exciting suspicion. Irregularity is properly a question of notice to the purchaser of something wrong, and is so treated here.

3. "Voidable" obligation in Paragraph (b) of Subsection (1) is intended to limit the provision to notice of defense which will permit any party to avoid his original obligation on the instrument, as distinguished from a set-off or counterclaim.

4. Notice that one party has been discharged is not notice to the purchaser of an infirmity in the obligation of other parties who remain liable on the instrument. A purchaser with notice that an indorser is discharged takes subject to that discharge as provided in the section on effect of discharge against a holder in due course (Section 3-602) but is not prevented from taking the obligation of the maker in due course. If he has notice that all parties are discharged he cannot be a holder in due course.

5. Subsection (2) follows the policy of Section 6 of the Uniform Fiduciaries Act, and specifies the same elements as notice of improper conduct of a fiduciary. Under Paragraph (e) of Subsection (4) mere notice of the existence of the fiduciary relation is not enough in itself to prevent the holder from taking in due course, and he is free to take the instrument on the assumption that the fiduciary is acting properly. The purchaser may pay cash into the hands of the fiduciary without notice of any breach of the obligation. Section 3-206 should be consulted for the effect of a restrictive indorsement.

6. Subsection (3) removes an uncertainty in the original act by providing that reason to know of an overdue installment or other part of the principal amount is notice that the instrument is overdue and thus prevents the purchaser from taking in due course. On the other hand Subsection (4) (f) makes notice that interest is overdue insufficient, on the basis of banking and commercial practice, the decisions under the original act, and the frequency with which interest payments are in fact delayed. Notice of default in payment of any other instrument, except an uncured default in another instrument of the same series, is likewise insufficient.

7. Subsection (3) departs from the original Section 52(2) by providing that the purchaser may take accelerated paper, or a demand instrument on which demand has in fact been made, as a holder in due course if he takes without notice of the acceleration or demand. With this change the original Section 45 is eliminated, as the presumption that any negotiation has taken place before the instrument was in fact overdue is of importance only in aid of a holder in due course. Under this section it is not conclusive that the instrument was in fact overdue when it was negotiated, if the holder takes without notice of that fact.

The "reasonable time after issue" is retained from the original Section 53, but Paragraph (c) adds a presumption, as that term is defined in this act (Section 1-201), that a domestic check is stale after thirty days.

8. Paragraph (a) of Subsection (4) rejects decisions holding that an instrument known to be antedated or postdated is not "regular." Such knowlege does not prevent a holder from taking in due course.

9. Paragraph (b) of Subsection (4) is to be read together with the provisions of this article as to when a promise or order is unconditional and as to other writings affecting the instrument (Sections 3-105 and 3-119). Mere notice of the existence of an executory promise or a separate agreement does not prevent the holder from taking in due course, and such notice may even appear in the instrument itself. If the purchaser has notice of any default in the promise or agreement which gives rise to a defense or claim against the instrument, he is on notice to the same extent as in the case of any other information as to the existence of a defense or claim.

10. Paragraph (d) of Subsection (4) follows the policy of the original Section 14, under which any person in possession of an instrument has prima facie authority to fill blanks.

It is intended to mean that the holder may take in due course even though a blank is filled in his presence, if he is without notice that the filling is improper. Section 3-407 on alteration should be consulted as to the rights of subsequent holders following such an alteration.

11. Subsection (5) is new. It removes an uncertainty arising under the original act as to the effect of "constructive notice" through public filing or recording.

12. Subsection (6) is new. It means that notice must be received with a sufficient margin of time to afford a reasonable opportunity to act on it, and that a notice received by the president of a bank one minute before the bank's teller cashes a check is not effective to prevent the bank from becoming a holder in due course. See in this connection the provision on notice to an organization, Sec. 1-201(27).

Cross references.Sections 3-201 and 3-302.

Point 1: Section 1-201.

Point 4: Section 3-602.

Point 5: Section 3-206.

Point 7: Section 1-201.

Point 9: Sections 3-105(1) (b) and (c) and 3-119.

Point 10: Section 3-407.

Point 12: Section 1-201.

Definitional cross references."Accommodation party". Section 3-415.

"Agreement". Section 1-201.

"Alteration". Section 3-407.

"Bank". Section 1-201.

"Check". Section 3-104.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Negotiation". Section 3-202.

"Notice". Section 1-201.

"Party". Section 1-201.

"Person". Section 1-201.

"Presumed". Section 1-201.

"Promise". Section 3-102.

"Purchaser". Section 1-201.

"Reasonable time". Section 1-204.

"Signed". Section 1-201.

"Term". Section 1-201.

ANNOTATION

I. General Consideration.

When holder of note protected. - Holder of a note will be protected unless, at the time he took the paper, he had reason to believe, and did believe, there was some defect or infirmity in the paper. First Nat'l Bank v. Stover, 21 N.M. 453, 155 P. 905, 1916D L.R.A. 1280 (1915) (decided under former law).

And holder's burden of proof if fraud shown. - In a suit by the holder of note acquired from payee before maturity, where maker showed fraud in inception of instrument, the burden was on the holder to show that title to the paper was acquired in due course, and to remove the burden thus imposed he was required to show that he became the holder of the note before it was overdue and without notice that it had been previously dishonored, if such was the fact; that he took it in good faith for value; and that at the time of negotiation to him he had no notice of any infirmity therein, or defect in title of the person negotiating it. Gebby v. Carrillo, 25 N.M. 120, 177 P. 894 (1918) (decided under former law).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 397, 424, 426, 428, 430, 435, 451, 454 to 456, 458, 460, 468, 476, 486, 495, 938; 12 Am. Jur. 2d Bills and Notes § 1196.
Memoranda or notations on paper as affecting one's character as a holder in due course, 34 A.L.R. 1377.
Public records as affecting one's character as a holder in due course of negotiable paper, 37 A.L.R. 860.
Notation or memorandum on bill or note as notice, 56 A.L.R. 1373.
"Trustee" or "agent" after name of payee, endorser or endorsee, as charging transferee with notice of trust in favor of third parties or of defenses in maker, 61 A.L.R. 1389.
Endorsement without recourse as affecting character of endorsee or subsequent holder as holder in due course, 77 A.L.R. 487.
High rate of discount upon sale of negotiable paper as affecting one's status as holder in due course, 91 A.L.R. 1139.
Transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title or chattel mortgage, as subject to defenses which chattel purchaser could assert against seller, 44 A.L.R.2d 84.
What constitutes, under the Uniform Negotiable Instruments Law or Commercial Code, a reasonable time for taking a demand instrument, so as to support the taker's status as holder in due course, 10 A.L.R.3d 1199.
10 C.J.S. Bills and Notes §§ 303, 305, 323, 334.

II. Notice of Claim or Defense.

Evidence of bad faith. - Suspicious circumstances, negligence or willful ignorance may be evidence of bad faith. First Nat'l Bank v. Stover, 21 N.M. 453, 155 P. 905, 1916D L.R.A. 1280 (1915) (decided under former law).

And payee's fraud available defense. - The payee's fraud in obtaining the signatures of some of the makers of notes in suit is available to other makers as a defense. Schmidt v. Bank of Commerce, 234 U.S. 64, 34 S. Ct. 730, 58 L. Ed. 1214 (1914) (decided under former law).

III. No Notice of Claim or Defense.

Accommodation not notice of defense or claim. - An accommodation party is one who has signed the instrument as maker, drawer, acceptor or endorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at

the time of making the instrument knew him to be only an accommodation party. Hutchison v. Boney, 72 N.M. 194, 382 P.2d 525 (1963).

§ 55-3-305. Rights of a holder in due course.

To the extent that a holder is a holder in due course he takes the instrument free from:

(1) all claims to it on the part of any person; and

(2) all defenses of any party to the instrument with whom the holder has not dealt except:

(a) infancy, to the extent that it is a defense to a simple contract; and

(b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

(d) discharge in insolvency proceedings; and

(e) any other discharge of which the holder has notice when he takes the instrument.

History: 1953 Comp., § 50A-3-305, enacted by Laws 1961, ch. 96, § 3-305.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 15, 16 and 57, Uniform Negotiable Instruments Law.

Changes. Combined and reworded; new provisions and rule of original Section 15 reversed.

Purposes of changes and new matter.1. The section applies to any person who is himself a holder in due course, and equally to any transferee who acquires the rights of one (Section 3-201). "Takes" is substituted for "holds" in the original Section 57 because a holder in due course may still be subject to any claims or defenses which arise against him after he has taken the instrument.

2. The language "all claims to it on the part of any person" is substituted for "any defect of title of prior parties" in the original Section 57 in order to make it clear that the holder in due course takes the instrument free not only from any claim of legal title but also from all liens, equities or claims of any other kind. This includes any claim for rescission

of a prior negotiation, in accordance with the provisions of the section on reacquisition (Section 3-208).

3. "All defenses" includes nondelivery, conditional delivery or delivery for a special purpose. Under this article such nondelivery or qualified delivery is a defense (Sections 3-306 and 3-307) and the defendant has the full burden of establishing it. Accordingly the "conclusive presumption" of the third sentence of the original Section 16 is abrogated in favor of a rule of law cutting off the defense.

The effect of this section, together with the sections dealing with incomplete instruments (Section 3-115) and alteration (Section 3-407) is to cut off the defense of nondelivery of an incomplete instrument against a holder in due course, and to change the rule of the original Section 15.

4. Paragraph (a) of Subsection (2) is new. It follows the decisions under the original act in providing that the defense of infancy may be asserted against a holder in due course, even though its effect is to render the instrument voidable but not void. The policy is one of protection of the infant against those who take advantage of him, even at the expense of occasional loss to an innocent purchaser. No attempt is made to state when infancy is available as a defense or the conditions under which it may be asserted. In some jurisdictions it is held that an infant cannot rescind the transaction or set up the defense unless he restores the holder to his former position, which in the case of a holder in due course is normally impossible. In other states an infant who has misrepresented his age may be estopped to assert his infancy. Such questions are left to the local law, as an integral part of the policy of each state as to the protection of infants.

5. Paragraph (b) of Subsection (2) is new. It covers mental incompetence, guardianship, ultra vires acts or lack of corporate capacity to do business, any remaining incapacity of married women or any other incapacity apart from infancy. Such incapacity is largely statutory. Its existence and effect is left to the law of each state. If under the local law the effect is to render the obligation of the instrument entirely null and void, the defense may be asserted against a holder in due course. If the effect is merely to render the obligation voidable at the election of the obligor, the defense is cut off.

6. Duress is a matter of degree. An instrument signed at the point of a gun is void, even in the hands of the holder in due course. One signed under threat to prosecute the son of the maker for theft may be merely voidable, so that the defense is cut off. Illegality is most frequently a matter of gambling or usury, but may arise in many other forms under a great variety of statutes. The statutes differ greatly in their provisions and the interpretations given them. They are primarily a matter of local concern and local policy. All such matters are therefore left to the local law. If under that law the effect of the duress or the illegality is to make the obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise it is cut off.

7. Paragraph (c) of Subsection (2) is new. It follows the great majority of the decisions

under the original act in recognizing the defense of "real" or "essential" fraud, sometimes called fraud in the essence or fraud in the factum, as effective against a holder in due course. The common illustration is that of the maker who is tricked into signing a note in the belief that it is merely a receipt or some other document. The theory of the defense is that his signature on the instrument is ineffective because he did not intend to sign such an instrument at all. Under this provision the defense extends to an instrument signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms.

The test of the defense here stated is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge. In determining what is a reasonable opportunity all relevant factors are to be taken into account, including the age and sex of the party, his intelligence, education and business experience; his ability to read or to understand English, the representations made to him and his reason to rely on them or to have confidence in the person making them; the presence or absence of any third person who might read or explain the instrument to him, or any other possibility of obtaining independent information and the apparent necessity, or lack of it, for acting without delay.

Unless the misrepresentation meets this test, the defense is cut off by a holder in due course.

8. Paragraph (d) is also new. It is inserted to make it clear that any discharge in bankruptcy or other insolvency proceedings, as defined in this article, is not cut off when the instrument is purchased by a holder in due course.

9. Paragraph (e) of Subsection (2) is also new. Under the notice to purchaser section of this article (Section 3-304), notice of any discharge which leaves other parties liable on the instrument does not prevent the purchaser from becoming a holder in due course. The obvious case is that of the cancellation of an indorsement, which leaves the maker and prior indorsers liable. As to such parties the purchaser may be a holder in due course, but he takes the instrument subject to the discharge of which he has notice. If he is without such notice, the discharge is not effective against him (Section 3-602).

Cross references.Point 1: Section 3-201(1).

Point 2: Section 3-208.

Point 3: Sections 3-115(2), 3-306(c), 3-307(2) and 3-407(3).

Point 9: Sections 3-304(1) (b) and 3-602.

Definitional cross references."Contract". Section 1-201.

"Holder in due course". Section 3-302.

"Insolvency proceedings". Section 1-201.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Party". Section 1-201.

"Person". Section 1-201.

"Term". Section 1-201.

ANNOTATION

I. General Consideration.

Law reviews. - For comment, "Assignments - Maker's Defenses Cut Off - Uniform Commercial Code § 9-206," see 5 Nat. Resources J. 408 (1965).

For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 255, 263, 264, 275, 279, 333, 398, 421, 652, 666, 670, 672, 676, 679, 690, 693, 695, 715, 716, 719, 720, 725; 12 Am. Jur. 2d Bills and Notes §§ 1158, 1170.
Deception as to character of paper signed as defense as against bona fide holder of negotiable paper, 160 A.L.R. 1295.
Insanity of maker, drawer or endorser as defense against holder in due course, 24 A.L.R.2d 1380.
Fraud in the inducement and fraud in the factum as defenses under U.C.C. § 3-305 against holder in due course, 78 A.L.R.3d 1020.
Economic duress or business compulsion in execution of promissory note, 79 A.L.R.3d 598.
10 C.J.S. Bills and Notes § 482 et seq.

II. Defenses Holder In Due Course Free From.

Notes not voided by lack of knowledge. - Plaintiffs, who signed contract for installation of aluminum siding on their home under the mistaken impression they would get a discount price as a "show home," but failed to read the contract itself, may not have notes and mortgages in hands of a holder in due course cancelled and voided on ground they did not have knowledge or reasonable opportunity to understand the notes. Burchett v. Allied Concord Fin. Corp., 74 N.M. 575, 396 P.2d 186 (1964).

Because loss on person who occasions it. - The reason for the rule is that when one or two innocent persons must suffer by the act of a third, the loss must be borne by the one who enables the third person to occasion it. Burchett v. Allied Concord Fin. Corp., 74 N.M. 575, 396 P.2d 186 (1964).

But failure of consideration may be defense. - Knowledge on the part of an endorsee of a promissory note that it had been given in consideration of some executory contract of the payee which said payee afterwards fails to perform will not deprive such endorsee of his character of a bona fide holder in due course, unless he had actual notice of the breach prior to acquiring the note. Azar v. Slack, 29 N.M. 528, 224 P. 398 (1924) (decided under former law).

III. Defenses Holder In Due Course Not Free From.

Fraud in the inception nullifies instrument. - Although a holder in due course holds an instrument free from any defect of title, and free from defenses available to prior parties among themselves insofar as a voidable instrument is concerned, where fraud in the inception is present, such fraud makes the instrument an absolute nullity and not merely voidable. United States v. Castillo, 120 F. Supp. 522 (D.N.M. 1954) (decided under former law).

Must be mistaken belief induced by payee. - To completely invalidate the enforceability of a negotiable promissory note, the fraud perpetrated must have been such as to induce the maker of the note to execute the same under the mistaken belief that the instrument being signed was something other than a promissory note and must have come about as a direct result of misrepresentation on the part of the payee or his agent. United States v. Castillo, 120 F. Supp. 522 (D.N.M. 1954) (decided under former law).

However, maker must exercise reasonable prudence. - The maker cannot be guilty of negligence in signing a written instrument and then defend upon the ground of lack of knowledge where in the exercise of reasonable prudence the attempted fraud could be discovered; and it is not a defense to the enforcement of an obligation to insist that a fraud has been wrought where the maker did not take the care to read the instrument being signed, inasmuch as such an omission generally constitutes negligence. United States v. Castillo, 120 F. Supp. 522 (D.N.M. 1954).

Failure to read an instrument is not negligence per se but is to be considered in light of all surrounding facts and circumstances with particular emphasis on the maker's intelligence and literacy. United States v. Castillo, 120 F. Supp. 522 (D.N.M. 1954).

And illiteracy deemed not negligence. - Where defendants are nearly illiterate in the English language and had no reason to believe the agent of the payee in question was misrepresenting the character of the paper signed, they were not guilty of negligence in failing to verify that the instrument was in fact a note rather than a contract for repairs as fraudulently represented, and the sued upon instrument was void from its inception. United States v. Castillo, 120 F. Supp. 522 (D.N.M. 1954).

Bill won at gambling unenforceable. - The Uniform Negotiable Instruments Law is merely declaration of the law merchant heretofore in effect and is not intended to modify the gaming law so as to allow enforcement by holder in due course of note or bill won at gambling. Farmers' State Bank v. Clayton Nat'l Bank, 31 N.M. 344, 245 P. 543, 46 A.L.R. 952 (1925) (decided under former law).

§ 55-3-306. Rights of one not holder in due course.

Unless he has the rights of a holder in due course any person takes the instrument subject to:

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an action on a simple contract; and

(c) the defenses of want or failure of consideration, nonperformance of any condition precedent, nondelivery or delivery for a special purpose (Section 3-408 [55-3-408 NMSA 1978]); and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.

History: 1953 Comp., § 50A-3-306, enacted by Laws 1961, ch. 96, § 3-306.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 16, 28, 58 and 59, Uniform Negotiable Instruments Law.

Changes. Combined, condensed and reworded.

Purposes of changes. The changes are intended to remove the following uncertainties arising under the original sections:

1. Any transferee who acquires the rights of a holder in due course under the transfer section of this article (Section 3-201) is included within the provisions of the preceding Section 305. This section covers any person who neither qualifies in his own right as a holder in due course nor has acquired the rights of one by transfer. In particular the section applies to a bona fide purchaser with notice that the instrument is overdue.

2. "All valid claims to it on the part of any person" includes not only claims of legal title, but all liens, equities or other claims of right against the instrument or its proceeds. It includes claims to rescind a prior negotiation and to recover the instrument or its proceeds.

3. Paragraph (b) restates the first sentence of the original Section 58.

4. Paragraph (c) condenses the original Sections 16 and 28. Want or failure of consideration is specifically mentioned, as in the original Section 28, in order to make it clear that either is a defense which the defendant has the burden of establishing under the following section of this article. The language as to an "ascertained or liquidated amount or otherwise" in the original Section 28 is omitted because it is believed to be superfluous. The third sentence of Section 16 is now covered by the preceding section. The fourth sentence is omitted in favor of the rule stated in the following section, which places the full burden of establishing the defense of nondelivery, conditional delivery or delivery for a special purpose upon the defendant, and makes any presumption unnecessary.

5. Paragraph (d) is substituted for the last sentence of the original Section 59, as a more detailed and explicit statement of the same policy, which is also found in the original Section 22. The contract of the obligor is to pay the holder of the instrument, and the claims of other persons against the holder are generally not his concern. He is not required to set up such a claim as a defense, since he usually will have no satisfactory evidence of his own on the issue; and the provision that he may not do so is intended as much for his protection as for that of the holder. The claimant who has lost possession of an instrument so payable or indorsed that another may become a holder has lost his rights on the instrument, which by its terms no longer runs to him. The provision includes all claims for rescission of a negotiation, whether based in incapacity, fraud, duress, mistake, illegality, breach of trust or duty or any other reason. It includes claims based on conditional delivery or delivery for a special purpose. It includes claims of legal title, lien, constructive trust or other equity against the instrument or its proceeds. The exception made in the case of theft is based on the policy which refuses to aid a proved thief to recover, and refuses to aid him indirectly by permitting his transferee to recover unless the transferee is a holder in due course. The exception concerning restrictive indorsements is intended to achieve consistency with Section 3-603 and related sections.

Nothing in this section is intended to prevent the claimant from intervening in the holder's action against the obligor or defending the action for the latter, and asserting his claim in the course of such intervention or defense. Nothing here stated is intended to prevent any interpleader, deposit in court or other available procedure under which the defendant may bring the claimant into court or be discharged without himself litigating the claim as a defense. Compare Section 3-803 on vouching in other parties alleged to be liable.

Cross references.Section 3-302.

Point 1: Sections 3-201(1) and 3-305.

Point 2: Section 3-207.

Point 3: Section 3-307(2).

Point 4: Sections 3-305 and 3-307(2).

Point 5: Section 3-803.

Definitional cross references."Action". Section 1-201.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

When recovery allowed on note. - Where real estate broker executed note to secure purchasers of lodge against amounts in excess of contract price that they might be required to pay to clear title, and purchasers paid or obligated themselves to pay amount in excess of contract price, purchasers were entitled to recover excess from broker. Brock v. Adams, 79 N.M. 17, 439 P.2d 234 (1968).

But availability of setoff generally. - Where a note, executed and delivered by the maker to payee, was after maturity transferred and assigned to transferee who became

indebted to makers on other matters, and transferee assigned note to assignee, setoff which would have been available against transferee was also available to the makers in a cross-action by the assignee on the note. Turkenkoph v. Te Beest, 55 N.M. 279, 232 P.2d 684 (1951) (decided under former law).

Provision to protect against premature delivery. - Provision in note that it was not binding on any of the signers until signed by not less than 10 men, was to protect other signers from a premature, or any, delivery or negotiation thereof until 10 comakers had joined in carrying the burden. Wood v. Eminger, 44 N.M. 636, 107 P.2d 557 (1940) (decided under former law).

And unconditional delivery completes contract on note. - After unconditional delivery of a note which, according to its terms, is ripe for delivery, the contract becomes complete and irrevocable. Wood v. Eminger, 44 N.M. 636, 107 P.2d 557 (1940) (decided under former law).

When payment of bill of exchange occurs. - The mere act of stamping a bill of exchange "paid" by the payee, in and of itself, does not constitute payment. Payment could only be made by delivery of actual cash, or an adjustment of accounts, by agreement of the parties, so that the payee would be obligated to the holder of the bill. Hanna v. McCrory, 19 N.M. 183, 141 P. 996 (1914) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 270, 275, 279, 333, 372, 421, 486, 653, 656, 657, 666, 722, 724; 12 Am. Jur. 2d Bills and Notes §§ 1158, 1170, 1171, 1187, 1247.
10 C.J.S. Bills and Notes §§ 25, 232 et seq., 478 et seq., 513 et seq.

§ 55-3-307. Burden of establishing signatures, defenses and due course.

(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue:

(a) the burden of establishing it is on the party claiming under the signature; but

(b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

(3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

History: 1953 Comp., § 50A-3-307, enacted by Laws 1961, ch. 96, § 3-307.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 59, Uniform Negotiable Instruments Law.

Changes. Reworded and new provisions.

Purposes of changes and new matter.

1. Subsection (1) is new, although similar provisions are found in a number of states. The purpose of the requirement of a specific denial in the pleadings is to give the plaintiff notice that he must meet a claim of forgery or lack of authority as to the particular signature, and to afford him an opportunity to investigate and obtain evidence. Where local rules of pleading permit, the denial may be on information and belief, or it may be a denial of knowledge or information sufficient to form a belief. It need not be under oath unless the local statutes or rules require verification. In the absence of such specific denial the signature stands admitted, and is not in issue. Nothing in this section is intended, however, to prevent amendment of the pleading in a proper case.

The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. "Burden of establishing" is defined in the definitions section of this act (Section 1-201). The burden is on the party claiming under the signature, but he is aided by the presumption that it is genuine or authorized [as] stated in Paragraph (b). "Presumption" is also defined in this act (Section 1-201). It means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized the plaintiff is not required to prove that it is authentic. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of the defendant or more accessible to him. He is therefore required to make some sufficient showing of the grounds for his denial before the plaintiff is put to his proof. His evidence need not be sufficient to require a directed verdict in his favor, but it must be enough to support his denial by permitting a finding in his favor. Until he introduces such evidence the presumption requires a finding for the plaintiff. Once such evidence is introduced the burden of establishing the signature by a preponderance of the total evidence is on the plaintiff.

Under Paragraph (b) this presumption does not arise where the action is to enforce the obligation of a purported signer who has died or become incompetent before the evidence is required, and so is disabled from obtaining or introducing it. "Action" of course includes a claim asserted against the estate of a deceased or an incompetent.

2. Subsection (2) is substituted for the first clause of the original Section 59. Once signatures are proved or admitted, a holder makes out his case by mere production of the instrument, and is entitled to recover in the absence of any further evidence. The defendant has the burden of establishing any and all defenses, not only in the first

instance but by a preponderance of the total evidence. The provision applies only to a holder, as defined in this act (Section 1-201). Any other person in possession of an instrument must prove his right to it and account for the absence of any necessary indorsement. If he establishes a transfer which gives him the rights of a holder (Section 3-201), this provision becomes applicable, and he is then entitled to recover unless the defendant establishes a defense.

3. Subsection (3) rephrases the last clause of the first sentence of the original Section 59. Until it is shown that a defense exists the issue as to whether the holder is a holder in due course does not arise. In the absence of a defense any holder is entitled to recover and there is no occasion to say that he is deemed prima facie to be a holder in due course. When it is shown that a defense exists the plaintiff may, if he so elects, seek to cut off the defense by establishing that he is himself a holder in due course, or that he has acquired the rights of a prior holder in due course (Section 3-201). On this issue he has the full burden of proof by a preponderance of the total evidence. "In all respects" means that he must sustain this burden by affirmative proof that the instrument was taken for value, that it was taken in good faith, and that it was taken without notice (Section 3-302).

Nothing in this section is intended to say that the plaintiff must necessarily prove that he is a holder in due course. He may elect to introduce no further evidence, in which case a verdict may be directed for the plaintiff or the defendant, or the issue of the defense may be left to the jury, according to the weight and sufficiency of the defendant's evidence. He may elect to rebut the defense itself by proof to the contrary, in which case again a verdict may be directed for either party or the issue may be for the jury. This subsection means only that if the plaintiff claims the rights of a holder in due course against the defense he has the burden of proof upon that issue.

Cross references.Sections 3-305, 3-306, 3-401, 3-403 and 3-404.

Point 1: Section 1-201.

Point 2: Sections 1-201 and 3-201(1).

Point 3: Sections 3-201(1) and 3-302.

Definitional cross references."Action". Section 1-201.

"Burden of establishing". Section 1-201.

"Defendant". Section 1-201.

"Genuine". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Presumed". Section 1-201.

"Rights". Section 1-201.

"Signature". Section 3-401.

ANNOTATION

Holder's burden when maker shows fraud. - In a suit by the holder of a negotiable instrument acquired from the payee before maturity, where the maker shows fraud in the inception of the instrument, the burden is upon the holder to show that he acquired title to the paper in due course. Gebby v. Carrillo, 25 N.M. 120, 177 P. 894 (1918) (decided under former law).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 333; 12 Am. Jur. 2d Bills and Notes §§ 1137, 1155, 1158, 1167, 1187, 1213, 1296, 1297, 1301, 1319.
Direction of verdict based on testimony of party or interested witness as to good faith of holder, 72 A.L.R. 61.
Taking negotiable paper in payment of pre-existing indebtedness as sustaining one's character as holder in due course, 80 A.L.R. 671.
11 C.J.S. Bills and Notes §§ 654, 657.

Part 4

LIABILITY OF PARTIES

§ 55-3-401. Signature.

(1) No person is liable on an instrument unless his signature appears thereon.

(2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

History: 1953 Comp., § 50A-3-401, enacted by Laws 1961, ch. 96, § 3-401.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 18, Uniform Negotiable Instruments Law.

Changes. Reworded.

Purposes of changes. To make it clear that:

1. No one is liable on an instrument unless and until he has signed it. The chief application of the rule has been in cases holding that a principal whose name does not appear on an instrument signed by his agent is not liable on the instrument even though the payee knew when it was issued that it was intended to be the obligation of one who did not sign. The exceptions made as to collateral and virtual acceptances by the original Sections 134 and 135 are now abrogated by the definition of an acceptance and the rules governing its operation. An allonge is part of the instrument to which it is affixed. Section 3-202(2).

Nothing in this section is intended to prevent any liability arising apart from the instrument itself. The party who does not sign may still be liable on the original obligation for which the instrument was given, or for breach of any agreement to sign, or in tort for misrepresentation, or even on an oral guaranty of payment where the statute of frauds is satisfied. He may of course be liable under any separate writing. The provision is not intended to prevent an estoppel to deny that the party has signed, as where the instrument is purchased in good faith reliance upon his assurance that a forged signature is genuine.

2. A signature may be handwritten, typed, printed or made in any other manner. It need not be subscribed, and may appear in the body of the instrument, as in the case of "I, John Doe, promise to pay-" without any other signature. It may be made by mark, or even by thumbprint. It may be made in any name, including any trade name or assumed name, however false and fictitious, which is adopted for the purpose. Parol evidence is admissible to identify the signer, and when he is identified the signature is effective.

This section is not intended to affect any local statute or rule of law requiring a signature by mark to be witnessed, or any signature to be otherwise authenticated, or requiring any form of proof. It is to be read together with the provision under which a person paying or giving value for the instrument may require indorsement in both the right name and the wrong one; and with the provision that the absence of an indorsement in the right name may make an instrument so irregular as to call its ownership into question and put a purchaser upon notice which will prevent his taking as a holder in due course.

Cross references.Sections 3-202(2), 3-402 to 3-406.

Point 1: Section 3-410.

Point 2: Section 3-203.

Definitional cross references."Person". Section 1-201.

"Instrument". Section 3-102.

"Signed". Section 1-201.

"Written". Section 1-201.

ANNOTATION

A rubber stamp endorsement is valid and sufficient to transfer title to the instrument endorsed, when made by one having authority. Cooper v. Albuquerque Nat'l Bank, 75 N.M. 295, 404 P.2d 125 (1965).

Liability of partnership generally. - Where one partner executes a negotiable note in his own name, even though for partnership purposes, the firm is not liable thereon. Harris v. Singh, 34 N.M. 470, 283 P. 910 (1929) (decided under former law).

Law reviews. - For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision'," see 4 Nat. Resources J. 398 (1964).

Cooper v. Albuquerque Nat'l Bank, 75 N.M. 295, 404 P.2d 125 (1965), commented on in 6 Nat. Resources J. 142 (1966).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 209, 210, 212, 556.
Sufficiency of signing or endorsing a bill or note by printing or stamping, 7 A.L.R. 672; 46 A.L.R. 1498.
Place of maker's signature on bill or note, 20 A.L.R. 394.
Construction and effect of statutes as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested, 42 A.L.R.2d 516.
Bank's liability for payment or withdrawal on less than required number of signatures, 7 A.L.R.4th 655.
10 C.J.S. Bills and Notes §§ 34, 73 et seq.; 80 C.J.S. Signatures § 1 et seq.

§ 55-3-402. Signature in ambiguous capacity.

Unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement.

History: 1953 Comp., § 50A-3-402, enacted by Laws 1961, ch. 96, § 3-402.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 17(6) and 63, Uniform Negotiable Instruments Law.

Changes. Combined and reworded.

Purposes of changes. The revised language is intended to say that any ambiguity as to the capacity in which a signature is made must be resolved by a rule of law that it is an indorsement. Parol evidence is not admissible to show any other capacity, except for the purpose of reformation of the instrument as it may be permitted under the rules of the particular jurisdiction. The question is to be determined from the face of the instrument alone, and unless the instrument itself makes it clear that he has signed in some other capacity the signer must be treated as an indorser.

The indication that the signature is made in another capacity must be clear without reference to anything but the instrument. It may be found in the language used. Thus if John Doe signs after "I, John Doe, promise to pay," he is clearly a maker; and "John Doe, witness" is not liable at all. The capacity may be found in any clearly evidenced purpose of the signature, as where a drawee signing in an unusual place on the paper has no visible reason to sign at all unless he is an acceptor. It may be found in usage or custom. Thus by long established practice judicially noticed or otherwise established a signature in the lower right hand corner of an instrument indicates an intent to sign as the maker of a note or the drawer of a draft. Any similar clear indication of an intent to sign in some other capacity may be enough to remove the signature from the application of this section.

Cross reference.Section 3-401.

Definitional cross references."Instrument". Section 3-102.

"Signature". Section 3-401.

ANNOTATION

Endorser of corporate paper generally. - Endorser of corporate paper does not lose his rights and status as such by the mere circumstance that he happens to be an officer and director. Pacific Nat'l Agrl. Credit Corp. v. Hagerman, 39 N.M. 549, 51 P.2d 857, 101 A.L.R. 1301 (1935) (decided under former law).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 212, 358; 12 Am. Jur. 2d Bills and Notes §§ 1154, 1241, 1269.
10 C.J.S. Bills and Notes § 38 et seq.

§ 55-3-403. Signature by authorized representative.

(1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.

(2) An authorized representative who signs his own name to an instrument:

(a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

(3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

History: 1953 Comp., § 50A-3-403, enacted by Laws 1961, ch. 96, § 3-403; 1967, ch. 186, § 9.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 19, 20 and 21, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and original Section 21 omitted.

Purposes of changes.1. The definition of "representative" in this act (Section 1-201) includes an officer of a corporation or association, a trustee, an executor or administrator of an estate, or any person empowered to act for another. It is not intended to mean that a trust or an estate is necessarily a legal entity with the capacity to issue negotiable instruments, but merely that if it can issue them they may be signed by the representative.

The power to sign for another may be an express authority, or it may be implied in law or in fact, or it may rest merely upon apparent authority. It may be established as in other cases of representation, and when relevant parol evidence is admissible to prove or to deny it.

2. Subsection (2) applies only to the signature of a representative whose authority to sign for another is established. If he is not authorized his signature has the effect of an unauthorized signature (Section 3-404). Even though he is authorized the principal is not liable on the instrument, under the provisions (Section 3-401) relating to signatures, unless the instrument names him and clearly shows that the signature is made on his behalf.

3. Assuming that Peter Pringle is a principal and Arthur Adams is his agent, an instrument might, for example, bear the following signatures affixed by the agent -

(a) "Peter Pringle," or

(b) "Arthur Adams," or

(c) "Peter Pringle by Arthur Adams, Agent," or

(d) "Arthur Adams, Agent," or

(e) "Peter Pringle

Arthur Adams."

A signature in form (a) does not bind Adams if authorized (Sections 3-401 and 3-404).

A signature as in (b) personally obligates the agent and parol evidence is inadmissible under Subsection (2) (a) to disestablish his obligation.

The unambiguous way to make the representation clear is to sign as in (c). Any other definite indication is sufficient, as where the instrument reads "Peter Pringle promises to pay" and it is signed "Arthur Adams, Agent." Adams is not bound if he is authorized (Section 3-404).

Subsection 2(b) adopts the New York (minority) rule of Megowan v. Peterson, 173 N.Y. 1 (1902), in such a case as (d); and adopts the majority rule in such a case as (e). In both cases the section admits parol evidence in litigation between the immediate parties to prove signature by the agent in his representative capacity. [Paragraph 3 was amended in 1966.]

4. The original Section 21, covering signatures by "procuration," is omitted. It was based

on English practice under which the words "per procuration" added to any signature are understood to mean that the signer is acting under a power of attorney which the holder is free to examine. The holder is thus put on notice of the limited authority, and there can be no apparent authority extending beyond the power of attorney. This meaning of "per procuration" is almost unknown in the United States, and the words are understood by the ordinary banker or attorney to be merely the equivalent of "by." The omission is not intended to suggest that a signature "by procuration" can no longer have the effect which it had under the original Section 21, in any case where a party chooses to use the expression.

Cross references.Point 1: Section 1-201.

Point 2: Sections 3-401(1), 3-404 and 3-405.

Definitional cross references."Instrument". Section 3-102.

"Person". Section 1-201.

"Representative". Section 1-201.

"Signature". Section 3-401.

ANNOTATION

Compiler's notes. - Laws 1967, ch. 186, § 10, is compiled as 55-3-412 NMSA 1978.

Treasurer not presumptively signing for corporation. - The treasurer of a corporation is not such an officer thereof as makes his signing a promissory note presumptively or prima facie the act of the corporation and the burden of showing he acted with authority is upon the plaintiff. Oak Grove & Sierra Verde Cattle Co. v. Foster, 7 N.M. 650, 41 P. 522 (1895) (decided under former law).

But when corporation unable to deny authority of president. - In suit by the payee of a note which was signed by the man who was president of a corporation as "Cox Bros., Inc., by Hal R. Cox," in the presence of his brother who was treasurer, the corporation will be estopped to deny its signature or the authority of the president to sign for the corporation, the payee having no knowledge of any limitation of authority; especially in view of the fact that similar transactions and similar notes had been acknowledged and paid. Timberlake v. Cox Bros., 39 N.M. 183, 43 P.2d 924 (1935).

Parol evidence is admissible to prove fraud on underlying transaction concerning a promissory note where a representative claims to have signed the instrument under the influence of fraudulent misrepresentations as to personal liability. Hot Springs Nat'l Bank v. Stoops, 94 N.M. 568, 613 P.2d 710 (1980).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 328, 466, 550, 555, 556, 558 to 560, 562, 566, 575; 12 Am. Jur. 2d Bills and Notes § 1241.
Authority of agent to endorse and transfer commercial paper, 12 A.L.R. 111; 37 A.L.R.2d 453.
Liability of principal for overdraft drawn by agent and paid by bank, 58 A.L.R. 816.
Personal liability of one who signs or endorses without qualification commercial paper of corporation, 82 A.L.R.2d 424.
Construction and application of UCC § 3-403(2) dealing with personal liability of authorized representative who signs negotiable instrument in his own name, 97 A.L.R.3d 798.
2A C.J.S. Agency § 233 et seq.; 10 C.J.S. Bills and Notes § 32.

§ 55-3-404. Unauthorized signatures.

(1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.

(2) Any unauthorized signature may be ratified for all purposes of this article. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

History: 1953 Comp., § 50A-3-404, enacted by Laws 1961, ch. 96, § 3-404.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 23, Uniform Negotiable Instruments Law.

Changes. Reworded and new provisions.

Purpose of changes and new matter. The changes are intended to remove uncertainties arising under the original section:

1. "Unauthorized signature" is a defined term (Section 1-201). It includes both a forgery and a signature made by an agent exceeding his actual or apparent authority.

2. The final clause of Subsection (1) is new. It states the generally accepted rule that the unauthorized signature, while it is wholly inoperative as that of the person whose name is signed, is effective to impose liability upon the actual signer or to transfer any rights that he may have in the instrument. His liability is not in damages for breach of a warranty of his authority, but is full liability on the instrument in the capacity in which he

has signed. It is, however, limited to parties who take or pay the instrument in good faith; and one who knows that the signature is unauthorized cannot recover from the signer on the instrument.

3. Subsection (2) is new. It settles the conflict which has existed in the decisions as to whether a forgery may be ratified. A forged signature may at least be adopted; and the word "ratified" is used in order to make it clear that the adoption is retroactive, and that it may be found from conduct as well as from express statements. Thus it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature; and although the forger is not an agent, the ratification is governed by the same rules and principles as if he were.

This provision makes ratification effective only for the purposes of this article. The unauthorized signature becomes valid so far as its effect as a signature is concerned. The ratification relieves the actual signer from liability on the signature. It does not of itself relieve him from liability to the person whose name is signed. It does not in any way affect the criminal law. No policy of the criminal law requires that the person whose name is forged shall not assume liability to others on the instrument; but he cannot affect the rights of the state. While the ratification may be taken into account with other relevant facts in determining punishment, it does not relieve the signer of criminal liability.

4. The words "or is precluded from denying it" are retained in Subsection (1) to recognize the possibility of an estoppel against the person whose name is signed, as where he expressly or tacitly represents to an innocent purchaser that the signature is genuine; and to recognize the negligence which precludes a denial of the signature.

Cross references.Sections 3-307, 3-401, 3-403 and 3-405.

Point 1: Section 1-201.

Point 4: Section 3-406.

Definitional cross references."Good faith". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Rights". Section 1-201.

"Signature". Section 3-401.

"Signed". Section 1-201.

"Unauthorized signature". Section 1-201.

"Value". Section 3-303.

ANNOTATION

Compiler's notes. - The cases in the following notes were decided under former law.

Effect of denial of signature by alleged maker. - A denial by the alleged maker of a promissory note, under oath, of the signature thereto, coupled with an allegation that the signature was a forgery, placed in issue the genuineness and due execution of the same. Wight v. Citizens' Bank, 17 N.M. 71, 124 P. 478 (1912).

Not affirmative defense. - Where alleged maker of a promissory note, under oath, denied the signature thereto, and alleged that the signature was a forgery, it did not constitute an affirmative defense, casting upon the defendant the burden to establish by a preponderance of the evidence that he did not make and execute the note in question. Wight v. Citizens' Bank, 17 N.M. 71, 124 P. 478 (1912).

But where corporation unable to deny authority of president. - Where the president of a corporation signed the corporation's name to a note, the treasurer being present and making no objection, the corporation was estopped to claim the signature as inadvertent, it having paid two other notes to the same payee, signed by the president. Timberlake v. Cox Bros., 39 N.M. 183, 43 P.2d 924 (1935).

Liability on forged instrument generally. - Where a bank, in good faith and for value, purchases from an endorser or holder a check upon another bank, and endorses and forwards same to its collection agency for collection, and the collection agency on presenting same to drawee bank receives payment, the drawee bank on discovery of the check to be forged cannot recover the money back from bank to whom it was paid without proving negligence by the latter. State Nat'l Bank v. Bank of Magdalena, 21 N.M. 653, 157 P. 498, 1916E L.R.A. 1296 (1916).

If endorsement of the payee be treated as a forgery, the bank as subsequent endorsee acquired no rights under it, and it is liable on its guarantee on an adjusted service certificate issued pursuant to World War Adjusted Compensation Act [38 U.S.C. § 591 et seq.] unless the United States is by its laches precluded from asserting the guaranty. United States v. First Nat'l Bank, 131 F.2d 985 (10th Cir. 1942), cert. denied, 318 U.S. 774, 63 S. Ct. 830, 87 L. Ed. 1144 (1943).

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 3 Am. Jur. 2d Agency §§ 81, 152; 10 Am. Jur. 2d Banks § 624; 11 Am. Jur. 2d Bills and Notes §§ 704, 709, 710, 712 to 714. Payment of check upon forged or unauthorized endorsement as affecting the right of true owner against the bank, 14 A.L.R. 764; 69 A.L.R. 1076; 137 A.L.R. 874.

Right of owner of check against one who cashes it on a forged or unauthorized endorsement and procures its payment by drawee, 100 A.L.R.2d 670.
Right of drawee of forged check or draft to recover amount paid thereon, 121 A.L.R.2d 1056.
What constitutes ratification of unauthorized signature under U.C.C. § 3-404, 93 A.L.R.3d 967.
10 C.J.S. Bills and Notes §§ 73, 493.

§ 55-3-405. Impostors; signature in name of payee.

(1) An indorsement by any person in the name of a named payee is effective if:

(a) an impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or

(b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

(c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

History: 1953 Comp., § 50A-3-405, enacted by Laws 1961, ch. 96, § 3-405.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 9(3), Uniform Negotiable Instruments Law.

Changes. Reworded and new provisions.

Purposes of changes and new matter.1. This section enlarges the original subsection to include additional situations which it has not been held to cover. The words "fictitious or nonexisting person" have been eliminated as misleading, since the existence or nonexistence of the named payee is not decisive and is important only as it may bear on the intent that he shall have no interest in the instrument. The instrument is not made payable to bearer and indorsements are still necessary to negotiation. The section however recognizes as effective indorsement of the types of paper covered no matter by whom made. This solution is thought preferable to making such instruments bearer paper; on the face of things they are payable to order and a subsequent taker should require what purports to be a regular chain of indorsements. On the other hand it is thought to be unduly restrictive to require that the actual indorsement be made by the impostor or other fraudulent actor. In most cases the person whose fraud procured the instrument to be issued will himself indorse; when some other third person indorses it

will most probably be a case of theft or a second independent fraud superimposed upon the original fraud. In neither case does there seem to be sufficient reason to reverse the rule of the section. To recapitulate: the instrument does not become bearer paper, a purportedly regular chain in indorsements is required, but any person - first thief, second impostor or third murderer - can effectively indorse in the name of the payee.

2. Subsection (1)(a) is new. It rejects decisions which distinguish between face-to-face imposture and imposture by mail and hold that where the parties deal by mail the dominant intent of the drawer is to deal with the name rather than with the person so that the resulting instrument may be negotiated only by indorsement of the payee whose name has been taken in vain. The result of the distinction has been under some prior law, to throw the loss in the mail imposture forward to a subsequent holder or to the drawee. Since the maker or drawer believes the two to be one and the same, the two intentions cannot be separated, and the "dominant intent" is a fiction. The position here taken is that the loss, regardless of the type of fraud which the particular impostor has committed, should fall upon the maker or drawer.

"Impostor" refers to impersonation, and does not extend to a false representation that the party is the authorized agent of the payee. The maker or drawer who takes the precaution of making the instrument payable to the principal is entitled to have his indorsement.

3. Subsection (1)(b) restates the substance of the original Subsection 9(3). The test stated is not whether the named payee is "fictitious," but whether the signer intends that he shall have no interest in the instrument. The following situations illustrate the application of the subsection.

a. The drawer of a check, for his own reasons, makes it payable to P knowing that P does not exist.

b. The drawer makes the check payable in the name of P. A person named P exists, but the drawer does not know it.

c. The drawer makes the check payable to P, an existing person whom he knows, intending to receive the money himself and that P shall have no interest in the check.

d. The treasurer of a corporation draws its check payable to P, who to the knowledge of the treasurer does not exist.

e. The treasurer of a corporation draws its check payable to P. P exists but the treasurer has fraudulently added his name to the payroll intending that he shall not receive the check.

f. The president and the treasurer of a corporation both sign its check payable to P. P does not exist. The treasurer knows it but the president does not.

g. The same facts as f, except that P exists and the treasurer knows it, but intends that P shall have no interest in the check.

In all the cases stated an indorsement by any person in the name of P is effective.

4. Paragraph (c) is new. It extends the rule of the original Subsection 9(3) to include the padded payroll cases, where the drawer's agent or employee prepares the check for signature or otherwise furnishes the signing officer with the name of the payee. The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of his employees, or, if he is not, is at least in a better position to cover the loss by fidelity insurance; and that the cost of such insurance is properly an expense of his business rather than of the business of the holder or drawee.

The provision applies only to the agent or employee of the drawer, and only to the agent or employee who supplies him with the name of the payee. The following situations illustrate its application.

a. An employee of a corporation prepares a padded payroll for its treasurer, which includes the name of P. P does not exist, and the employee knows it, but the treasurer does not. The treasurer draws the corporation's check payable to P.

b. The same facts as a, except that P exists and the employee knows it but intends him to have no interest in the check. In both cases an indorsement by any person in the name of P is effective and the loss falls on the corporation.

5. The section is not intended to affect criminal liability for forgery or any other crime, or civil liability to the drawer or to any other person. It is to be read together with the section under which an unauthorized signer is personally liable on the signature to any person who takes the instrument in good faith (Section 3-404(1)).

Cross references.Sections 3-401, 3-403, 3-404 and 3-406.

Point 5: Section 3-404(1).

Definitional cross references."Instrument". Section 3-102.

"Issue". Section 3-102.

"Person". Section 1-201.

"Signature". Section 3-401.

ANNOTATION

Section is exception to general rule of nonliability. - As a general rule, forged indorsements are ineffective to pass title or to authorize a drawee to pay. But this section operates as an exception to the general rule. Western Cas. & Sur. Co. v. Citizens Bank, 676 F.2d 1344 (10th Cir. 1982).

In certain factual situations, this section treats anyone's indorsement in the name of the payee as effective to pass title to the instrument, leaving the drawer liable on the instrument despite the forged indorsement. Western Cas. & Sur. Co. v. Citizens Bank, 676 F.2d 1344 (10th Cir. 1982).

Purpose of the indorsement requirement in this section is primarily to ensure that the check presents a normal appearance and that the person negotiating it can reasonably be identified as the intended payee. Western Cas. & Sur. Co. v. Citizens Bank, 676 F.2d 1344 (10th Cir. 1982).

Subsection (1)(c) covers apparently normal business transaction. - Subsection (1)(c) covers situations in which an employee starts the wheels of normal business procedure in motion to produce a check for a nonauthorized transaction. Western Cas. & Sur. Co. v. Citizens Bank, 676 F.2d 1344 (10th Cir. 1982).

Negligence of bank not relevant under Subsection (1)(c). - A court need not consider allegations of negligence on the part of the bank in a factual situation falling within Subsection (1)(c). Western Cas. & Sur. Co. v. Citizens Bank, 676 F.2d 1344 (10th Cir. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 638 to 640; 11 Am. Jur. 2d Bills and Notes § 331.
Who must bear loss as between drawer or endorser who delivers check to an impostor and one who purchases, cashes or pays it upon the impostor's endorsement, 81 A.L.R.2d 1365.
Nominal payee rule of U.C.C. § 3-405(1)(b), 92 A.L.R.3d 268.
Construction and application of U.C.C. § 3-405(1)(a) involving issuance of negotiable instrument induced by impostor, 92 A.L.R.3d 608.
10 C.J.S. Bills and Notes §§ 129, 192, 220.

§ 55-3-406. Negligence contributing to alteration or unauthorized signature.

Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

History: 1953 Comp., § 50A-3-406, enacted by Laws 1961, ch. 96, § 3-406.

OFFICIAL COMMENT

Prior uniform statutory provisions. None.

Purposes.1. This section is new. It adopts the doctrine of Young v. Grote, 4 Bing. 253 (1827), which held that a drawer who so negligently draws an instrument as to facilitate its material alteration is liable to a drawee who pays the altered instrument in good faith. It should be noted that the rule as stated in the section requires that the negligence "substantially" contribute to the alteration.

2. The section extends the above principle to the protection of a holder in due course and of payors who may not technically be drawees. It rejects decisions which have held that the maker of a note owes no duty of care to the holder because at the time the instrument is drawn there is no contract between them. By drawing the instrument and "setting it afloat upon a sea of strangers" the maker or drawer voluntarily enters into a relation with later holders which justifies his responsibility. In this respect an instrument so negligently drawn as to facilitate alteration does not differ in principle from an instrument containing blanks which may be filled.

The holder in due course under the rules governing alteration (Section 3-407) may enforce the altered instrument according to its original tenor. Where negligence of the obligor has substantially contributed to the alteration, this section gives the holder the alternative right to enforce the instrument as altered.

3. No attempt is made to define negligence which will contribute to an alteration. The question is left to the court or the jury upon the circumstances of the particular cases. Negligence usually has been found where spaces are left in the body of the instrument in which words or figures may be inserted. No unusual precautions are required, and the section is not intended to change decisions holding that the drawer of a bill is under no duty to use sensitized paper, indelible ink or a protectograph; or that it is not negligence to leave spaces between the lines or at the end of the instrument in which a provision for interest or the like can be written.

4. The section applies only where the negligence contributes to the alteration. It must afford an opportunity of which advantage is in fact taken. The section approves decisions which have refused to hold the drawer responsible where he has left spaces in a check but the payee erased all the writing with chemicals and wrote in an entirely new check.

5. This section does not make the negligent party liable in tort for damages resulting from the alteration. Instead it estops him from asserting it against the holder in due course or drawee. The reason is that in the usual case the extent of the loss, which involves the possibility of ultimate recovery from the wrongdoer, cannot be determined at the time of litigation, and the decision would have to be made on the unsatisfactory

basis of burden of proof. The holder or drawee is protected by an estoppel, and the task of pursuing the wrongdoer is left to the negligent party. Any amount in fact recovered from the wrongdoer must be held for the benefit of the negligent party under ordinary principles of equity.

6. The section protects parties who act not only in good faith (Section 1-201), but also in observance of the reasonable standards of their business. Thus any bank which takes or pays an altered check which ordinary banking standards would require it to refuse cannot take advantage of the estoppel.

7. The section applies the same rule to negligence which contributes to a forgery or other unauthorized signature, as defined in this act (Section 1-201). The most obvious case is that of the drawer who makes use of a signature stamp or other automatic signing device and is negligent in looking after it. The section extends, however, to cases where the party has notice that forgeries of his signature have occurred and is negligent in failing to prevent further forgeries by the same person. It extends to negligence which contributes to a forgery of the signature of another, as in the case where a check is negligently mailed to the wrong person having the same name as the payee. As in the case of alteration, no attempt is made to specify what is negligence, and the question is one for the court or the jury on the facts of the particular case.

Cross references.Sections 3-401 and 3-404.

Point 2: Section 3-407 (3).

Point 6: Section 1-201.

Point 7: Section 1-201.

Definitional cross references."Alteration". Section 3-407.

"Good faith". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Unauthorized signature". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 78, 386, 710.
Negligence in drawing check which facilitates alteration as to amount as affecting

drawee's bank's liability, 42 A.L.R.2d 1070.
Alteration of figures indicating amount of bill or note, without change in written words, as forgery, 64 A.L.R.2d 1029.
What amounts to "negligence contributing to alteration or unauthorized signature" under U.C.C. § 3-406, 67 A.L.R.3d 144.
3A C.J.S. Alteration of Instruments § 20; 10 C.J.S. Bills and Notes § 484.

§ 55-3-407. Alteration.

(1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in:

(a) the number or relations of the parties; or

(b) an incomplete instrument, by completing it otherwise than as authorized; or

(c) the writing as signed, by adding to it or by removing any part of it.

(2) As against any person other than a subsequent holder in due course:

(a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;

(b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

(3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed.

History: 1953 Comp., § 50A-3-407, enacted by Laws 1961, ch. 96, § 3-407.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 14, 15, 124 and 125, Uniform Negotiable Instruments Law.

Changes. Combined and reworded; new provisions and rule of original Section 15 reversed.

Purposes of changes and new matter. The changes are intended to remove uncertainties arising under the original sections, and to modify the rules as to discharge:

1. Subsection (1) substitutes a general definition for the list of illustrations in the original Section 125. Any alteration is material only as it may change the contract of a party to the instrument; and the addition or deletion of words which do not in any way affect the contract of any previous signer is not material. But any change in the contract of a party, however slight, is a material alteration; and the addition of one cent to the amount payable, or an advance of one day in the date of payment, will operate as a discharge if it is fraudulent.

Specific mention is made of a change in the number or relations of the parties in order to make it clear that any such change is material only if it changes the contract of one who has signed. The addition of a comaker or a surety does not change in most jurisdictions the contract of one who has already signed as maker and should not be held material as to him. The addition of the name of an alternative payee is material, since it changes his obligation. Paragraph (c) makes special mention of a change in the writing signed in order to cover occasional cases of addition of sticker clauses, scissoring or perforating instruments where the separation is not authorized.

2. Paragraph (b) of Subsection (1) is to be read together with Section 3-115 on incomplete instruments. Where an instrument contains blanks or is otherwise incomplete, it may be completed in accordance with the authority given and is then valid and effective as completed. If the completion is unauthorized and has the effect of changing the contract of any previous signer, this provision follows the generally accepted rule in treating it as a material alteration which may operate as a discharge.

3. Subsection (2) modifies the very rigorous rule of the original Section 124. The changes made are as follows:

a. A material alteration does not discharge any party unless it is made by the holder. Spoliation by any meddling stranger does not affect the rights of the holder. It is of course intended that the acts of the holder's authorized agent or employee, or of his confederates, are to be attributed to him.

b. A material alteration does not discharge any party unless it is made for a fraudulent purpose. There is no discharge where a blank is filled in in the honest belief that it is as authorized; or where a change is made with a benevolent motive such as a desire to give the obligor the benefit of a lower interest rate. Changes favorable to the obligor are unlikely to be made with any fraudulent intent; but if such an intent is found the alteration may operate as a discharge.

c. The discharge is a personal defense of the party whose contract is changed by the alteration, and anyone whose contract is not affected cannot assert it. The contract of any party is necessarily affected, however, by the discharge of any party against whom he has a right of recourse on the instrument. Assent to the alteration given before or after it is made will prevent the party from asserting the discharge. "Or is precluded from asserting the defense" is added in Paragraph (a) to recognize the possibility of an estoppel or other ground barring the defense which does not rest on assent.

d. If the alteration is not material or if it is not made for a fraudulent purpose there is no discharge, and the instrument may be enforced according to its original tenor. Where blanks are filled or an incomplete instrument is otherwise completed there is no original tenor, but the instrument may be enforced according to the authority in fact given.

4. Subsection (3) combines the final sentences of the original Sections 14 and 124, and provides that a subsequent holder in due course takes free of the discharge in all cases. The provision is merely one form of the general rule governing the effect of discharge against a holder in due course (Section 3-602). The holder in due course may enforce the instrument according to its original tenor. In this connection reference should be made to the section giving the holder in due course the right, where the maker's or drawer's negligence has substantially contributed to the alteration, to enforce the instrument in its altered form (Section 3-406). Reference should also be made to Section 4-401 covering a bank's right to charge its customer's account in the case of altered instruments.

Where blanks are filled or an incomplete instrument is otherwise completed, this subsection follows the original Section 14 in placing the loss upon the party who left the instrument incomplete and permitting the holder to enforce it in its completed form. As indicated in the comment to Section 3-115 on incomplete instruments, this result is intended even though the instrument was stolen from the maker or drawer and completed after the theft; and the effect of this subsection, together with the section on incomplete instruments is to reverse the rule of the original Section 15.

There is no inconsistency between Subsection (3) and Paragraph (b) of Subsection (2). The holder in due course may elect to enforce the instrument either as provided in that paragraph or as provided in Subsection (3).

It should be noted that a purchaser who takes the instrument with notice of any material alteration, including the unauthorized completion of an incomplete instrument, takes with notice of a claim or defense and cannot be a holder in due course (Section 3-304).

Cross references.Sections 3-305, 3-306 and 3-307.

Point 2: Section 3-115.

Point 4: Sections 3-115, 3-304(2), 3-602 and 4-401.

Definitional cross references."Contract". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Signed". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Generally. - Defense of alteration of an instrument is not available under pleadings alleging fraud. Schmidt v. Bank of Commerce, 234 U.S. 64, 34 S. Ct. 730, 58 L. Ed. 1214 (1914) (decided under former law).

Defense of alteration of instrument by addition of other signatures must be pleaded to be available to other comakers. Schmidt v. Bank of Commerce, 234 U.S. 64, 34 S. Ct. 730, 58 L. Ed. 1214 (1914) (decided under former law).

This section is not applicable unless the alteration made by the holder was fraudulent; and where there is no evidence from which an inference of fraud could be drawn, there is no question of fact for the jury concerning discharge of the maker. Bank of N.M. v. Rice, 78 N.M. 170, 429 P.2d 368 (1967).

Law reviews. - For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision'," see 4 Nat. Resources J. 398 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Alteration of Instruments § 31; 11 Am. Jur. 2d Bills and Notes §§ 78, 666.
Alteration of commercial paper by reducing the amount, 9 A.L.R. 1087.
Liability of party to commercial paper so drawn as to be easily alterable as to amount, 22 A.L.R. 1139; 36 A.L.R. 327; 39 A.L.R. 1380.
Rights and liabilities of bank with respect to certified check or draft fraudulently altered, 22 A.L.R. 1157.
Detachment of paper used to conceal the nature or terms of a bill or note which one signed or endorsed, as an alteration, 34 A.L.R. 532.
Alteration of note before delivery to payee as affecting parties who do not personally consent, 44 A.L.R. 1244.
Erasing endorsement of payment as an alteration of instrument, 44 A.L.R. 1540.
Alteration of instrument by agent as binding on principal, 51 A.L.R. 1229.
Rights and liabilities of drawee bank, as to persons other than drawer, with respect to uncertified check which was altered, 75 A.L.R.2d 611.
What constitutes "fraudulent and material" alteration of negotiable instrument under U.C.C. § 3-407(2)(a), 88 A.L.R.3d 905.
3A C.J.S. Alteration of Instruments § 5 et seq.; 10 C.J.S. Bills and Notes § 486.

§ 55-3-408. Consideration.

Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3-305 [55-3-305 NMSA 1978]), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this act under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount.

History: 1953 Comp., § 50A-3-408, enacted by Laws 1961, ch. 96, § 3-408.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 24, 25 and 28, Uniform Negotiable Instruments Law.

Changes. Combined and reworded.

Purposes of changes.1. "Consideration" is distinguished from "value" throughout this article. "Consideration" refers to what the obligor has received for his obligation, and is important only on the question of whether his obligation can be enforced against him.

2. The "except" clause is intended to remove the difficulties which have arisen where a note or a draft, or an indorsement of either, is given as payment or as security for a debt already owed by the party giving it, or by a third person. The provision is intended to change the result of decisions holding that where no extension of time or other concession is given by the creditor the new obligation fails for lack of legal consideration. It is intended also to mean that an instrument given for more or less than the amount of a liquidated obligation does not fail by reason of the common law rule that an obligation for a lesser liquidated amount cannot be consideration for the surrender of a greater.

3. With respect to the necessity or sufficiency of consideration other obligations on an instrument are subject to the ordinary rules of contract law relating to contracts not under seal. Promissory estoppel or any other equivalent or substitute for consideration is to be recognized as in other contract cases. The provision of the original Section 28 as to absence or failure of consideration is now covered by the section dealing with the rights of one not a holder in due course; and the "presumption" of consideration in the original Section 24 is replaced by the provision relating to the burden of establishing defenses.

Cross references.Point 1: Section 3-303.

Point 3: Sections 3-306(c) and 3-307(2).

Definitional cross references."Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Compiler's notes. - The cases in the following notes were decided under former law.

An accommodation party cannot defend for failure of consideration, where the endorsee loaned the amount of the note to the maker. Jones v. White, 34 N.M. 592, 286 P. 424 (1930).

Nor joint maker. - A plea by one joint maker that note in suit was without consideration as to him is bad, unless it negatives a consideration to a third party with his knowledge or with detriment to the promisee. Lane v. Mayer, 33 N.M. 28, 262 P. 182 (1927).

New consideration needed for signers of note after delivery. - A note contained a provision that it was not binding on any of the signers until signed by not less than 10 men. First signer delivered note, signed by only seven names to plaintiff who secured an automobile for same. The automobile was wrecked within a short time after note was delivered. After the automobile was wrecked note was again circulated and three additional signers secured thereto. In an action on the note it was held not enforceable against the three additional signers for lack of consideration. Wood v. Eminger, 44 N.M. 636, 107 P.2d 557 (1940).

However, additional consideration for existing obligation inadequate. - Agreement to give additional consideration for performance of a provision in a contract which party receiving consideration is already under obligation to perform is void because without consideration. Ollman v. Huddleston, 41 N.M. 75, 64 P.2d 97 (1937).

Burden of proof on want of consideration. - In a suit upon a negotiable promissory note, the burden of showing want of consideration is on the defendant, and if he offers any evidence tending to show want of consideration, plaintiff must show by a preponderance of evidence that there was consideration. Citizens' Nat'l Bank v. Bean, 26 N.M. 203, 190 P. 1018 (1920).

And on illegality of consideration. - In a suit on a note where it is claimed that the obligation is unenforceable because a part of the consideration is an agreement against public policy, defendant must carry the burden of showing such illegality. Dominguez v. Rocas, 34 N.M. 317, 281 P. 25 (1929).

But instructed verdict if no evidence of failure of consideration. - Court erred in overruling plaintiff's motion for instructed verdict in suit on note where defense was failure of consideration and there was no evidence of failure of consideration. Melhop v. Costa, 26 N.M. 337, 192 P. 477 (1920).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 215, 216, 229, 237, 238, 242, 334, 337, 657; 12 Am. Jur. 2d Bills and Notes § 1187.
Bona fides of purchaser of bill or note on an executory consideration, 3 A.L.R. 987; 100 A.L.R. 1357.
Cross notes, bills or checks as consideration for each other, 7 A.L.R. 1569.
Moral obligation as consideration for executory promise, 17 A.L.R. 1299; 79 A.L.R. 1346; 8 A.L.R.2d 787.
Death of obligor as affecting note in consideration of promise to marry obligor, 34 A.L.R. 36.
Renewal as affecting defense of failure of consideration, 35 A.L.R. 1258; 72 A.L.R. 600.
Burden of proof as to consideration when plaintiff not protected as holder in due course, 35 A.L.R. 1370; 65 A.L.R. 904; 127 A.L.R. 1003.
Right of maker, or other party, to transfer to make the defense that paper was transferred on a gambling consideration, 56 A.L.R. 1322.
Surrender of claim against insolvent as consideration for promise by third person, 59 A.L.R. 315.
Marriage promise as consideration for note made some time thereafter, 63 A.L.R. 1184.
Liability of bank on note given to aid evasion of law, 64 A.L.R. 595.
Consideration for note or other obligation given to make good depletion of capital or assets of bank, 95 A.L.R. 534.
Right of recovery by bona fide purchaser of note or other instrument given to cover gambling loan, 53 A.L.R.2d 376.
10 C.J.S. Bills and Notes §§ 152, 153, 517; 11 C.J.S. Bills and Notes §§ 654, 655.

§ 55-3-409. Draft not an assignment.

(1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

(2) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance.

History: 1953 Comp., § 50A-3-409, enacted by Laws 1961, ch. 96, § 3-409.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 127 and 189, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and new provisions.

Purposes of changes and new matter.The two original sections are combined, brought forward to appear in connection with acceptance, and reworded to remove uncertainties.

1. As under the original sections, a check or other draft does not of itself operate as an assignment in law or equity. The assignment may, however, appear from other facts, and particularly from other agreements, express or implied; and when the intent to assign is clear the check may be the means by which the assignment is effected.

2. The language of the original Section 189, that the drawee is not liable "to the holder," is changed as inaccurate and not intended. The drawee is not liable on the instrument until he accepts; but he remains subject to any other liability to the holder. In this connection reference should be made to Section 4-302 on the payor bank's liability for late return. Such a bank if it does not either make prompt settlement or return on an item received by it will become liable to a holder of the item.

3. Subsection (2) is new. It is intended to make it clear that this section does not in any way affect any liability which may arise apart from the instrument itself. The drawee who fails to accept may be liable to the drawer or to the holder for breach of the terms of a letter of credit or any other agreement by which he is obligated to accept. He may be liable in tort or upon any other basis because of his representation that he has accepted, or that he intends to accept. The section leaves unaffected any liability of any kind apart from the instrument.

Cross references.Sections 3-410, 3-411, 3-412 and 3-415.

Point 2: Section 4-302.

Definitional cross references."Acceptance". Section 3-410.

"Check". Section 3-104.

"Contract". Section 1-201.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Letter of credit". Section 5-104.

ANNOTATION

Generally. - Against a drawee bank, a check is not an assignment of the fund; but as against the drawer, the giving of a check for value on an ordinary bank deposit is an

assignment pro tanto. The death of the depositor will not revoke the authority of the bank to pay the check. Elgin v. Gross-Kelly & Co., 20 N.M. 450, 150 P. 922, 1916A L.R.A. 711 (1915) (decided under former law).

Where check deemed assignment by maker. - Where the maker of a check died after the check was delivered to the payee but before it had been paid by the bank on which the check was drawn, it was held that upon issuance of the check for value there was an assignment pro tanto of the funds of the drawer on deposit in the bank on which the check was drawn. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Although not as depository bank concerned. - The fact that a check is for value is material as to the issues between the parties, and, although there is no assignment so far as the depository bank is concerned, as between the maker and the payee, there is an assignment. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

But effect of acceptance. - The effect of the acceptance of the order is to constitute the acceptor the principal debtor. By the act of acceptance he assumes to pay the order or bill, and becomes the principal debtor for the amount specified. The acceptance is an admission of everything essential to the existence of such liability. Clayton Townsite Co. v. Clayton Drug Co., 20 N.M. 185, 147 P. 460 (1915).

Payee of check may sue bank for payment made on forged endorsement, in an action for conversion, though he could not sue on the contract. State v. First Nat'l Bank, 38 N.M. 225, 30 P.2d 728 (1934).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 538, 562, 563, 565, 568, 577; 11 Am. Jur. 2d Bills and Notes §§ 104, 501, 593.
9 C.J.S. Banks and Banking § 366; 10 C.J.S. Bills and Notes § 171.

§ 55-3-410. Definition and operation of acceptance.

(1) Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification.

(2) A draft may be accepted although it has not been signed by the drawer or is

otherwise incomplete or is overdue or has been dishonored.

(3) Where the draft is payable at a fixed period after sight and the acceptor fails to date his acceptance the holder may complete it by supplying a date in good faith.

History: 1953 Comp., § 50A-3-410, enacted by Laws 1961, ch. 96, § 3-410.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 132, 133, 134, 135, 136, 137, 138, 161-170 and 191, Uniform Negotiable Instruments Law.

Changes. Combined, reworded and original Sections 134, 135, 137 and 161-170 eliminated.

Purposes of changes.1. The original Sections 161-170 providing for acceptance for honor are omitted from this article. This ancient practice developed at a time when communications were slow, and particularly in overseas transactions there might be a delay of several months before the drawer could be notified of dishonor by nonacceptance and take steps to protect his credit. The need for intervention by a third party has passed with the development of the cable transfer, the letter of credit, and numerous other devices by which a substitute arrangement is promptly made. The practice has been obsolete for many years, and the sections are therefore eliminated.

2. Under Section 3-417 a person obtaining acceptance gives a warranty against alteration of the instrument before acceptance.

3. Subsection (1) adopts the rule of Section 17 of the English Bills of Exchange Act that the acceptance must be written on the draft. It eliminates the original Sections 134 and 135, providing for "virtual" acceptance by a written promise to accept drafts to be drawn, and "collateral" acceptance by a separate writing. Both have been anomalous exceptions to the policy that no person is liable on an instrument unless his signature appears on it. Both are derived from a line of early American cases decided at a time when difficulties of communication, particularly overseas, might leave the holder in doubt for a long period whether the draft was accepted. Such conditions have long since ceased to exist, and the "virtual" or "collateral" acceptance is now almost entirely obsolete. Good commercial and banking practice does not sanction acceptance by any separate writing because of the dangers and uncertainties arising when it becomes separated from the draft. The instrument is now forwarded to the drawee for his acceptance upon it, or reliance is placed upon the obligation of the separate writing itself, as in the case of a letter of credit.

Nothing in this section is intended to eliminate any liability of the drawee in contract, tort or otherwise arising from the separate writing or any other obligation or representation, as provided in Section 3-409.

Subsection (1) likewise eliminates the original Section 137, providing for acceptance by delay or refusal to return the instrument but the drawee may be liable for a conversion of the instrument under Section 3-419.

4. Subsection (1) states the generally recognized rule that the mere signature of the drawee on the instrument is a sufficient acceptance. Customarily the signature is written vertically across the face of the instrument; but since the drawee has no reason to sign for any other purpose his signature in any other place, even on the back of the instrument, is sufficient. It need not be accompanied by such words as "Accepted," "Certified," or "Good." It must not, however, bear any words indicating an intent to refuse to honor the bill; and nothing in this provision is intended to change such decisions as Norton v. Knapp, 64 Iowa 112, 19 N.W. 867 (1884), holding that the drawee's signature accompanied by the words "Kiss my foot" is not an acceptance.

5. The final sentence of Subsection (1) expressly states the generally recognized rule, implied in the definition of acceptance in the original Section 191, that an acceptance written on the draft takes effect when the drawee notifies the holder or gives notice according to his instructions. Acceptance is thus an exception to the usual rule that no obligation on an instrument is effective until delivery.

6. Subsection (3) changes the last sentence of the original Section 138. The purpose of the provision is to provide a definite date of payment where none appears on the instrument. An undated acceptance of a draft payable "thirty days after sight" is incomplete; and unless the acceptor himself writes in a different date the holder is authorized to complete the acceptance according to the terms of the draft by supplying a date of presentment. Any date which the holder chooses to write in is effective providing his choice of date is made in good faith. Any different agreement not written on the draft is not effective, and parol evidence is not admissible to show it.

Cross references.Sections 3-411, 3-412 and 3-418.

Point 2: Section 3-417.

Point 3: Sections 3-401(1), 3-409(2) and 3-419.

Point 6: Section 3-412.

Definitional cross references."Delivery". Section 1-201.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Honor". Section 1-201.

"Notification". Section 1-201.

"Presentment". Section 3-504.

"Signature". Section 3-401.

"Signed". Section 1-201.

"Written". Section 1-201.

ANNOTATION

Under former law, oral acceptance is not binding upon the drawee. Clayton Townsite Co. v. Clayton Drug Co., 20 N.M. 185, 147 P. 460 (1915); Hanna v. McCrory, 19 N.M. 183, 141 P. 996 (1914).

Mere act of stamping bill of exchange "paid" by payee is not acceptance. Hanna v. McCrory, 19 N.M. 183, 141 P. 996 (1914) (decided under former law).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision'," see 4 Nat. Resources J. 398 (1964).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 500, 503, 504, 506, 507, 510; 12 Am. Jur. 2d Bills and Notes § 1241.
Acceptance of checks by telegraph or telephone, 2 A.L.R. 1146; 13 A.L.R. 989.
Ratification by corporation of unauthorized acceptance of commercial paper by officer by acceptance and retention of benefits, 7 A.L.R. 1472.
Clearinghouse transactions as payment or acceptance of checks, 12 A.L.R. 998; 30 A.L.R. 1028.
What amounts to acceptance extrinsic to check, 26 A.L.R. 312.
Variance between description of goods in letter of credit and documents accompanying draft as affecting duty to accept draft, 30 A.L.R. 353.
Acceptance of cashier's check from debtor as absolute or conditional payment, 36 A.L.R. 470; 42 A.L.R. 1353; 45 A.L.R. 1487.
Bank's acceptance of check as affected by attempt to pay it otherwise than in cash, 38 A.L.R. 185.

Drawee's mere writing of his name on bill as an acceptance thereof, 48 A.L.R. 760.
Discharge of drawer or endorser of check by holder's acceptance therefor of something other than money, 52 A.L.R. 994; 87 A.L.R. 442.
Destruction of or refusal to return bill as an acceptance, 63 A.L.R. 1138.
Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order, 97 A.L.R.3d 714.
Provision in draft or note directing payment "on acceptance" as affecting negotiability, 19 A.L.R.4th 1268.
3A C.J.S. Alteration of Instruments § 66; 10 C.J.S. Bills and Notes § 174 et seq.

§ 55-3-411. Certification of a check.

(1) Certification of a check is acceptance. Where a holder procures certification the drawer and all prior indorsers are discharged.

(2) Unless otherwise agreed a bank has no obligation to certify a check.

(3) A bank may certify a check before returning it for lack of proper indorsement. If it does so the drawer is discharged.

History: 1953 Comp., § 50A-3-411, enacted by Laws 1961, ch. 96, § 3-411.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 187 and 188, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and new provisions.

Purposes of changes and new matter.1. The second sentence of Subsection (1) continues the rule of original Section 188 that, while certification procured by a holder discharges the drawer and other prior parties, certification procured by the drawer leaves him liable. Under this provision any certification procured by a holder discharges the drawer and prior indorsers. Any indorsement made after a certification so procured remains effective; and where it is intended that any indorser shall remain liable notwithstanding certification, he may indorse with the words "after certification" to make his liability clear.

2. Subsection (2) is new. It states the generally recognized rule that in the absence of agreement a bank is under no obligation to certify a check, because it is a demand instrument calling for payment rather than acceptance. The bank may be liable for breach of any agreement with the drawer, the holder and/or any other person by which it undertakes to certify. Its liability is not on the instrument, since the drawee is not so liable until acceptance (Section 3-409(1)). Any liability is for breach of the separate agreement.

3. Subsection (3) is new. It recognizes the banking practice of certifying a check which is returned for proper indorsement in order to protect the drawer against a longer contingent liability. It is consistent with the provision of Section 3-410(2) permitting certification although the check has not been signed or is otherwise incomplete.

Cross references.Sections 3-412, 3-413, 3-417 and 3-418.

Point 2: Section 3-409(1).

Point 3: Section 3-410(2).

Definitional cross references."Acceptance". Section 3-410.

"Bank". Section 1-201.

"Check". Section 3-104.

"Holder". Section 1-201.

ANNOTATION

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 577, 588, 590, 600 to 602.
Effect of certification of check upon presentment by one other than the owner or drawer, 12 A.L.R. 992.
Right of drawer to stop payment of certified check, 35 A.L.R. 942.
Delay in presenting certified or accepted check for payment as affecting liability of drawee bank, 42 A.L.R. 1138.
Discharge of drawer or endorser of check by holder's acceptance of certification thereof as payment, 52 A.L.R. 1001; 87 A.L.R. 444.
Collecting bank's acceptance of certification of check instead of payment, 61 A.L.R. 748; 89 A.L.R. 1336.
Refusal to certify check by drawee bank as equivalent to dishonor, excusing presentment, for purposes of drawer's liability, 62 A.L.R. 377.
Right of bank certifying check or note by mistake to cancel, or avoid effect of, certification, 25 A.L.R.3d 1367.
9 C.J.S. Banks and Banking § 370 et seq.; 10 C.J.S. Bills and Notes §§ 39, 217, 472.

§ 55-3-412. Acceptance varying draft.

(1) Where the drawee's proffered acceptance in any manner varies the draft as presented the holder may refuse the acceptance and treat the draft as dishonored in which case the drawee is entitled to have his acceptance canceled.

(2) The terms of the draft are not varied by an acceptance to pay at any particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at such bank or place.

(3) Where the holder assents to an acceptance varying the terms of the draft each drawer and indorser who does not affirmatively assent is discharged.

History: 1953 Comp., § 50A-3-412, enacted by Laws 1961, ch. 96, § 3-412; 1967, ch. 186, § 10.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 139, 140, 141 and 142, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and law changed as to qualified acceptances.

Purposes of changes.1. The section applies to conditional acceptances, acceptances for part of the amount, acceptances to pay at a different time from that required by the draft or to the acceptance of less than all of the drawees, all of which are covered by the original Section 141. It applies to any other engagement changing the essential terms of the draft.

2. Where the drawee offers such a varied engagement the holder has an election. He may reject the offer, insist on acceptance of the draft as presented, and treat the refusal to give it as a dishonor. In that event the drawee is not bound by his engagement, and is entitled to have it cancelled. After any necessary notice of dishonor and protest the holder may have his recourse against the drawer and indorsers.

If the holder elects to accept the offer, this section does not invalidate the drawee's varied engagement. It remains his effective obligation, which the holder may enforce against him. By his assent, however, the holder discharges any drawer or indorser who does not also assent. The rule of the original Section 142 is changed to require that the assent of the drawer or indorser be affirmatively expressed. Mere failure to object within a reasonable time is not assent which will prevent the discharge.

3. The rule of original Section 140 that an acceptance to pay at a particular place is an unqualified acceptance is modified by the provision of Subsection (2) that the terms of the draft are not varied by an acceptance to pay at any particular bank or place in the United States unless the acceptance states that the draft is to be paid only at such bank

or place. Section 3-504(4) provides that a draft accepted payable at a bank in the United States must be presented at the bank designated [As amended 1962].

Cross references.Sections 3-410 and 3-413.

Point 3: Section 3-504(4).

Definitional cross references."Acceptance". Section 3-410.

"Bank". Section 1-201.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Term". Section 1-201.

"Written". Section 1-201.

ANNOTATION

Compiler's notes. - Laws 1967, ch. 186, § 11, is compiled as 55-3-504 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 515, 517, 518, 520.
10 C.J.S. Bills and Notes §§ 39, 180, 217.

§ 55-3-413. Contract of maker, drawer and acceptor.

(1) The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to Section 3-115 [55-3-115 NMSA 1978] on incomplete instruments.

(2) The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse.

(3) By making, drawing or accepting, the party admits as against all subsequent parties including the drawee the existence of the payee and his then capacity to indorse.

History: 1953 Comp., § 50A-3-413, enacted by Laws 1961, ch. 96, § 3-413.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 60, 61 and 62, Uniform Negotiable Instruments Law.

Changes. Combined and reworded.

Purposes of changes.The original sections are combined for convenience and condensed to avoid duplication of language. This section should be read in connection with the sections on incomplete instruments (3-115), negligence contributing to alteration or unauthorized signature (3-406), alteration (3-407), acceptances varying a draft (3-412) and finality of payment or acceptance (3-418). Thus a maker who signs an incomplete note engages under this section to pay it according to its tenor at the time he signs it, but by virtue of Sections 3-115 and 3-407 the note may thereafter be completed and enforced against him. In the same way, if the maker's negligence substantially contributes to alteration of the instrument, he will become liable on his note as altered under Section 3-406. When a holder assents to an acceptance varying a draft (Section 3-412) he can of course hold the acceptor only according to the form of acceptance to which the holder agreed. Section 3-418 applies the rule of Price v. Neal both to acceptance and payment; thus an acceptor may not, after acceptance, assert that the drawer's signature is unauthorized.

Subsection (1) applies to all drafts (including checks) the rule that the acceptance relates to the instrument as it was at the time of its acceptance and not (in case of alteration before acceptance) to its original tenor. The cases on this point under the original act (all of which involved checks) have been in conflict. It should be noted that under Section 3-417 a person who obtains acceptance warrants to the acceptor that the instrument has not been materially altered.

Except as indicated in the foregoing comment the section makes no change in substance from the provision of the original act.

Cross references.Sections 3-115, 3-406, 3-407, 3-412, 3-417 and 3-418.

Definitional cross references."Contract". Section 1-201.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Protest". Section 3-509.

ANNOTATION

Maker of promissory note is "primarily liable" thereon although he signs only for accommodation. First Sav. Bank & Trust Co. v. Flournoy, 24 N.M. 256, 171 P. 793 (1917) (decided under former law).

Effect of acceptance of bill of exchange is to constitute the acceptor the principal debtor. By the act of acceptance, he assumes to pay the order or bill, and becomes the principal debtor for the amount specified; the acceptance being an admission of everything essential to the existence of such liability. Clayton Townsite Co. v. Clayton Drug Co., 20 N.M. 185, 147 P. 460 (1915) (decided under former law).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 586, 589, 593, 597, 1005.
Insanity of drawer or indorser as defense against holder in due course, 24 A.L.R.2d 1380.
10 C.J.S. Bills and Notes §§ 35 et seq., 183.

§ 55-3-414. Contract of indorser; order of liability.

(1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

(2) Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

History: 1953 Comp., § 50A-3-414, enacted by Laws 1961, ch. 96, § 3-414.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 38, 44, 66, 67 and 68, Uniform Negotiable Instruments Law.

Changes. Combined and reworded.

Purposes of changes.1. Subsection (1) states the contract of indorsement - that if the instrument is dishonored and any protest or notice of dishonor which may be necessary under Section 3-501 is given, the indorser will pay the instrument. The indorser's engagement runs to any holder (whether or not for value) and to any indorser subsequent to him who has taken the instrument up. An indorser may disclaim his liability on the contract of indorsement, but only if the indorsement itself so specifies. Since the disclaimer varies the written contract of indorsement, the disclaimer itself must be written on the instrument and cannot be proved by parol. The customary manner of disclaiming the indorser's liability under this section is to indorse "without recourse". Apart from such a disclaimer all indorsers incur this liability, without regard to whether or not the indorser transferred the instrument for value or received consideration for his indorsement.

Original Section 44, permitting a representative to indorse in such terms as to exclude personal liability, is omitted as unnecessary and included in the broader right to disclaim any liability. No change in the law is intended by this omission.

2. In addition to his liability on the contract of indorsement, an indorser, if a transferor, gives the warranties stated in Section 3-417.

3. As in the case of acceptor's liability (Section 3-413), this section conditions the indorser's liability on the tenor of the instrument at the time of his indorsement. Thus if a person indorses an altered instrument he assumes liability as indorser on the instrument as altered.

4. Subsection (2) is intended to clarify existing law under original Section 68.

The section states two presumptions: One is that the indorsers are liable to one another in the order in which they have in fact indorsed. The other is that they have in fact indorsed in the order in which their names appear. Parol evidence is admissible to show that they have indorsed in another order, or that they have otherwise agreed as to their liability to one another.

The last sentence of the original Section 68 is now covered by Section 3-118(e) (Ambiguous Terms and Rules of Construction).

Cross references.Point 1: Section 3-501.

Point 2: Section 3-417.

Point 3: Section 3-413.

Point 4: Section 3-118(e).

Definitional cross references."Contract". Section 1-201.

"Dishonor". Section 3-507.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Presumed". Section 1-201.

"Protest". Section 3-509.

"Signature". Section 3-401.

ANNOTATION

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision'," see 4 Nat. Resources J. 398 (1964).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 334, 349, 351, 363, 599, 607, 611, 617 to 620, 628, 629; 12 Am. Jur. 2d Bills and Notes §§ 1241, 1268, 1271, 1274.
Undertaking of one who endorses a note without recourse, 2 A.L.R. 216; 91 A.L.R. 399.
Admissibility of parol evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 4 A.L.R. 764; 11 A.L.R. 637; 22 A.L.R. 527; 35 A.L.R. 1120; 54 A.L.R. 999; 92 A.L.R. 721.
Necessity of express agreement between endorsers to be jointly and not successively liable, in order to give a right of contribution as between themselves, 11 A.L.R. 1332; 90 A.L.R. 305.
Endorsement of bill or note in form of guaranty as transferring title, 21 A.L.R. 1375; 33 A.L.R. 97; 46 A.L.R. 1516.
Endorsement without recourse as affecting character of endorsee or subsequent holder as holder in due course, 77 A.L.R. 487.
Insanity of endorser as defense against holder in due course, 24 A.L.R.2d 1390.
10 C.J.S. Bills and Notes §§ 214, 217, 222.

§ 55-3-415. Contract of accommodation party.

(1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

(2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

(3) As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

(4) An indorsement which shows that it is not in the chain of title is notice of its accommodation character.

(5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

History: 1953 Comp., § 50A-3-415, enacted by Laws 1961, ch. 96, § 3-415.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 28, 29 and 64, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and new provisions.

Purposes of changes and new matter. To make it clear that:

1. Subsection (1) recognizes that an accommodation party is always a surety (which includes a guarantor), and it is his only distinguishing feature. He differs from other sureties only in that his liability is on the instrument and he is a surety for another party to it. His obligation is therefore determined by the capacity in which he signs. An accommodation maker or acceptor is bound on the instrument without any resort to his principal, while an accommodation indorser may be liable only after presentment, notice of dishonor and protest. The subsection recognizes the defenses of a surety in accordance with the provisions subjecting one not a holder in due course to all simple contract defenses, as well as his rights against his principal after payment. Under subsection (3) except as against a holder in due course without notice of the accommodation, parol evidence is admissible to prove that the party has signed for accommodation. In any case, however, under Subsection (4) an indorsement which is not in the chain of title (the irregular or anomalous indorsement) is notice to all subsequent takers of the instrument of the accommodation character of the

indorsement.

2. Subsection (1) eliminates the language of the old Section 29 requiring that the accommodation party sign the instrument "without receiving value therefor." The essential characteristic is that the accommodation party is a surety, and not that he has signed gratuitously. He may be a paid surety, or receive other compensation from the party accommodated. He may even receive it from the payee, as where A and B buy goods and it is understood that A is to pay for all of them and that B is to sign a note only as a surety for A.

3. The obligation of the accommodation party is supported by any consideration for which the instrument is taken before it is due. Subsection (2) is intended to change occasional decisions holding that there is no sufficient consideration where an accommodation party signs a note after it is in the hands of a holder who has given value. The party is liable to the holder in such a case even though there is no extension of time or other concession. This is consistent with the provision as to antecedent obligations as consideration (Section 3-408). The limitation to "before it is due" is one of suretyship law, by which the obligation of the surety is terminated at the time limit unless in the meantime the obligation of the principal has become effective.

4. As a surety the accommodation party is not liable to the party accommodated; but he is otherwise liable on the instrument in the capacity in which he has signed. This general statement of the rule makes unnecessary the detailed provisions of the original Section 64, which is therefore eliminated, without any change in substance.

5. Subsection (5) is intended to change the result of such decisions as Quimby v. Varnum, 190 Mass. 211, 76 N.E. 671 (1906), which held that an accommodation indorser who paid the instrument could not maintain an action on it against the accommodated party since he had no "former rights" to which he was remitted. Under ordinary principles of suretyship the accommodation party who pays is subrogated to the rights of the holder paid, and should have his recourse on the instrument.

Cross references.Sections 3-305, 3-408, 3-603, 3-604 and 3-606.

Point 1: Section 3-306(b).

Point 3: Section 3-408.

Definitional cross references."Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Signed". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Signers requested by bank deemed accommodation makers. - Where appellants had endorsed a note at the request of a bank which desired to have the loan made, but had already loaned the maker the legal limit, they were accommodation indorsers and were liable to a holder for value. Jones v. White, 34 N.M. 592, 286 P. 424 (1930).

Extent of liability of joint and several maker of note. - The joint and several maker of a promissory note, who pledges it as security for another note signed by him, and for any other indebtedness, is liable on the note, although the liability of his joint maker is limited to the amount due on the note for which the joint and several note was given as security. Texas Bank & Trust Co. v. Cavin, 26 N.M. 326, 192 P. 365 (1920) (decided under former law).

Payee and holder of a joint and several note signed by C. and A., who had knowledge that A. signed the note as collateral for another note signed by C., can recover from A. only the amount remaining due on the note of C., as for which the joint note was collateral. Texas Bank & Trust Co. v. Cavin, 26 N.M. 326, 192 P. 365 (1920) (decided under former law).

Payee and holder of a collateral note, with knowledge that it has been diverted from the purpose for which it was given, cannot hold the accommodation maker liable for any other purpose or to any greater extent than that for which the accommodation note was given. Texas Bank & Trust Co. v. Cavin, 26 N.M. 326, 192 P. 365 (1920) (decided under former law).

And accommodation maker may sue maker on note. - Where a note and mortgage are assigned to an accommodation maker who then paid up the note, the accommodation maker succeeds to the payee's rights and may sue the maker on the note, because the note was not discharged when paid by the accommodation maker. Simson v. Bilderbeck, Inc., 76 N.M. 667, 417 P.2d 803 (1966).

And foreclose assigned mortgage. - An accommodation maker's payment of a note will not extinguish the lien of mortgage assigned to the accommodation maker and the accommodation maker may foreclose mortgage upon his payment of the note. Simson v. Bilderbeck, Inc., 76 N.M. 667, 417 P.2d 803 (1966).

Agreement which modified the terms of a note and provided for smaller monthly payments was an accommodation, and the indorser's consent thereto was effective to

bind her to the changes in the agreement. Crawford v. 733 San Mateo Co. 854 F.2d 1220 (10th Cir. 1988).

Parties listed on promissory note as "guarantors" found to be makers. - See Color World TV Rental, Inc. v. White, 25 Bankr. 652 (Bankr. D.N.M. 1982).

Law reviews. - For annual survey of New Mexico law relating to commercial law, see 12 N.M.L. Rev. 173 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 120, 121, 237, 240, 241, 364, 458, 522, 530, 536, 539 to 549, 931; 12 Am. Jur. 2d Bills and Notes §§ 1241, 1247, 1287.
Parol evidence to vary or explain endorsement of bill or note given for accommodation, 4 A.L.R. 764; 11 A.L.R. 637; 22 A.L.R. 527; 35 A.L.R. 1120; 54 A.L.R. 999; 92 A.L.R. 721.
Right of accommodation party to bill or note to revoke his signature, 22 A.L.R. 1348.
Rights and remedies of accommodation party to paper as against accommodated party after payment, 36 A.L.R. 553; 77 A.L.R. 668.
Authority of bank officer or employee to bind bank by endorsement or guaranty of paper for accommodation of third person, 37 A.L.R. 1373.
Release of collateral as discharging accommodation maker, 48 A.L.R. 715; 65 A.L.R. 1425; 108 A.L.R. 1088; 2 A.L.R.2d 260.
Rights of transferee after maturity of accommodation paper, 48 A.L.R. 1280.
Liability of bank on accommodation paper given for evasion of law, 64 A.L.R. 595.
Amount paid for paper by holder as limiting recovery against accommodation party, 69 A.L.R. 1313.
Original consideration as supporting obligation of accommodation parties who became such after the contract had been delivered and accepted, 74 A.L.R. 1097.
One taking accommodation paper as collateral security for preexisting indebtedness, as bona fide holder, 80 A.L.R. 682.
Note given to make good depletion of capital or assets of bank as one for accommodation, 95 A.L.R. 541.
Failure of accommodation maker or endorser to disaffirm transaction, or his continued recognition of note after learning of use for purpose other than intended as ratification of the diversion, 105 A.L.R. 437.
Discharge of accommodation maker or surety by release of mortgage or other security given for note, 2 A.L.R.2d 260.
Liability of insane accommodation endorser of negotiable instrument, 24 A.L.R.2d 1391.
Who is accommodation party under U.C.C. § 3-415, 90 A.L.R.3d 342.
10 C.J.S. Bills and Notes §§ 39, 482; 11 C.J.S. Bills and Notes § 737 et seq.

§ 55-3-416. Contract of guarantor.

(1) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its

tenor without resort by the holder to any other party.

(2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

(3) Words of guaranty which do not otherwise specify guarantee payment.

(4) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.

(5) When words of guaranty are used, presentment, notice of dishonor and protest are not necessary to charge the user.

(6) Any guaranty written on the instrument is enforceable notwithstanding any statute of frauds.

History: 1953 Comp., § 50A-3-416, enacted by Laws 1961, ch. 96, § 3-416.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. The section is new. It states the commercial understanding as to the meaning and effect of words of guaranty added to a signature.

An indorser who guarantees payment waives not only presentment, notice of dishonor and protest, but also all demand upon the maker or drawee. Words of guaranty do not affect the character of the indorsement as an indorsement (Section 3-202 (4)); but the liability of the indorser becomes indistinguishable from that of a co-maker. A guaranty of collection likewise waives formal presentment, notice of dishonor and protest, but requires that the holder first proceed against the maker or acceptor by suit and execution, or show that such proceeding would be useless.

Subsection (6) is concerned chiefly with the type of statute of frauds which provides that no promise to answer for the debt, default or miscarriage of another is enforceable unless it is evidenced by a writing which states the consideration for the promise. It is unusual to state any consideration when a guaranty is added to a signature on a negotiable instrument, which in itself sufficiently shows the nature of the transaction; and such statutes have commonly been held not to apply to such guaranties.

Cross references.Sections 3-202(4) and 3-415.

Definitional cross references."Holder". Section 1-201.

"Insolvent". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presumption". Section 1-201.

"Protest". Section 3-509.

"Signature". Section 3-401.

"Written". Section 1-201.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 120, 534. Construction and effect of UCC § 3-416 governing guaranty contracts, 10 A.L.R.4th 897.
10 C.J.S. Bills and Notes §§ 39, 209 et seq.; 37 C.J.S. Frauds, Statute of § 30; 38 C.J.S. Guaranty § 46.

§ 55-3-417. Warranties on presentment and transfer.

(1) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that:

(a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

(b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith:

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is

also the drawee; or

(iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

(c) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith:

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee; or

(iii) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or

(iv) to the acceptor of a draft with respect to an alteration made after the acceptance.

(2) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that:

(a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

(b) all signatures are genuine or authorized; and

(c) the instrument has not been materially altered; and

(d) no defense of any party is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

(3) By transferring "without recourse" the transferor limits the obligation stated in Subsection (2) (d) to a warranty that he has no knowledge of such a defense.

(4) A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority.

History: 1953 Comp., § 50A-3-417, enacted by Laws 1961, ch. 96, § 3-417.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 65 and 69, Uniform Negotiable Instruments Law.

Changes. Combined and reworded and new provisions added.

Purposes of changes and new matter.1. The obligations imposed by this section are stated in terms of warranty. Warranty terms, which are not limited to sale transactions, are used with the intention of bringing in all the usual rules of law applicable to warranties, and in particular the necessity of reliance in good faith and the availability of all remedies for breach of warranty, such as rescission of the transaction or an action for damages. Like other warranties, those stated in this section may be disclaimed by agreement between the immediate parties. In the case of an indorser, disclaimer of his liability as a transferor, to be effective, must appear in the form of the indorsement, and no parol proof of "agreement otherwise" is admissible. For corresponding warranties in the case of items in the bank collection process, Section 4-207 should be consulted.

2. Subsection (1) is new. It is intended to state the undertaking to a party who accepts or pays of one who obtains payment or acceptance or of any prior transferor. It is closely connected with the following section on the finality of acceptance or payment (Section 3-418), and should be read together with it.

3. Subsection (1) (a) retains the generally accepted rule that the party who accepts or pays does not "admit" the genuineness of indorsements, and may recover from the person presenting the instrument when they turn out to be forged. The justification for the distinction between forgery of the signature of the drawer and forgery of an indorsement is that the drawee is in a position to verify the drawer's signature by comparison with one in his hands, but has ordinarily no opportunity to verify an indorsement.

4. Subsection (1) (b) recognizes and deals with competing equities of parties accepting or paying instruments bearing unauthorized maker's or drawer's signatures and those obtaining acceptances or receiving payment. The warranties prescribed and exceptions thereto follow closely principles established at common law, particularly, those under Price v. Neal, 3 Burr. 1354 (1762).

The basic warranty that the person obtaining payment or acceptance and any prior transferor warrants that he has no knowledge that the signature of the maker or drawer is unauthorized stems from the general principle that one who presents an instrument knowing that the signature of the maker or drawer is forged or unauthorized commits an obvious fraud upon the party to whom presentment is made. However, few cases present this simple fact situation. If the signature of a maker or drawer has been forged, the parties include the dishonest forger himself and usually one or more innocent holders taking from him. Frequently, the state of knowledge of a holder is difficult to determine and sometimes a holder takes such a forged instrument in perfect good faith but subsequently learns of the forgery. Since in different fact situations holders have equities of varying strength, it is necessary to have some exceptions to the basic

warranty.

The exceptions apply only in favor of a holder in due course and, within the provisions of Section 3-201, to all subsequent transferees from a holder in due course. Since a condition of the status of a holder in due course under Section 3-302(1) (a) is that the holder takes the instrument without notice of any defense against it, this condition presupposes that at the time of taking such a holder had no knowledge of the unauthorized signature. Consequently, the warranty of Subsection (1) (b) is pertinent in the case of a holder in due course only in the relatively few cases where he acquires knowledge of the forgery after the taking but before the presentment. In this situation the holder in due course must continue to act in good faith to be exempted from the basic warranty.

The first exemption from the warranty by such a holder, made by Subparagraph (i), is that the warranty does not run to a maker of a note with respect to the maker's own signature. This codifies the rule of Price v. Neal, and related cases. Since a maker of a note is presumed to know his own signature, if he fails to detect a forgery of his own signature and pays the note, under the Price v. Neal principle he should not be permitted to recover such payment from a holder in due course acting in good faith. Similarly, under Subparagraph (ii) a drawer of a draft is presumed to know his own signature and if he fails to detect a forgery of his signature and pays a draft he may not recover that payment from a holder in due course acting in good faith. This rule applies if the drawer pays the instrument as drawer and also if he pays the instrument as drawee in a case where he is both drawer and drawee.

Under the principle of Price v. Neal a drawee of a draft is presumed to know the signature of his customer, the drawer. However, under Subsection (1) (b) and Subparagraph (iii) of this subsection this presumption is not strong enough to deprive such a drawee (either in accepting or paying an instrument) of the warranty of no knowledge of the unauthorized drawer's signature, unless the holder in due course took the instrument and became such a holder after the drawee's acceptance; or obtained the acceptance without knowledge that the drawer's signature was unauthorized. In the former case, the holder taking after and thereby presumably in reliance on the acceptance should be protected as against the drawee who accepted without detecting the unauthorized signature. In the latter case the holder, having no knowledge of the unauthorized signature at the time of the drawee's acceptance, would not be charged with this warranty and would be entitled to enforce such acceptance under Section 3-418, even if thereafter he acquired knowledge of the unauthorized signature prior to enforcement of the acceptance. Such right of the holder to enforce the acceptance would be valueless if immediately upon enforcing it and obtaining payment the holder became obligated to return the payment by reason of breach of the warranty of no knowledge at the time of payment.

5. Subsection (1) (c) retains the common law rule, followed by several decisions under the original act, which has permitted a party paying a materially altered instrument in good faith to recover, and a party who accepts such an instrument to avoid such

acceptance. As in the case of Subsection (1) (b) this warranty is not imposed against a holder in due course acting in good faith in favor of a maker of a note or a drawer of a draft on the ground that such maker or drawer should know the form and amount of the note or draft which he has signed. The exception made by Subparagraph (iii) in the case of a holder in due course of a draft accepted after the alteration follows the decisions in National City Bank of Chicago v. National Bank of Republic of Chicago, 300 Ill. 103, 132 N.E. 832, 22 A.L.R. 1153 (1921), and Wells Fargo Bank & Union Trust Company v. Bank of Italy, 214 Cal. 156, 4 P.2d 781 (1931), and is based on the principle that an acceptance is an undertaking relied upon in good faith by an innocent party. The attempt to avoid this result by certifying checks "payable as originally drawn" leaves the subsequent purchaser in uncertainty as to the amount for which the instrument is certified, and so defeats the entire purpose of certification, which is to obtain the definite obligation of the bank to honor a definite instrument. Subparagraph (iii) accordingly provides that such language is not sufficient to impose on the holder in due course the warranty of no material alteration where the holder took the draft after the acceptance and presumably in reliance on it.

Subparagraph (iv) of Subsection (1) (c) exempts a holder in due course from the warranty of no material alteration to the acceptor of a draft with respect to an alteration made after the acceptance. A drawee accepting a draft has an opportunity of ascertaining the form and particularly the amount of the draft accepted. If, thereafter, the draft is materially altered and is thereupon presented for payment to the acceptor, the acceptor has the necessary information in its records to verify the form and particularly the amount of the draft. If in spite of this available information it pays the draft, there is as much reason to leave the responsibility for such payment upon the acceptor (as against a holder in due course acting in good faith) as there is in the case of a maker or drawer paying a materially altered note or draft.

6. Under Section 3-201 parties taking from or holding under a holder in due course, within the limits of that section, will have the same rights under Section 3-417(1) as a holder in due course. Of course such parties claiming under a holder in due course must act in good faith and be free from fraud, illegality and notice as provided in Section 3-201.

7. The liabilities imposed by Subsection (2) in favor of the immediate transferee apply to all persons who transfer an instrument for consideration whether or not the transfer is accompanied by indorsement. Any consideration sufficient to support a simple contract will support those warranties.

8. Subsection (2) changes the original Section 65 to extend the warranties of any

indorser beyond the immediate transferee in all cases. Where there is an indorsement the warranty runs with the instrument and the remote holder may sue the indorser-warrantor directly and thus avoid a multiplicity of suits which might be interrupted by the insolvency of an intermediate transferor. The language of Subsections (2) (b) and (2) (c) is substituted for "genuine and what it purports to be" in the original Section 65(1). The

language of Subsection (2) (a) is substituted for that of Section 65(2) in order to cover the case of the agent who transfers for another.

9. Subsection (2) (d) resolves a conflict in the decisions as to whether the transferor warrants that there are no defenses to the instrument good against him. The position taken is that the buyer does not undertake to buy an instrument incapable of enforcement, and that in the absence of contrary understanding the warranty is implied. Even where the buyer takes as a holder in due course who will cut off the defense, he still does not undertake to buy a lawsuit with the necessity of proving his status. Subsection (3) however provides that an indorsement "without recourse" limits the (2) (d) warranty to one that the indorser has no knowledge of such defenses. With this exception the liabilities of a "without recourse" indorser under this section are the same as those of any other transferor. Under Section 3-414 "without recourse" in an indorsement is effective to disclaim the general contract of the indorser stated in that section.

10. Subsection (2) (e) is substituted for Section 65(4). The transferor does not warrant against difficulties of collection, apart from defenses, or against impairment of the credit of the obligor or even his insolvency in the commercial sense. The buyer is expected to determine such questions for himself before he takes the obligation. If insolvency proceedings as defined in this act (Section 1-201) have been instituted against the party who is expected to pay and the transferor knows it, the concealment of that fact amounts to a fraud upon the buyer, and the warranty against knowledge of such proceedings is provided accordingly.

11. Subsection (4) is substituted for Section 69 of the original act. It applies only to a selling agent, as distinguished from an agent for collection. It follows the rule generally accepted that an agent who makes the disclosure warrants his good faith and authority and may not by contract assume a lesser warranty.

Cross references.Sections 3-404, 3-405, 3-406, 3-414 and 4-207.

Point 1: Section 4-207.

Point 2: Section 3-418.

Point 4: Sections 3-201, 3-302 and 3-418.

Point 9: Section 3-414.

Point 10: Section 1-201.

Definitional cross references."Acceptance". Section 3-410.

"Alteration". Section 3-407.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Genuine". Section 1-201.

"Good faith". Section 1- 201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Party". Section 1-201.

"Person". Section 1-201.

"Signature". Section 3-401.

"Term". Section 1-201.

ANNOTATION

Law reviews. - For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision'," see 4 Nat. Resources J. 398 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 617, 646, 649, 650, 998, 999, 1004 to 1008, 1012 to 1014; 12 Am. Jur. 2d Bills and Notes §§ 1090, 1241, 1268.
Transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as subject to defenses which chattel purchaser could assert against seller, 44 A.L.R.2d 8.
10 C.J.S. Bills and Notes §§ 183, 214, 237 et seq., 467.

§ 55-3-418. Finality of payment or acceptance.

Except for recovery of bank payments as provided in the article on bank deposits and collections (Article 4) and except for liability for breach of warranty on presentment under the preceding section [55-3-417 NMSA 1978], payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

History: 1953 Comp., § 50A-3-418, enacted by Laws 1961, ch. 96, § 3-418.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 62, Uniform Negotiable Instruments Law.

Changes. Completely restated.

Purposes of changes.The rewording is intended to remove a number of uncertainties arising under the original section.

1. The section follows the rule of Price v. Neal, 3 Burr. 1354 (1762), under which a drawee who accepts or pays an instrument on which the signature of the drawer is forged is bound on his acceptance and cannot recover back his payment. Although the original act is silent as to payment, the common law rule has been applied to it by all but a very few jurisdictions. The traditional justification for the result is that the drawee is in a superior position to detect a forgery because he has the maker's signature and is expected to know and compare it; a less fictional rationalization is that it is highly desirable to end the transaction on an instrument when it is paid rather than reopen and upset a series of commercial transactions at a later date when the forgery is discovered.

The rule as stated in the section is not limited to drawees, but applies equally to the maker of a note or to any other party who pays an instrument.

2. The section follows the decisions under the original act applying the rule of Price v. Neal to the payment of overdrafts, or any other payment made in error as to the state of the drawer's account. The same argument for finality applies, with the additional reason that the drawee is responsible for knowing the state of the account before he accepts or pays.

3. The section follows decisions under the original act, in making payment or acceptance final only in favor of a holder in due course, or a transferee who has the rights of a holder in due course under the shelter principle. If no value has been given for the instrument the holder loses nothing by the recovery of the payment or the avoidance of the acceptance, and is not entitled to profit at the expense of the drawee; and if he has given only an executory promise or credit he is not compelled to perform it after the forgery or other reason for recovery is discovered. If he has taken the instrument in bad faith or with notice he has no equities as against the drawee.

4. The section rejects decisions under the original act permitting recovery on the basis of mere negligence of the holder in taking the instrument. If such negligence amounts to a lack of good faith as defined in this act (Section 1-201) or to notice under the rules (Section 3-304) relating to notice to a purchaser of an instrument, the holder is not a holder in due course and is not protected; but otherwise the holder's negligence does not affect the finality of the payment or acceptance.

5. This section is to be read together with the preceding section, which states the warranties given by the person obtaining acceptance or payment. It is also limited by

the bank collection provision (Section 4-301) permitting a payor bank to recover a payment improperly paid if it returns the item or sends notice of dishonor within the limited time provided in that section. But notice that the latter right is sharply limited in time, and terminates in any case when the bank has made final payment, as defined in Section 4-213.

Cross references.Sections 3-302, 3-303 and 3-417.

Point 2: Section 3-201(1).

Point 4: Sections 1-201, 3-302 and 3-304.

Point 5: Sections 3-417, 4-213 and 4-301.

Definitional cross references."Acceptance". Section 3-410.

"Account". Section 4-104.

"Bank". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Presentment". Section 3-504.

ANNOTATION

Law reviews. - For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision'," see 4 Nat. Resources J. 398 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 649, 650, 704, 997, 999, 1004 to 1008, 1010, 1013, 1017, 1018.
Right of drawee of forged check or draft to recover amount paid thereon, 121 A.L.R. 1056.
What constitutes change of position by payee so as to preclude recovery of payment made under mistake, 40 A.L.R.2d 997.
Right of bank certifying check or note by mistake to cancel, or avoid effect of, certification, 25 A.L.R.3d 1367.
10 C.J.S. Bills and Notes §§ 183, 467.

§ 55-3-419. Conversion of instrument; innocent representative.

(1) An instrument is converted when:

(a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or

(b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

(c) it is paid on a forged indorsement.

(2) In an action against a drawee under Subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under Subsection (1) the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this act [chapter] concerning restrictive indorsements, a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner, is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

(4) An intermediary bank or payor bank which is not a depositary bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (Sections 3-205 and 3-206 [55-3-205 and 55-3-206 NMSA 1978]) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.

History: 1953 Comp., § 50A-3-419, enacted by Laws 1961, ch. 96, § 3-419.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 137, Uniform Negotiable Instruments Law.

Changes. Rule changed and new provisions.

Purposes of changes and new matter. To remove difficulties arising under the original section, and to cover additional situations:

1. The provision of the original Section 137 that refusal to return a bill presented for acceptance is deemed to be acceptance has led to difficulties. If the bill is accepted it is not dishonored, and the holder is left without recourse against the drawer and indorsers when he has most need for immediate recourse. The drawee does not in fact accept and does everything he can to display an intention not to accept; and the "acceptance" is useless to the holder for any purpose other than an action against the drawee, since he has nothing that he can negotiate. The original rule has therefore been changed (see Section 3-410).

2. A negotiable instrument is the property of the holder. It is a mercantile specialty which embodies rights against other parties, and a thing of value. This section adopts the

generally recognized rule that a refusal to return it on demand is a conversion. The provision is not limited to drafts presented for acceptance, but extends to any instrument presented for payment, including a note presented to the maker. The action is not on the instrument, but in tort for its conversion.

The detention of an instrument voluntarily delivered is not wrongful unless and until there is demand for its return. Demand for a return at a particular time may, however, be made at the time of delivery; or it may be implied under the circumstances or understood as a matter of custom. If the holder is to call for the instrument and fails to do so, he is to be regarded as extending the time. "Refuses" is meant to cover any intentional failure to return the instrument, including its intentional destruction. It does not cover a negligent loss or destruction, or any other unintentional failure to return. In such a case the party may be liable in tort for any damage sustained as a result of his negligence, but he is not liable as a converter under this section.

3. Subsection (1) (c) is new. It adopts the prevailing view of decisions holding that payment on a forged indorsement is not an acceptance, but that even though made in good faith it is an exercise of dominion and control over the instrument inconsistent with the rights of the owner, and results in liability for conversion.

4. Subsection (2) is new. It adopts the rule generally applied to the conversion of negotiable instruments, that the obligation of any party on the instrument is presumed, in the sense that the term is defined in this act (Section 1-201), to be worth its face value. Evidence is admissible to show that for any reason such as insolvency or the existence of a defense the obligation is in fact worthless, or even that it is without value. In the case of the drawee, however, the presumption is replaced by a rule of absolute liability.

5. Subsection (3), which is new, is intended to adopt the rule of decisions which has held that a representative, such as a broker or depositary bank, who deals with a negotiable instrument for his principal in good faith is not liable to the true owner for conversion of the instrument or otherwise, except that he may be compelled to turn over to the true owner the instrument itself or any proceeds of the instrument remaining in his hands. The provisions of Subsection (3) are, however, subject to the provisions of this act concerning restrictive indorsements (Sections 3-205, 3-206 and related sections).

6. The provisions of this section are not intended to eliminate any liability on warranties of presentment and transfer (Section 3-417). Thus a collecting bank might be liable to a drawee bank which had been subject to liability under this section, even though the collecting bank might not be liable directly to the owner of the instrument.

Cross references.Sections 3-409, 3-410, 3-411 and 3-603.

Point 4: Section 1-201.

Point 5: Sections 1-201, 3-205 and 3-206.

Point 6: Section 3-417.

Definitional cross references."Acceptance". Section 3-410.

"Action". Section 1-201.

"Bank". Section 1-201.

"Collecting bank". Sections 3-102 and 4-105.

"Depositary bank". Sections 3-102 and 4-105.

"Good faith". Section 1-201.

"Instrument". Section 3-102.

"Intermediary bank". Sections 3-102 and 4-105.

"On demand". Section 3-108.

"Person". Section 1-201.

"Presumed". Section 1-201.

"Representative". Section 1-201.

ANNOTATION

No liability for paying on forged endorsement on bearer paper. - A check drawn to a fictitious payee is the same as if it were made payable to bearer; and, since an endorsement on such paper is not necessary to its validity or negotiability, a bank is not liable for paying on a forged endorsement on bearer paper. Airco Supply Co. v. Albuquerque Nat'l Bank, 68 N.M. 195, 360 P.2d 386 (1961) (decided under former law).

Drawee bank has no right to debit account of depositor on a check which bears a forged signature of the drawer. Airco Supply Co. v. Albuquerque Nat'l Bank, 68 N.M. 195, 360 P.2d 386 (1961) (decided under former law).

Generally, bank converts instrument when pays over unauthorized indorsement. - Absent negligence on the part of an indorser, a bank converts an instrument when it pays over an unauthorized indorsement. Casarez v. Garcia, 99 N.M. 508, 660 P.2d 598 (Ct. App. 1983).

And cashier check's true owner entitled to sue bank. - The true owner of a cashier's check has a right to bring an action for conversion or negligence against a bank as

drawee when it pays on an unauthorized indorsement. Casarez v. Garcia, 99 N.M. 508, 660 P.2d 598 (Ct. App. 1983).

Law reviews. - For comment on Jomack Lumber Co. v. Grants State Bank, 75 N.M. 787, 411 P.2d 759 (1966), see 7 Nat. Resources J. 106 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 101, 510.
Promissory notes as subject of conversion, 44 A.L.R.2d 931.
Payee's right of recovery, in conversion under UCC § 3-419(1)(c), for money paid on unauthorized indorsement, 23 A.L.R.4th 855.
Bank's "reasonable commercial standards" defense under UCC § 3-419(3), 49 A.L.R.4th 888.
9 C.J.S. Banks and Banking § 212 et seq.; 10 C.J.S. Bills and Notes §§ 36, 37, 184, 467; 89 C.J.S. Trover and Conversion § 13 et seq.

Part 5

PRESENTMENT, NOTICE OF DISHONOR AND PROTEST

§ 55-3-501. When presentment, notice of dishonor and protest necessary or permissible.

(1) Unless excused (Section 3-511 [55-3-511 NMSA 1978]), presentment is necessary to charge secondary parties as follows:

(a) presentment for acceptance is necessary to charge the drawer and indorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. The holder may at his option present for acceptance any other draft payable at a stated date;

(b) presentment for payment is necessary to charge any indorser;

(c) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor or maker only as stated in Section 3-502 (1) (b) [55-3-502 NMSA 1978].

(2) Unless excused (Section 3-511 [55-3-511 NMSA 1978]):

(a) notice of any dishonor is necessary to charge any indorser;

(b) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, notice of any dishonor is necessary, but failure to give such notice discharges such drawer, acceptor or maker only as stated in Section 3-502 (1)

(b) [55-3-502 NMSA 1978].

(3) Unless excused (Section 3-511 [55-3-511 NMSA 1978]) protest of any dishonor is necessary to charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states and territories of the United States and the District of Columbia. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.

(4) Notwithstanding any provision of this section, neither presentment nor notice of dishonor nor protest is necessary to charge an indorser who has indorsed an instrument after maturity.

History: 1953 Comp., § 50A-3-501, enacted by Laws 1961, ch. 96, § 3-501.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 70, 89, 118, 129, 143, 144, 150, 151, 152, 157, 158 and 186, Uniform Negotiable Instruments Law.

Changes. Combined and simplified.

Purposes of changes.1. Part 5 simplifies the requirements of the original act as to presentment for acceptance or payment, notice of dishonor and protest. This section assembles in one place all provisions as to when any such proceeding is necessary. It eliminates some of the requirements and simplifies others. The effect of unexcused delay in any such proceeding as a discharge is covered by the next section, and the sections following prescribe the details of the proceedings.

2. The words "necessary to charge" are retained from the original act. They mean that the necessary proceeding is a condition precedent to any right of action against the drawer or indorser. He is not liable and cannot be sued without the proceedings however long delayed. Under some circumstances delay is excused. If it is not excused it may operate as a discharge under the next section. Under some circumstances the proceeding may be entirely excused and the drawer or indorser is then liable as if the proceeding had been duly taken. Section 3-511 states the circumstances under which delay may be excused or the proceeding entirely excused.

3. Subsection (1) (a) retains the substance of the original Sections 143, 144 and 150. The last sentence of the subsection states the rule of the decisions both at common law and under the original act, that the holder may at his option present any time draft for acceptance, and is not required to wait until the due date to know whether the drawee will accept it; but that if he does make presentment and acceptance is refused he must give notice of dishonor. There is no similar right to present for acceptance a draft payable on demand, since a demand draft entitles the holder to immediate payment but not to acceptance.

4. Subsections (1) (b) and (1) (c) on presentment for payment follow Section 70 of the original act with one important change. Under the original act and under this section ((1) (b)) presentment for payment is necessary (unless excused) to charge any drawer. Under the original act drawers of drafts other than checks were wholly discharged by a failure to make due presentment but drawers of checks (Section 70 in conjunction with Section 186) were discharged only "to the extent of the loss caused by the delay" - that is to say, when insolvency of the drawee bank occurred after the time when presentment was due. The check rule of the original act (somewhat modified - see Section 3-502(1) (b) and Comment thereto) is by Subsection (1) (c) extended to all drawers, and also to the acceptors and makers of domiciled - "payable at a bank" - drafts and notes. Thus drawers of drafts other than checks are not, as they were under Section 70, wholly discharged by failure to make due presentment but, like drawers of checks, are discharged only as they may have suffered loss as provided in Section 3-502(1) (b). As to domiciled paper original Section 70 provided that ability and willingness to pay at the place named at maturity were "equivalent to a tender of payment" - that is to say would stop the running of interest, but had no other effect. Accordingly cases have held that makers and acceptors of domiciled paper were not discharged to any extent by the holder's failure to make presentment even when the obligor had funds available in the paying bank on the date for presentment and the bank subsequently failed. Subsection (1) (c) applies the check rule to such makers and acceptors; the "tender" language of Section 70 is eliminated; and the result in the cases referred to in the preceding sentence is reversed. Under this section as under the original act presentment for payment is not necessary to charge primary parties (makers and acceptors of undomiciled paper).

5. Under Subsection (2) the rules as to necessity of notice of dishonor run parallel with the rules as to necessity of presentment stated in Subsection (1).

6. Under the original Sections 129 and 152 protest is required in the case of every "foreign draft," defined as a draft which on its face is not both drawn and payable "within this state." The result has been that upon dishonor in New York a check which appears on its face to be drawn in Jersey City must be protested in order to sue the drawer or any indorser. This has led to great inconvenience and expense of protest fees. The only function of protest is that of proof of dishonor, and it adds nothing to notice of dishonor as such.

Subsection (3) eliminates the requirement of protest except upon dishonor of a draft which on its face appears to be either drawn or payable outside of the states, territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico. The requirement is left as to such international drafts because it is generally required by foreign law, which this article cannot affect. The formalities of protest are covered by Section 3-509 on protest, and substitutes for protest as proof of dishonor are provided for in Section 3-510 on evidence of dishonor and of notice. [This paragraph was amended in 1966.]

This provision retains from the original Section 118 the rule permitting the holder at his option to make protest of any dishonor of any other instrument. Even where not required protest may have definite convenience where process does not run to another state and the taking of depositions is a slow and expensive matter. Even where the instrument is drawn and payable entirely within a state there may be convenience in saving the trip of a witness from Buffalo to New York to testify to dishonor, where the substitute evidence of dishonor and notice of dishonor cannot be relied on. Either required or optional protest is presumptive evidence of dishonor. (Section 3-510.)

7. The permissible "protest for better security" of original Section 158 is retained in the case of a foreign draft, as the practice is common in certain foreign countries.

8. Under the final sentence of Section 7 of the original act an instrument indorsed when overdue became payable on demand as to the indorser. That language has been deleted from this article - see Section 3-108 and Comment. It meant, among other things and in view of the provisions of the original act as to demand paper, that such an indorser was discharged unless the instrument was presented for payment within a reasonable time after his indorsement. Presentment of overdue paper for the purpose of charging an indorser is unusual and not an expected commercial practice; the rule has been little more than a trap for those not familiar with the act. Subsection (4), reversing the original act, provides that as to indorsers after maturity neither presentment nor notice of dishonor nor protest is necessary; like primary parties therefore they will remain liable on the instrument for the period of the applicable statute of limitations.

Cross references.Point 1: Sections 3-502 to 3-508.

Point 2: Sections 3-413, 3-414 and 3-511.

Point 3: Sections 3-413, 3-414 and 3-511.

Point 4: Section 3-502.

Point 6: Sections 3-413, 3-414, 3-509, 3-510 and 3-511.

Point 8: Section 3-108.

Definitional cross references."Acceptance". Section 3-410.

"Bank". Section 1-201.

"Certificate of deposit". Section 3-104.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Secondary party". Section 3-102.

"Signature". Section 3-401.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 167, 187, 743, 744, 753, 789, 790, 883 to 887, 897; 12 Am. Jur. 2d Bills and Notes § 1225.
Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it, 2 A.L.R. 1381.
Duty of collecting bank as to notices of protest or dishonor which it receives from its correspondent, 4 A.L.R. 534.
Necessity of protest and notice as between coendorsers of negotiable paper, 9 A.L.R. 1188; 32 A.L.R. 190.
Stopping payment as affecting necessity of presentment of check, 14 A.L.R. 562.
Duty of holder of note containing endorsement in form of guaranty, to make demand for payment and give notice of nonpayment, 21 A.L.R. 1390.
When instrument deemed payable at a "special place" within provision making willingness and ability to pay at such place equivalent to tender, 24 A.L.R. 1050.
Validity and effect of agreement to give bank all, or part, of fees of notary for protesting paper, 25 A.L.R. 170.
Insolvency or bankruptcy of party primarily liable on commercial paper, as excusing demand and notice of dishonor, 25 A.L.R. 962; 87 A.L.R. 1394.
Right of notary who protests paper to change or contradict his certificate, 28 A.L.R. 543.
Effect of delay in presentation of check given for payment of taxes, 44 A.L.R. 1236; 124 A.L.R. 1159.
Duty of holder as regards presentation of check to drawee bank as affected by run on bank or other indications of impending closing of doors, 88 A.L.R. 479.
Time within which check must be presented to prevent discharge of drawer in event of

bank's insolvency, 91 A.L.R. 1181.
Necessity of notice of nonpayment of note or bill upon which corporation is primary obligor, in order to hold officer, director or stockholder as endorser, 123 A.L.R. 1367.
Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance, 39 A.L.R.2d 1296.
Pledgee's liability for failure to make demand, 45 A.L.R.3d 248.
10 C.J.S. Bills and Notes § 343 et seq.

§ 55-3-502. Unexcused delay; discharge.

(1) Where without excuse any necessary presentment or notice of dishonor is delayed beyond the time when it is due:

(a) any indorser is discharged; and

(b) any drawer or the acceptor of a draft payable at a bank or the maker of a note payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect to such funds, but such drawer, acceptor or maker is not otherwise discharged.

(2) Where without excuse a necessary protest is delayed beyond the time when it is due any drawer or indorser is discharged.

History: 1953 Comp., § 50A-3-502, enacted by Laws 1961, ch. 96, § 3-502.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 7, 70, 89, 144, 150, 152 and 186, Uniform Negotiable Instruments Law.

Changes. Combined and simplified.

Purposes of changes.This section is the complement of the preceding section. It covers in one section widely scattered provisions of the original act:

1. The circumstances under which presentment or notice of dishonor or protest or delay therein are excused are stated in Section 3-511. When not excused delay operates as a discharge as provided in this section.

2. Subsection (1) (b) applies to any drawer, as well as to the makers and acceptors of drafts and notes payable at a bank, the rule of the original Section 186 providing for discharge only where the drawer of a check has sustained loss through the delay. This section expressly limits the rule to loss sustained through insolvency of the drawee or

payor which was the only type of loss to which the Section 186 rule has ever been applied in the cases arising under it.

The purpose of the rule is to avoid hardship upon the holder through complete discharge, and unjust enrichment of the drawer or other party who normally has received goods or other consideration for the issue of the instrument. He is "deprived of funds" in any case where bank failure or other insolvency of the drawee or payor has prevented him from receiving the benefit of funds which would have paid the instrument if it had been duly presented.

The original language discharging the drawer "to the extent of the loss caused by the delay" has not worked out satisfactorily in the decided cases, since the amount of the loss caused by the failure of a bank is almost never ascertainable at the time of suit and may not be ascertained until some years later. The decisions have turned upon burden of proof, and the drawer has seldom succeeded in proving his discharge. Subsection (1) (b) therefore substitutes a right to discharge liability by written assignment to the holder of rights against the drawee or payor as to the funds which cover the particular instrument. The assignment is intended to give the holder an effective right to claim against the drawee or payor.

3. Subsection (2) retains the rule of the original Section 152, that any unexcused delay of a required protest is a complete discharge of all drawers and indorsers.

Cross references.Point 1: Section 3-511(1).

Point 2: Section 3-501.

Point 3: Section 3-509.

Definitional cross references."Bank". Section 1-201.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Insolvent". Section 1-201.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Notice of dishonor". Section 3-508.

"Payor bank". Section 4-105.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Rights". Section 1-201.

"Signature". Section 3-401.

"Written". Section 1-201.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 763, 887.
Discharge of endorser by delay in presenting check, 11 A.L.R. 1028.
10 C.J.S. Bills and Notes §§ 293 et seq., 367 et seq.

§ 55-3-503. Time of presentment.

(1) Unless a different time is expressed in the instrument the time for any presentment is determined as follows:

(a) where an instrument is payable at or a fixed period after a stated date any presentment for acceptance must be made on or before the date it is payable;

(b) where an instrument is payable after sight it must either be presented for acceptance or negotiated within a reasonable time after date or issue, whichever is later;

(c) where an instrument shows the date on which it is payable presentment for payment is due on that date;

(d) where an instrument is accelerated presentment for payment is due within a reasonable time after the acceleration;

(e) with respect to the liability of any secondary party presentment for acceptance or payment of any other instrument is due within a reasonable time after such party becomes liable thereon.

(2) A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of the particular case. In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:

(a) with respect to the liability of the drawer, thirty days after date or issue, whichever is later; and

(b) with respect to the liability of an endorser, seven days after his indorsement.

(3) Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties.

(4) Presentment to be sufficient must be made at a reasonable hour, and if at a bank during its banking day.

History: 1953 Comp., § 50A-3-503, enacted by Laws 1961, ch. 96, § 3-503.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 71, 72, 75, 85, 86, 144, 145, 146, 186 and 193, Uniform Negotiable Instruments Law.

Changes. Combined and simplified and new provisions.

Purposes of changes and new matter.1. This section states in one place all of the rules applicable to the time of presentment. Excused delay is covered by Section 3-511 on waiver and excuse, and the effect of unexcused delay by Section 3-502 on discharge.

The original Section 86, as to the determination of the time of payment by calculation from the day the time is to run, is omitted as superfluous. It states a rule universally applied to all time calculations in the law of contracts, and has no special application to negotiable instruments. No change in the law is intended.

2. Subsection (1) contains new provisions stating the commercial understanding as to the presentment of instruments payable after sight, and of accelerated paper.

3. Subsection (2) retains the substance of the original Section 193 as to the determination of a reasonable time. It provides specific time limits which are presumed, as that term is defined in this act (Section 1-201), to be reasonable for uncertified checks drawn and payable within the continental limits of the United States. The court-made time limit of one day after the receipt of the instrument found in decisions under the original act has proved to be too short a time for some holders, such as the department store or other large business clearing many checks through its books shortly after the first of the month, as well as the farmer or other individual at a distance from a bank.

The time limit provided differs as to drawer and indorser. The drawer, who has himself issued the check and normally expects to have it paid and charged to his account is reasonably required to stand behind it for a longer period, especially in view of the

protection now provided by Federal Deposit Insurance. The thirty days specified coincides with the time after which a purchaser has notice that a check has become stale (Section 3-304(3) (c)). The indorser, who has normally merely received the check and passed it on, and does not expect to have to pay it, is entitled to know more promptly whether it is to be dishonored, in order that he may have recourse against the person with whom he has dealt.

4. Subsection (3) replaces the original Sections 85 and 146. It is intended to make allowance for the increasing practice of closing banks or businesses on Saturday or other days of the week. It is not intended to mean that any drawee or obligor can avoid dishonor of instruments by extended closing.

5. Subsection (4) eliminates the provision of the original Section 75 permitting presentment "at any hour before the bank is closed" if the drawer has no funds in the bank. The change is made to avoid inconvenience to the bank.

"Banking day" is defined in Section 4-104.

Cross references.Point 1: Sections 3-501, 3-502, 3-505, 3-506 and 3-511.

Point 3: Sections 1-201 and 3-304(3) (c).

Point 5: Section 4-104.

Definitional cross references."Acceptance". Section 3-410.

"Bank". Section 1-201.

"Banking day". Section 4-104.

"Check". Section 3-104.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Presentment". Section 3-504.

"Presumed". Section 1-201.

"Reasonable time". Section 1-204.

"Secondary party". Section 3-102.

"Usage of trade". Section 1-205.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 291, 764, 888, 889.
Bank failure, who must bear loss of funds where failure occurs during delay in presenting note, 2 A.L.R. 1381.
Discharge of endorser by delay in presenting check, 11 A.L.R. 1028.
Effect of delay in presentment of draft given in payment of taxes, 44 A.L.R. 1236; 124 A.L.R. 1159.
Loss from insolvency of bank before presentment of bank draft as falling upon purchaser of draft or upon subsequent holder, 56 A.L.R. 494.
Time for presentment of negotiable instrument falling due on Saturday, Sunday or holiday, 102 A.L.R. 437.
Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance, 39 A.L.R.2d 1296.
10 C.J.S. Bills and Notes §§ 169, 246, 352 et seq.

§ 55-3-504. How presentment made.

(1) Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder.

(2) Presentment may be made:

(a) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or

(b) through a clearinghouse; or

(c) at the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or pay nor anyone authorized to act for him is present or accessible at such place presentment is excused.

(3) It may be made:

(a) to any one of two or more makers, acceptors, drawees or other payors; or

(b) to any person who has authority to make or refuse the acceptance or payment.

(4) A draft accepted or a note made payable at a bank in the United States must be presented at such bank.

(5) In the cases described in Section 4-210 [55-4-210 NMSA 1978] presentment may be made in the manner and with the result stated in that section.

History: 1953 Comp., § 50A-3-504, enacted by Laws 1961, ch. 96, § 3-504; 1967, ch. 186, § 11.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 72, 73, 77, 78 and 145, Uniform Negotiable Instruments Law.

Changes. Combined and simplified.

Purposes of changes.1. This section is intended to simplify the rules as to how presentment is made and to make it clear that any demand upon the party to pay is a presentment no matter where or how. Former technical requirements of exhibition of the instrument and the like are not required unless insisted upon by the party to pay (Section 3-505).

2. Paragraph (a) of Subsection (2) authorizes presentment by mail directly to the obligor. The presentment is sufficient and the instrument is dishonored by non-acceptance or non-payment even though the party making presentment may be liable for improper collection methods. "Through a clearinghouse" means that presentment is not made when the demand reaches the clearinghouse, but when it reaches the obligor. Section 4-210 should also be consulted for the methods of presenting which may properly be employed by a collecting bank. Subsection (5) of this section makes it clear that presentment made under Section 4-210 is proper presentment.

3. Paragraph (a) of Subsection (3) eliminates the requirement of the original Sections 78 and 145(1) that presentment be made to each of two or more makers, acceptors or drawees unless they are partners or one has authority to act for the others. The holder is entitled to expect that any one of the named parties will pay or accept, and should not be required to go to the trouble and expense of making separate presentment to a number of them.

4. Section 3-412 provides that an acceptance made payable at a bank in the United States does not vary the draft. Subsection (4) of this section makes it clear that a draft so accepted must be presented at the bank so designated. The same rule is applied to notes made payable at a bank. The rule of the subsection is in conformity with the provisions of Section 3-501 on presentment and Section 3-502 on the effect of failure to make presentment with reference to domiciled paper [This paragraph was amended in 1962].

Cross references.Point 1: Sections 3-501, 3-502, 3-505 and 3-511.

Point 2: Section 4-210.

Point 5: Sections 3-412, 3-501 and 3-502.

Definitional cross references."Acceptance". Section 3-410.

"Bank". Section 1-201.

"Clearinghouse". Section 4-104.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Party". Section 1-201.

"Person". Section 1-201.

ANNOTATION

Compiler's notes. - Laws 1967, ch. 186, § 12, is compiled as 55-4-106 NMSA 1978.

Presentment for payment can be made to any named drawee since each is ordered to pay. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Bankruptcy debtor found personally obligated on checks which he signed. - See Chavez v. 4B's Restaurant, Inc. 25 Bankr. 142 (Bankr. D.N.M. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 710, 838; 11 Am. Jur. 2d Bills and Notes §§ 890, 891.
Conduct of holder of check at time of presentation for payment as affecting drawer's liability, 4 A.L.R. 1233.
What amounts to presentation to charge parties secondarily liable on paper payable in a certain town or city, without further specification of place, 39 A.L.R. 918.
10 C.J.S. Bills and Notes §§ 169, 360 et seq.

§ 55-3-505. Rights of party to whom presentment is made.

(1) The party to whom presentment is made may without dishonor require:

(a) exhibition of the instrument; and

(b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and

(c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and

(d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.

(2) Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.

History: 1953 Comp., § 50A-3-505, enacted by Laws 1961, ch. 96, § 3-505.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 74, Uniform Negotiable Instruments Law.

Changes. Expanded and modified.

Purposes of changes. To supplement the provisions as to how presentment is made, by permitting the party to whom it is made to insist on additional requirements:

1. In the first instance a mere demand for acceptance or payment is sufficient presentment, and if the payment is unqualifiedly refused nothing more is required. The party to whom presentment is made may, however, require exhibition of the instrument, its production at the proper place, identification of the party making presentment, and a signed receipt on the instrument or its surrender on full payment. Failure to comply with any such requirement invalidates the presentment and means that the instrument is not dishonored. The time for presentment is, however, extended to give the person presenting a reasonable opportunity to comply with the requirements.

2. "Reasonable identification" means identification reasonable under all the circumstances. If the party on whom demand is made knows the person making presentment, no requirement of identification is reasonable, while if the circumstances are suspicious a great deal may be required. The requirement applies whether the instrument presented is payable to order or to bearer.

Cross references.Point 1: Sections 3-504 and 3-506.

Definitional cross references."Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Presentment". Section 3-504.

"Reasonable time". Section 1-204.

"Signed". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 890, 891.
Necessity of possession and exhibition of paper at time of demand in order to make a valid presentment, 11 A.L.R. 969; 50 A.L.R. 1200.
10 C.J.S. Bills and Notes §§ 169, 360 et seq.

§ 55-3-506. Time allowed for acceptance or payment.

(1) Acceptance may be deferred without dishonor until the close of the next business day following presentment. The holder may also in a good faith effort to obtain acceptance and without either dishonor of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day.

(2) Except as a longer time is allowed in the case of documentary drafts drawn under a letter of credit, and unless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor pending reasonable examination to determine whether it is properly payable, but payment must be made in any event before the close of business on the day of presentment.

History: 1953 Comp., § 50A-3-506, enacted by Laws 1961, ch. 96, § 3-506.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 136, Uniform Negotiable Instruments Law.

Changes. Expanded.

Purposes of changes. The original section covered only the time allowed to the drawee on presentment for acceptance. This section also covers the time allowed on presentment for payment.

Section 5-112 (Time Allowed for Honor) states the time, longer than here provided, during which a bank to which drafts are presented under a letter of credit may defer payment or acceptance without dishonor of the drafts. As to drafts drawn under a letter of credit Section 5-112 of course controls.

Section 4-301 on deferred posting should be consulted for the right of a payor bank to recover tentative settlements made by it on the day an item is received. That right does not survive final payment (Section 4-213).

Cross references.Sections 4-301 and 5-112.

Definitional cross references."Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Documentary draft". Sections 3-102 and 4-104.

"Instrument". Section 3-102.

"Letter of credit". Section 5-103.

"Party". Section 1-201.

"Presentment". Section 3-504.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 892.
Destruction of or refusal to return bill as an acceptance, 63 A.L.R. 1138.
10 C.J.S. Bills and Notes §§ 173, 462.

§ 55-3-507. Dishonor; holder's right of recourse; term allowing re-presentment.

(1) An instrument is dishonored when:

(a) a necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is seasonably returned by the midnight deadline (Section 4-301 [55-4-301 NMSA 1978]); or

(b) presentment is excused and the instrument is not duly accepted or paid.

(2) Subject to any necessary notice of dishonor and protest, the holder has upon

dishonor an immediate right of recourse against the drawers and indorsers.

(3) Return of an instrument for lack of proper indorsement is not dishonor.

(4) A term in a draft or an indorsement thereof allowing a stated time for re-presentment in the event of any dishonor of the draft by nonacceptance if a time draft or by nonpayment if a sight draft gives the holder as against any secondary party bound by the term an option to waive the dishonor without affecting the liability of the secondary party and he may present again up to the end of the stated time.

History: 1953 Comp., § 50A-3-507, enacted by Laws 1961, ch. 96, § 3-507.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 83 and 149, Uniform Negotiable Instruments Law.

Changes. Reworded.

Purposes of changes.1. The language of the section is changed in accordance with the provisions of the preceding section as to the time allowed for acceptance or payment.

2. Subsection (3) is new. It states general banking and commercial understanding. The time within which a payor bank must return items, and the methods of returning, are stated in Section 4-301. Under Section 3-411(3) a bank may certify an item so returned.

Cross references.Point 1: Sections 3-503, 3-504, 3-505, 3-508 and 4-301.

Point 2: Sections 3-411(3) and 4-301.

Definitional cross references."Acceptance". Section 3-410.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Midnight deadline". Section 4-104.

"Notice of dishonor". Section 3-508.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Right". Section 1-201.

"Seasonably". Section 1-204.

"Secondary party". Section 3-102.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 893, 894.
Duty of bank when several checks which, in the aggregate, exceed the depositor's balance, are presented at the same time, 26 A.L.R. 1486.
Liability of bank to depositor for dishonoring check, 126 A.L.R. 206.
10 C.J.S. Bills and Notes §§ 39, 184, 217, 367.

§ 55-3-508. Notice of dishonor.

(1) Notice of dishonor may be given to any person who may be liable on the instrument by or on behalf of the holder or any party who has himself received notice, or any other party who can be compelled to pay the instrument. In addition an agent or bank in whose hands the instrument is dishonored may give notice to his principal or customer or to another agent or bank from which the instrument was received.

(2) Any necessary notice must be given by a bank before its midnight deadline and by any other person before midnight of the third business day after dishonor or receipt of notice of dishonor.

(3) Notice may be given in any reasonable manner. It may be oral or written and in any terms which identify the instrument and state that it has been dishonored. A misdescription which does not mislead the party notified does not vitiate the notice. Sending the instrument bearing a stamp, ticket or writing stating that acceptance or payment has been refused or sending a notice of debit with respect to the instrument is sufficient.

(4) Written notice is given when sent although it is not received.

(5) Notice to one partner is notice to each although the firm has been dissolved.

(6) When any party is in insolvency proceedings instituted after the issue of the instrument notice may be given either to the party or to the representative of his estate.

(7) When any party is dead or incompetent notice may be sent to his last known

address or given to his personal representative.

(8) Notice operates for the benefit of all parties who have rights on the instrument against the party notified.

History: 1953 Comp., § 50A-3-508, enacted by Laws 1961, ch. 96, § 3-508.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 90 to 108, Uniform Negotiable Instruments Law.

Changes. Combined and simplified.

Purposes of changes. To simplify notice of dishonor and eliminate many of the detailed requirements of the original act:

1. Notice is normally given by the holder or by an indorser who has himself received notice. Subsection (1) is intended to encourage and facilitate notice of dishonor by permitting any party who may be compelled to pay the instrument to notify any party who may be liable on it. Thus an indorser may notify another indorser who is not liable to the one who gives notice, even when the latter has not received notice from any other party to the instrument.

2. Except as to collecting banks, as to whom Section 4-212 controls, the time within which necessary notice must be given is extended to three days after dishonor or receipt of notice from another party. In the case of individuals the one-day time limit of the original act has proved too short in many cases. It is extended to give the party a margin of time within which to ascertain what is required of him and get out an ordinary business letter. This time leeway eliminates the elaborate provisions as to the time of mailing in the original Sections 103 and 104.

3. Subsection (3) retains the substance of the original Sections 95 and 96. The provision approves the bank practice of returning the instrument bearing a stamp, ticket or other writing, or a notice of debit of the account, as sufficient notice. Subsection (4) retains the substance of the original Section 105.

4. Subsection (7) permits notice to be sent to the last known address of a party who is dead or incompetent rather than to his personal representative. The provision is intended to save time, as the name of the personal representative often cannot easily be ascertained, and mail addressed to the original party will reach the representative.

Cross references.Sections 3-501, 3-507 and 3-511.

Point 2: Section 4-212.

Definitional cross references."Acceptance". Section 3-410.

"Bank". Section 1-201.

"Customer". Section 4-104.

"Dishonor". Section 3-507.

"Holder". Section 1-201.

"Insolvency proceedings". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Midnight deadline". Section 4-104.

"Notifies". Section 1-201.

"Party". Section 1-201.

"Person". Section 1-201.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Send". Section 1-201.

"Written" and "writing". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 895, 896.
To whom should notice of protest or of dishonor of commercial paper be given in event of death of the party entitled thereto, 1 A.L.R. 474.
Necessity of protest and notice as between coendorsers of negotiable paper, 9 A.L.R. 1188; 32 A.L.R. 190.
Insolvency or bankruptcy of party primarily liable on commercial paper, as excusing demand and notice of dishonor, 25 A.L.R. 962; 87 A.L.R. 1394.
Promise to pay at future time by party to whom presentment is made as excusing immediate notice of dishonor, 62 A.L.R. 295.
10 C.J.S. Bills and Notes § 379 et seq.

§ 55-3-509. Protest; noting for protest.

(1) A protest is a certificate of dishonor made under the hand and seal of a United States consul or vice consul or a notary public or other person authorized to certify dishonor by the law of the place where dishonor occurs. It may be made upon information satisfactory to such person.

(2) The protest must identify the instrument and certify either that due presentment has been made or the reason why it is excused and that the instrument has been dishonored by nonacceptance or nonpayment.

(3) The protest may also certify that notice of dishonor has been given to all parties or to specified parties.

(4) Subject to Subsection (5) any necessary protest is due by the time that notice of dishonor is due.

(5) If, before protest is due, an instrument has been noted for protest by the officer to make protest, the protest may be made at any time thereafter as of the date of the noting.

History: 1953 Comp., § 50A-3-509, enacted by Laws 1961, ch. 96, § 3-509.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 153, 154, 155, 156, 158 and 160, Uniform Negotiable Instruments Law.

Changes. Combined and simplified.

Purposes of changes.1. Protest is not necessary except on drafts drawn or payable outside of the United States. Section 3-501(3) which also permits the holder at his option to make protest on dishonor of any other instrument. This section is intended to simplify either necessary or optional protest when it is made.

2. "Protest" has been used to mean the act of making protest, and sometimes loosely to refer to the entire process of presentment, notice of dishonor and protest. In this article it is given its original, technical meaning, that of the official certificate of dishonor.

3. Subsection (1) adds to the notary public the United States consul or vice consul, and any other person authorized to certify dishonor by the law of the place where dishonor occurs. It eliminates the requirement of the original Section 156 that protest must be made at the place of dishonor. It eliminates also the provision of the original Section 154 permitting protest by "any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses." This has at least left uncertainty as to the identity and credibility of the persons certifying, and has almost never been used. Any necessary delay in finding the proper officer to make protest is excused under

Section 3-511.

4. "Information satisfactory to such person" does away with the requirement occasionally stated, that the person making protest must certify as of his own knowledge. The requirement has been more honored in the breach than in the observance, and in practice protest has been made upon hearsay which the officer regards as reliable, upon the admission of the person who has dishonored or at most upon re-presentment, which is only indirect proof of the original dishonor. There is seldom any possible motive for false protest, and the basis on which it is made is never questioned. Subsection (1) leaves to the certifying officer the responsibility for determining whether he has satisfactory information. The provision is not intended to affect any personal liability of the officer for making a false certificate.

5. The protest need not be in any particular form, so long as it certifies the matters stated in Subsection (2). It need not be annexed to the instrument, and may be forwarded separately; but annexation may identify the instrument. If the instrument is lost, destroyed or wrongfully withheld, protest is still sufficient if it identifies the instrument; but the owner must prove his rights as in any action under this article on a lost, destroyed or stolen instrument (Section 3-804).

6. Subsection (3) recognizes the practice of including in the protest a certification that notice of dishonor has been given to all parties or to specified parties. The next section makes such a certification presumptive evidence that the notice has been given.

7. Protest is normally forwarded with notice of dishonor. Subsection (4) extends the time for making a necessary protest to coincide with the time for giving notice of dishonor. Any delay due to circumstances beyond the holder's control is excused under Section 3-511 on waiver or excuse. Any protest which is not necessary but merely optional with the holder may be made at any time before it is used as evidence.

8. Subsection (5) retains from the original Section 155 the provision permitting the officer to note the protest and extend it formally later.

Cross references.Point 1: Sections 3-501(3) and 3-511.

Point 3: Section 3-511(1).

Point 5: Section 3-804.

Point 6: Section 3-510(a).

Point 7: Sections 3-508(2) and 3-511(1).

Definitional cross references."Dishonor". Section 3-507.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Person". Section 1-201.

"Presentment". Section 3-504.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 789, 797, 897 to 899.
10 C.J.S. Bills and Notes §§ 368 et seq., 390.

§ 55-3-510. Evidence of dishonor and notice of dishonor.

The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

(a) a document regular in form as provided in the preceding section [55-3-509 NMSA 1978] which purports to be a protest;

(b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

(c) any book or record of the drawee, payor bank or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

History: 1953 Comp., § 50A-3-510, enacted by Laws 1961, ch. 96, § 3-510.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. This section is new. It states the effect of protest as evidence, and provides two substitutes for protest as proof of dishonor:

1. Paragraph (a) states the generally accepted rule that a protest is not only admissible as evidence, but creates a presumption, as that term is defined in this act (Section 1-201), of the dishonor which it certifies. The rule is extended to include the giving of any notice of dishonor certified by the protest. The provision also relieves the holder of the necessity of proving that a document regular in form which purports to be a protest is

authentic, or that the person making it was qualified. Nothing in the provision is intended to prevent the obligor from overthrowing the presumption by evidence that there was in fact no dishonor, that notice was not given, or that the protest is not authentic or not made by a proper officer.

2. Paragraph (b) recognizes as the full equivalent of protest the stamp, ticket or other writing of the drawee, payor or presenting bank. The drawee's statement that payment is refused on account of insufficient funds always has been commercially acceptable as full proof of dishonor. It should be satisfactory evidence in any court. It is therefore made admissible, and creates a presumption of dishonor. The provision applies only where the stamp or writing states reasons for refusal which are consistent with dishonor. Thus the following reasons for refusal are not evidence of dishonor, but of justifiable refusal to pay or accept:

Indorsement missing

Signature missing

Signature illegible

Forgery

Payee altered

Date altered

Post dated

Not on us

On the other hand the following reasons are satisfactory evidence of dishonor, consistent with due presentment, and are within this provision:

Not sufficient funds

Account garnished

No account

Payment stopped

3. Paragraph (c) recognizes as the full equivalent of protest any books or records of the drawee, payor bank or any collecting bank kept in its usual course of business, even though there is no evidence of who made the entries. The provision, as well as that of

Paragraph (b), rests upon the inherent improbability that bank records, or those of the drawee, will show any dishonor which has not in fact occurred, or that the holder will attempt to proceed on the basis of dishonor if he could in fact have obtained payment.

Cross references.Sections 3-501 and 3-508.

Point 1: Section 1-201.

Definitional cross references."Acceptance". Section 3-410.

"Collecting bank". Section 4-105.

"Dishonor". Section 3-507.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Payor bank". Section 4-105.

"Presumption". Section 1-201.

"Protest". Section 3-509.

"Writing". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bills and Notes §§ 1225, 1239.
10 C.J.S. Bills and Notes §§ 390, 677.

§ 55-3-511. Waived or excused presentment, protest or notice of dishonor or delay therein.

(1) Delay in presentment, protest or notice of dishonor is excused when the party is without notice that it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.

(2) Presentment or notice or protest as the case may be is entirely excused when:

(a) the party to be charged has waived it expressly or by implication either before or after it is due; or

(b) such party has himself dishonored the instrument or has countermanded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid; or

(c) by reasonable diligence the presentment or protest cannot be made or the notice given.

(3) Presentment is also entirely excused when:

(a) the maker, acceptor or drawee of any instrument except a documentary draft is dead or in insolvency proceedings instituted after the issue of the instrument; or

(b) acceptance or payment is refused but not for want of proper presentment.

(4) Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for nonpayment are excused unless in the meantime the instrument has been accepted.

(5) A waiver of protest is also a waiver of presentment and of notice of dishonor even though protest is not required.

(6) Where a waiver of presentment or notice or protest is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

History: 1953 Comp., § 50A-3-511, enacted by Laws 1961, ch. 96, § 3-511.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 79, 80, 81, 82, 109, 111, 112, 113, 114, 115, 116, 130, 147, 148, 150, 151 and 159, Uniform Negotiable Instruments Law.

Changes. Combined and simplified.

Purposes of changes. This section combines widely scattered sections of the original act, and is intended to simplify the rules as to when presentment, notice or protest is excused:

1. The single term "excused" is substituted for "excused," "dispensed with," "not necessary," "not required," as used variously in the original act. No change in meaning is intended.

2. Subsection (1) combines provisions found in the original Sections 81, 113, 147 and 159. Delay in making presentment either for payment or for acceptance, in giving notice of dishonor or in making protest is excused when the party has acted with reasonable diligence and the delay is not his fault. This is true where an instrument has been

accelerated without his knowledge, or demand has been made by a prior holder immediately before his purchase. It is true under any other circumstances where the delay is beyond his control. The words "not imputable to his default, misconduct or negligence" found in the original Sections 81, 113 and 159 are omitted as superfluous, but no change in substance is intended.

3. Any waived presentment, notice or protest is excused, as under the original Sections 82, 109, 110 and 111. The waiver may be express or implied, oral or written, and before or after the proceeding waived is due. It may be, and often is, a term of the instrument when it is issued. Subsection (5) retains as standard commercial usage the meaning attached by the original Section 111 to "protest waived."

4. Paragraph (b) of Subsection (2) combines the substance of provisions found in the original Sections 79, 80, 114, 115 and 130. A party who has no right to require or reason to expect that the instrument will be honored is not entitled to presentment, notice or protest. This is of course true where he has himself dishonored the instrument or has countermanded payment. It is equally true, for example, where he is an accommodated party and has himself broken the accommodation agreement.

5. Paragraph (c) of Subsection (2) combines provisions found in the original Sections 82 (1), 112 and 159. The excuse is established only by proof that reasonable diligence has been exercised without success, or that reasonable diligence would in any case have been unsuccessful.

6. Paragraph (a) of Subsection (3) is new. It excuses presentment in situations where immediate payment or acceptance is impossible or so unlikely that the holder cannot reasonably be expected to make presentment. He is permitted instead to have his immediate recourse upon the drawer or indorser, and let the latter file any necessary claim in probate or insolvency proceedings. The exception for the documentary draft is to preserve any profit on the resale of goods for the creditors of the drawee if his representative can find the funds to pay.

7. Paragraph (b) of Subsection (3) extends the original Section 148(3) to include any case where payment or acceptance is definitely refused and the refusal is not on the ground that there has been no proper presentment. The purpose of presentment is to determine whether or not the maker, acceptor or drawee will pay or accept; and when that question is clearly determined the holder is not required to go through a useless ceremony. The provision applies to a definite refusal stating no reasons.

8. Subsection (4) retains the rule of the original Sections 116 and 151.

9. Subsection (6) retains the rule of original Section 110.

Cross references.Sections 3-501, 3-502, 3-503, 3-507 and 3-509.

Definitional cross references."Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Documentary draft". Section 4-104.

"Draft". Section 3-104.

"Insolvency proceedings". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Right". Section 1-201.

ANNOTATION

Generally. - In suit against endorser on note where complaint alleged demand and presentment without mentioning waiver, complainants had no right to raise question of waiver. Hallowell & Brownlee v. Benitz, 38 N.M. 145, 28 P. 2d 1042 (1934) (decided under former law).

A draft drawn by an agent on his principal by authority of the principal is equivalent to a draft drawn by the principal himself, and need not be accepted by the drawee to bind it. First Nat'l Bank v. Home Ins. Co., 16 N.M. 66, 113 P. 815 (1911) (decided under former law).

Law reviews. - For article, "Essential Attributes of Commercial Paper-Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 845, 883, 899, 900.
Necessity of protest and notice as between coendorsers of negotiable paper, 9 A.L.R. 1188; 32 A.L.R. 190.
Waiver of demand and notice as affecting endorsers other than the one above whose name it immediately appears, 21 A.L.R. 1396; 110 A.L.R. 1228.
Examining directory as sufficient diligence in locating drawer or endorser for purpose of

notice of dishonor, 55 A.L.R. 673.
Necessity of notice to endorser who was in fact primarily liable, 62 A.L.R. 116.
Law regarding notice as condition of holding endorser as applied to bill or note with acceleration clause, or payable in installments, 104 A.L.R. 1331.
Endorsement of renewal note, or offer or promise to renew, as waiver by endorser of presentment and notice of nonpayment, 110 A.L.R. 1149.
10 C.J.S. Bills and Notes §§ 350, 417 et seq.

Part 6

DISCHARGE

§ 55-3-601. Discharge of parties.

(1) The extent of the discharge of any party from liability on an instrument is governed by the sections on:

(a) payment or satisfaction (Section 3-603 [55-3-603 NMSA 1978]); or

(b) tender of payment (Section 3-604 [55-3-604 NMSA 1978]); or

(c) cancellation or renunciation (Section 3-605 [55-3-605 NMSA 1978]); or

(d) impairment of right of recourse or of collateral (Section 3-606 [55-3-606 NMSA 1978]); or

(e) reacquisition of the instrument by a prior party (Section 3-208 [55-3-208 NMSA 1978]); or

(f) fraudulent and material alteration (Section 3-407 [55-3-407 NMSA 1978]); or

(g) certification of a check (Section 3-411 [55-3-411 NMSA 1978]); or

(h) acceptance varying a draft (Section 3-412 [55-3-412 NMSA 1978]); or

(i) unexcused delay in presentment or notice of dishonor or protest (Section 3-502 [55-3-502 NMSA 1978]).

(2) Any party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money.

(3) The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument:

(a) reacquires the instrument in his own right; or

(b) is discharged under any provision of this article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral (Section 3-606 [55-3-606 NMSA 1978]).

History: 1953 Comp., § 50A-3-601, enacted by Laws 1961, ch. 96, § 3-601.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 119, 120 and 121, Uniform Negotiable Instruments Law.

Changes. Portions of original sections combined and reworded and new provisions.

Purposes of changes.1. Subsection (1) contains an index referring to all of the sections of this article which provide for the discharge of any party. The list is exclusive so far as the provisions of this article are concerned, but it is not intended to prevent or affect any discharge arising apart from this statute, as for example a discharge in bankruptcy or a statutory provision for discharge if the instrument is negotiated in a gaming transaction.

2. A negotiable instrument is in itself merely a piece of paper bearing a writing, and strictly speaking is incapable of being discharged. The parties are rather discharged from liability on their contracts on the instrument. The language of the original Section 119 as to discharge of the instrument itself has left uncertainties as to the effect of the discharge upon the rights of a subsequent holder in due course. It is therefore eliminated, and this section now distinguishes instead between the discharge of a single party and the discharge of all parties.

So far as the discharge of any one party is concerned a negotiable instrument differs from any other contract only in the special rules arising out of its character to which Paragraphs (a) to (i) of Subsection (1) are an index, and in the effect of the discharge against a subsequent holder in due course (Section 3-602). Subsection (2) therefore retains from the original Section 119(4) the provision for discharge by "any other act which will discharge a simple contract for the payment of money," and specifically recognizes the possibility of a discharge by agreement.

The discharge of any party is a defense available to that party as provided in sections on rights of those who are and are not holders in due course (Sections 3-305 and 3-306). He has the burden of establishing the defense (Section 3-307).

3. Subsection (3) substitutes for the "discharge of the instrument" the discharge of all parties from liability on their contracts on the instrument. It covers a part of the substance of the original Section 119(1), (2) and (5), the original Section 120(1) and (3) and the original Section 121 (1) and (2). It states a general principle in lieu of the original detailed provisions. The principle is that all parties to an instrument are

discharged when no party is left with rights against any other party on the paper.

When any party reacquires the instrument in his own right his own liability is discharged; and any intervening party to whom he was liable is also discharged as provided in Section 3-208 on reacquisition. When he is left with no right of action against an intervening party and no right of recourse against any prior party, all parties are obviously discharged. The instrument itself is not necessarily extinct, since it may be reissued or renegotiated with a new and further liability; and if it subsequently reaches the hands of a holder in due course without notice of the discharge he may still enforce it as provided in Section 3-602 on effect of discharge against a holder in due course.

Under Section 3-606 on impairment of recourse or collateral, the discharge of any party discharges those who have a right of recourse against him, except in the case of a release with reservation of rights or a failure to give notice of dishonor. A discharge of one who has himself no right of action or recourse on the instrument may thus discharge all parties. Again the instrument itself is not necessarily extinct, and if it is negotiated to a subsequent holder in due course without notice of the discharge he may enforce it as provided in Section 3-602 on effect of discharge against a holder in due course.

4. The language "any party who has himself no right of action or recourse on the instrument" is substituted for "principal debtor," which is not defined by the original act and has been misleading. This article also omits the original Section 192, defining the "person primarily liable." Under Section 3-415 on accommodation parties an accommodation maker or acceptor, although he is primarily liable on the instrument in the sense that he is obligated to pay it without recourse upon another, has himself a right of recourse against the accommodated payee; and his reacquisition or discharge leaves the accommodated party liable to him. The accommodated payee, although he is not primarily liable to others, has no right of action or recourse against the accommodation maker, and his reacquisition or discharge may discharge all parties.

Cross references.Sections 3-406, 3-411, 3-412, 3-509, 3-603, 3-604 and 3-605.

Point 2: Sections 3-305, 3-306, 3-307 and 3-602.

Point 3: Sections 3-208, 3-602 and 3-606.

Point 4: Section 3-415.

Definitional cross references."Action". Section 1-201.

"Agreement". Section 1-201.

"Alteration". Section 3-407.

"Certification". Section 3-411.

"Check". Section 3-104.

"Contract". Section 1-201.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Money". Section 1-201.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Rights". Section 1-201.

ANNOTATION

Discharge of endorser. - Where payee used part of advance made at time of execution of note in paying accrued interest owing by maker, contrary to agreement, endorser of note, who was president of corporation which was maker of the note, was discharged from liability on his endorsement notwithstanding his failure to protest such diversion on learning of it two months later, and benefit derived by him in use by maker of part of advance in discharging another of its obligations which he had guaranteed. Pacific Nat'l Agrl. Credit Corp. v. Hagerman, 39 N.M. 549, 51 P.2d 857, 101 A.L.R. 1301 (1935) (decided under former law).

Discharge of principal debtor does not include discharge by limitations, and a surety is not released from his liability to pay, by such limitations, against the principal. Romero v. Hopewell, 28 N.M. 259, 210 P. 231 (1922) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 525, 901, 904, 912, 929, 930, 933, 952, 961, 963.
Endorsing payment upon note before maturity as releasing surety or endorser, 37 A.L.R. 477.
Taking of demand note in renewal as releasing surety or endorser, 48 A.L.R. 1222.
Payment voidable under bankruptcy act as discharge of surety, guarantor or endorser, 56 A.L.R. 1363.
Agreement by holder with principal not to put paper in course of collection for a specified time as releasing endorser, 63 A.L.R. 1532.
Failure or delay by holder of note to enforce collateral security as releasing endorser, 74 A.L.R. 129.
Mortgagee's purchase of equity of redemption as releasing endorser on secured note,

82 A.L.R. 764.
Consent of party secondarily liable to release of party primarily liable as affecting release of former, 169 A.L.R. 753.
Renewal note signed by one comaker as discharge of nonsigning comakers, 43 A.L.R.3d 246.
10 C.J.S. Bills and Notes §§ 438 et seq., 468.

§ 55-3-602. Effect of discharge against holder in due course.

No discharge of any party provided by this article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument.

History: 1953 Comp., § 50A-3-602, enacted by Laws 1961, ch. 96, § 3-602.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The section is intended to remove an uncertainty as to which the original act is silent. It rests on the principle that any discharge of a party provided under any section of this article is a personal defense of the party, which is cut off when a subsequent holder in due course takes the instrument without notice of the defense. Thus where an instrument is paid without surrender such a subsequent purchase cuts off the defense. This section applies only to discharges arising under the provisions of this article, and it has no application to any discharge arising apart from it, such as a discharge in bankruptcy.

Under Section 3-304(1) (b) on notice to purchaser it is possible for a holder to take the instrument in due course even though he has notice that one or more parties have been discharged, so long as any party remains undischarged. Thus he may take with notice that an indorser of a note has been released, and still be a holder in due course as to the liability of the maker. In that event, the holder in due course is subject to the defense of the discharge of which he had notice when he took the instrument.

Cross references.Sections 3-302, 3-304, 3-305 and 3-601.

Definitional cross references."Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Party". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 654, 670, 901, 952, 961.
10 C.J.S. Bills and Notes §§ 438 et seq., 510.

§ 55-3-603. Payment or satisfaction.

(1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This subsection does not, however, result in the discharge of the liability:

(a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or

(b) of a party (other than an intermediary bank or a payor bank which is not a depositary bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not consistent with the terms of such restrictive indorsement.

(2) Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee (Section 3-201 [55-3-201 NMSA 1978]).

History: 1953 Comp., § 50A-3-603, enacted by Laws 1961, ch. 96, § 3-603.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 51, 88, 119, 121 and 171-177, Uniform Negotiable Instruments Law.

Changes. Parts of original sections combined and reworded and law changed.

Purposes of changes. This section changes the law as follows:

1. It eliminates the "payment in due course" found in the original Sections 51, 88 and 119. "Payment in due course" discharged all parties where it was made by one who has no right of recourse on the instrument; but this is true of any other discharge of such a party, and is now covered by Section 3-601(3) on discharge of parties. Such payment was effective as a discharge against a subsequent purchaser; but since it is made at or after maturity of the instrument a purchaser with notice of that fact cannot be a holder in due course, and one who takes without notice of the payment and the maturity should be protected against failure to take up the instrument. The matter is now covered by

Section 3-602.

2. The original Sections 171-177 provide for payment of a draft "for honor" after protest. The practice originated at a time when communications were slow and difficult, and in overseas transactions there might be a delay of several months before the drawer could act upon any dishonor. It provided a method by which a third party might intervene to protect the credit of the drawer and at the same time preserve his own rights. Cable, telegraph and telephone have made the practice obsolete for nearly a century, and it is today almost entirely unknown. It has been replaced by the cable transfer, the letter of credit and numerous other devices by which a substitute arrangement is promptly made. "Payment for honor" is therefore eliminated; and Subsection (2) now provides that any person may pay with the consent of the holder.

3. Payment to the holder discharges the party who makes it from his own liability on the instrument, and a part payment discharges him pro tanto. The same is true of any other satisfaction. Subsection (1) changes the law by eliminating the requirement of the original Section 88 that the payment be made in good faith and without notice that the title of the holder is defective. It adopts as a general principle the position that a payor is not required to obey an order to stop payment received from an indorser. However, this general principle is qualified by the provisions of Subsection (1) (a) and (b) respecting persons who acquire an instrument by theft, or through a restrictive indorsement (Section 3-205). These provisions are thus consistent with Section 3-306 covering the rights of one not a holder in due course.

When the party to pay is notified of an adverse claim to the instrument he has normally no means of knowing whether the assertion is true. The "unless" clause of Subsection (1) follows statutes which have been passed in many states on adverse claims to bank deposits. The paying party may pay despite notification of the adverse claim unless the adverse claimant supplies indemnity deemed adequate by the paying party or procures the issuance of process restraining payment in an action in which the adverse claimant and the holder of the instrument are both parties. If the paying party chooses to refuse payment and stand suit, even though not indemnified or enjoined, he is free to do so, although, under Section 3-306(d) on the rights of one not a holder in due course, except where theft or taking through a restrictive indorsement is alleged the payor must rely on the third party claimant to litigate the issue and may not himself defend on such a ground. His contract is to pay the holder of the instrument, and he performs it by making such payment. Except in cases of theft or restrictive indorsement there is no good reason to put him to inconvenience because of a dispute between two other parties unless he is indemnified or served with appropriate process.

4. With the elimination of "payment for honor," Subsection (2) provides that with the consent of the holder payment may be made by anyone, including a stranger. The subsection omits the provision of the original Section 121 by which the payor is "remitted to his former rights." It rejects such decisions as Quimby v. Varnum, 190 Mass. 211, 76 N.E. 671 (1906), holding that an irregular indorser who makes payment cannot recover on the instrument. The same result is reached under Section 3-415(5)

on accommodation parties. Upon payment and surrender of the paper the payor succeeds to the rights of the holder, subject to the limitation found in Section 3-201 on transfer that one who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

5. Payment discharges the liability of the person making it. It discharges the liability of other parties only as:

a. The discharge of the payor discharges others who have a right of recourse against him under Section 3-606; or

b. Reacquisition of the instrument discharges intervening parties under Section 3-208 on reacquisition; or

c. The discharge of one who has himself no right of recourse on the instrument discharges all parties under Section 3-601 on discharge of parties.

Cross references.Sections 3-604 and 3-606.

Point 1: Section 3-601(3).

Point 3: Sections 3-205 and 3-306(d).

Point 4: Sections 3-201 and 3-415(5).

Point 5: Sections 3-606, 3-208 and 3-601.

Definitional cross references."Action". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Order". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

I. General Consideration.
II. Payment or Satisfaction.
III. By Any Person.

I. General Consideration.

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 506, 531, 963 to 965, 970, 973.
Acceptance of renewal note made or endorsed by personal representative of obligor in original paper as payment or novation of that paper, 12 A.L.R. 1546.
Right to have usurious payments made on previous obligation applied as payment of principal on renewal, 13 A.L.R. 1244.
Rights and remedies of accommodation party to paper as against accommodated party after payment, 36 A.L.R. 553; 77 A.L.R. 668.
Renewal note as discharging original obligation or indebtedness, 52 A.L.R. 1416.
10 C.J.S. Bills and Notes §§ 438 et seq., 468.

II. Payment or Satisfaction.

Presentment at time of payment. - A party making payment upon a negotiable promissory note should insist upon the presentation of the paper by the party to whom the payment is made in order to make sure that it is at the time in his possession and not outstanding in another, and if he fails to do so the payment is wholly at payor's risk. Hayden v. Speakman, 20 N.M. 513, 150 P. 292 (1914) (decided under former law).

When payment deemed made. - The mere act of stamping a bill of exchange "paid" by the payee, in and of itself, does not constitute payment. Payment could only be made by delivery of the actual cash, or an adjustment of accounts, by agreement of the parties, so that the payee would be obligated to the holder of the bill. Hanna v. McCrory, 19 N.M. 183, 141 P. 996 (1914) (decided under former law).

And presumption of payment may not arise. - Even though a note may be 20 years past due, a presumption of payment does not arise if within 20 years prior to suit thereon, payment on the principal or interest is made, or it is otherwise definitely and unequivocally recognized as an existing obligation. Heisel v. York, 46 N.M. 210, 125 P.2d 717 (1942) (decided under former law).

Bank action compromising and settling note balance amounts to complete discharge of all parties, insofar as the bank is concerned; the bank does not thereby discharge a claim of contribution resulting between parties. Farmington Nat'l Bank v. Basin Plastics, Inc., 94 N.M. 668, 615 P.2d 985 (1980).

III. By Any Person.

Note of third person to debt generally. - The note of a third person given for a prior debt will be held a satisfaction, where it was agreed by the creditor to receive it absolutely as payment, and to run the risk of its being paid. The onus of establishing that it was so received is on the debtor. But there must be a clear and special agreement that the creditor shall take the paper absolutely as payment, or it will be no payment if it afterwards turns out to be of no value. A receipt in full of an account does not establish an agreement on the part of the creditor to accept as absolute payment at his own risk the note of a third person for the debt. Lindberg v. Ferguson Trucking Co., 74 N.M. 246, 392 P.2d 586 (1964).

Accommodation maker may sue maker on note. - Where a note and mortgage are assigned to an accommodation maker who then paid up the note, the accommodation maker succeeds to the payee's rights and may sue the maker on the note, because the note was not discharged when paid by the accommodation maker. Simson v. Bilderbeck, Inc., 76 N.M. 667, 417 P.2d 803 (1966).

And foreclose assigned mortgage. - An accommodation maker's payment of a note will not extinguish the lien of mortgage assigned to the accommodation maker and the accommodation maker may foreclose mortgage upon his payment of the note. Simson v. Bilderbeck, Inc., 76 N.M. 667, 417 P.2d 803 (1966).

§ 55-3-604. Tender of payment.

(1) Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interests, costs and attorney's fees.

(2) The holder's refusal of such tender wholly discharges any party who has a right of recourse against the party making the tender.

(3) Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender.

History: 1953 Comp., § 50A-3-604, enacted by Laws 1961, ch. 96, § 3-604.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 70 and 120, Uniform Negotiable Instruments Law.

Changes. Parts of original sections combined and reworded and new provisions.

Purposes of changes and new matter.1. Subsection (1) is new. It states the generally accepted rule as to the effect of tender.

2. Subsection (2) rewords the original Subsection 120(4). The party discharged is one who has a right of recourse against the party making tender, whether the latter be a prior party or a subsequent one who has been accommodated.

3. Subsection (3) rewords the final clause of the first sentence of the original Section 70. Where the instrument is payable at any one of two or more specified places, the maker or acceptor must be able and ready to pay at each of them. The language in original Section 70 was taken to mean that makers and acceptors of notes and drafts payable at a bank were not discharged by failure of a holder to make due presentment of such paper at the designated bank. This article reverses that rule. See Sections 3-501 on necessity of presentment, 3-504 on how presentment is made and 3-502 on effect of delay in presentment.

Cross references.Section 3-601.

Point 3: Sections 3-501, 3-502 and 3-504.

Definitional cross references."Holder". Section 1-201.

"Instrument". Section 3-102.

"On demand". Section 3-108.

"Party". Section 1-201.

"Right". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 743, 938. 10 C.J.S. Bills and Notes § 442; 20 C.J.S. Costs § 76 et seq.; 47 C.J.S. Interest § 172; 86 C.J.S. Tender § 50 et seq.

§ 55-3-605. Cancellation and renunciation.

(1) The holder of an instrument may even without consideration discharge any party:

(a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or

(b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.

(2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.

History: 1953 Comp., § 50A-3-605, enacted by Laws 1961, ch. 96, § 3-605.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 48, 119(3), 120(2), 122 and 123, Uniform Negotiable Instruments Law.

Changes. Combined and reworded.

Purposes of changes.1. The original act does not state how cancellation is to be effected, except as to striking indorsements under the original Section 48. It must be done in such a manner as to be apparent on the face of the instrument, and the methods stated, which are supported by the decisions, are exclusive.

2. Subsection (1) (b) restates the original Section 122. The provision as to "discharge of the instrument" is now covered by discharge, Section 3-601(3); that as to subsequent holders in due course by Section 3-602 on effect of discharge against a holder in due course.

3. Subsection (2) is new. It is intended to make it clear that the striking of an indorsement, or any other cancellation or renunciation, does not affect the title.

Cross references.Point 2: Sections 3-601 and 3-602.

Definitional cross references."Holder". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Rights". Section 1-201.

"Signature". Section 3-401.

"Signed". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Mistaken, unauthorized, or unintentional cancellation. - A cancellation, release, or surrender of the instrument is ineffective if it is unauthorized, unintentional, or done by mistake. Los Alamos Credit Union v. Bowling, 108 N.M. 113, 767 P.2d 352 (1989).

Bank action compromising and settling note balance amounts to complete discharge of all parties, insofar as the bank is concerned; the bank does not thereby discharge a claim of contribution resulting between parties. Farmington Nat'l Bank v. Basin Plastics, Inc., 94 N.M. 668, 615 P.2d 985 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 934, 935, 948 to 950, 952.
Accord and satisfaction by endorsement and transfer of commercial paper by agent having no authority to compromise, 46 A.L.R. 1523.
What constitutes renunciation by surrender of negotiable instrument under U.C.C. § 3-605, 96 A.L.R.3d 1144.
Unintentional cancellation of negotiable instrument under UCC Article 3, 54 A.L.R.4th 617.
10 C.J.S. Bills and Notes § 468 et seq.

§ 55-3-606. Impairment of recourse or of collateral.

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder:

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of recourse the holder preserves:

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others.

History: 1953 Comp., § 50A-3-606, enacted by Laws 1961, ch. 96, § 3-606.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 120, Uniform Negotiable Instruments Law.

Changes. Reworded and new provisions.

Purposes of changes and new matter. To make it clear that:

1. The words "any party to the instrument" remove an uncertainty arising under the original section. The suretyship defenses here provided are not limited to parties who are "secondarily liable," but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so.

2. Consent may be given in advance, and is commonly incorporated in the instrument; or it may be given afterward. It requires no consideration, and operates as a waiver of the consenting party's right to claim his own discharge.

3. The words "to the knowledge of the holder" exclude the latent surety, as for example the accommodation maker where there is nothing on the instrument to show that he has signed for accommodation and the holder is ignorant of that fact. In such a case the holder is entitled to proceed according to what is shown by the face of the paper or what he otherwise knows, and does not discharge the surety when he acts in ignorance of the relation.

4. This section retains the right of the holder to release one party, or to postpone his time of payment, while expressly reserving rights against others. Subsection (2), which is new, states the generally accepted rule as to the effect of such an express reservation of rights. [Comment 4 was amended in 1966.]

5. Paragraph (b) of Subsection (1) is new. The suretyship defense stated has been generally recognized as available to indorsers or accommodation parties. As to when a holder's actions in dealing with collateral may be "unjustifiable," the section on rights and duties with respect to collateral in the possession of a secured party (Section 9-207) should be consulted.

Cross reference.Point 5: Section 9-207.

Definitional cross references."Agreement". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Rights between guarantor and creditor determined by contract. - The duty imposed on a creditor under Subsection (1) (b) encompasses the good faith obligation to exercise reasonable means to protect the rights of guarantors, including timely perfecting of the security interest; however, the rights of the guarantor as against the creditor are determined by the terms of the contract between them. American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975).

And by general law of suretyship. - Since this section allows a surety to waive his defenses and 55-1-102 NMSA 1978 allows the parties by agreement to determine the standards by which the performance of their good faith obligations are to be measured, the court may read and interpret the provisions of the guaranty agreement to determine whether the guarantors should be relieved of liability under the general law of suretyship. American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975).

But guarantor not heard if waived rights in collateral. - Where a guarantor or surety expressly and unequivocally consents to a waiver or release of his rights in the collateral, he will not be heard to complain of the failure of the guarantee to perfect the security interest therein in the first instance. American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975).

Nor if note unsecured. - The fact that a note upon its face specified that it was unsecured, and, incidentally, was guaranteed by a separate guaranty agreement on its reverse side, as a matter of law, disposed of the guarantors' contentions that certain security documents and mortgages previously executed to secure liabilities "now existing or hereafter arising" were security for the later note, and therefore guarantors' claims that the bank had impaired its collateral were also disposed. American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 931, 939.
Discharge of accommodation maker or surety by release of mortgage or other security given for note, 2 A.L.R.2d 260.
Who is "party" discharged on negotiable instrument to extent of holder's unjustifiable impairment of collateral, under U.C.C. § 3-606(1)(b), 93 A.L.R.3d 1283.
What constitutes unjustifiable impairment of collateral, discharging parties to negotiable instrument under U.C.C. § 3-606(1)(b), 95 A.L.R.3d 962.
10 C.J.S. Bills and Notes § 472 et seq.

Part 7

ADVICE OF INTERNATIONAL SIGHT DRAFT

§ 55-3-701. Letter of advice of international sight draft.

(1) A "letter of advice" is a drawer's communication to the drawee that a described draft has been drawn.

(2) Unless otherwise agreed when a bank receives from another bank a letter of advice of an international sight draft the drawee bank may immediately debit the drawer's account and stop the running of interest pro tanto. Such a debit and any resulting credit to any account covering outstanding drafts leaves in the drawer full power to stop payment or otherwise dispose of the amount and creates no trust or interest in favor of the holder.

(3) Unless otherwise agreed and except where a draft is drawn under a credit issued by the drawee, the drawee of an international sight draft owes the drawer no duty to pay an unadvised draft but, if it does so and the draft is genuine, may appropriately debit the drawer's account.

History: 1953 Comp., § 50A-3-701, enacted by Laws 1961, ch. 96, § 3-701.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes. To recognize and clarify, in law, certain established practices of international banking.

1. Checks drawn by one international bank on the account it carries (in a currency foreign to itself) in another international bank are still handled under practices which reflect older conditions, but which have a real, continuing reason in the typical, European rule that a bank paying a check in good faith and in ordinary course can charge its depositor's account notwithstanding forgery of a necessary indorsement. To decrease the risk that forgery will prove successful, the practice is to send a letter of

advice that a draft has been drawn and will be forthcoming. Subsection 3 recognizes that a drawer who sends no such letter forfeits any rights for improper dishonor, while still permitting the drawee to protect his delinquent drawer's credit.

2. Subsection (2) clears up for American courts, the meaning of another international practice: that of charging the drawer's account on receipt of the letter of advice. This practice involves no conception of trust or the like and the rule of Section 3-409(1) (draft not an assignment) still applies. The debit has to do with the payment of interest only. The section recognizes the fact.

Cross reference.Point 2: Section 3-409(1).

Definitional cross references."Account". Section 4-104.

"Bank". Section 1-201.

"Credit". Section 5-103.

"Draft". Section 3-104.

"Genuine". Section 1-201.

"Holder". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 494; 11 Am. Jur. 2d Bills and Notes §§ 60, 594, 705.
9 C.J.S. Banks and Banking §§ 174 et seq., 330 et seq.

Part 8

MISCELLANEOUS

§ 55-3-801. Drafts in a set.

(1) Where a draft is drawn in a set of parts, each of which is numbered and expressed to be an order only if no other part has been honored, the whole of the parts constitutes one draft but a taker of any part may become a holder in due course of the draft.

(2) Any person who negotiates, indorses or accepts a single part of a draft drawn in a set thereby becomes liable to any holder in due course of that part as if it were the whole set, but as between different holders in due course to whom different parts have been negotiated the holder whose title first accrues has all rights to the draft and its proceeds.

(3) As against the drawee the first presented part of a draft drawn in a set is the part entitled to payment, or if a time draft, to acceptance and payment. Acceptance of any subsequently presented part renders the drawee liable thereon under Subsection (2). With respect both to a holder and to the drawer payment of a subsequently presented part of a draft payable at sight has the same effect as payment of a check notwithstanding an effective stop order (Section 4-407 [55-4-407 NMSA 1978]).

(4) Except as otherwise provided in this section, where any part of a draft in a set is discharged by payment or otherwise the whole draft is discharged.

History: 1953 Comp., § 50A-3-801, enacted by Laws 1961, ch. 96, § 3-801.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 178-183, Uniform Negotiable Instruments Law.

Changes. Combined and reworded.

Purposes of changes.The revised language makes no important change in substance, and is intended only as a clarification and supplementation of the original sections:

1. Drafts in a set customarily contain such language as "Pay . . . . . this first of exchange (second unpaid)," with equivalent language in the second part. Today a part also commonly bears conspicuous indication of its number. At least the first factor is necessary to notify the holder of his rights, and is therefore necessary in order to make this section apply. Subsection (1) so provides, thus stating in the statute a matter left previously to a commercial practice long uniform but expensive to establish in court.

2. The final sentence of Subsection (3) is new. Payment of the part of the draft subsequently presented is improper and the drawee may not charge it to the account of the drawer, but some one has probably been unjustly enriched on the total transaction, at the expense of the drawee. So the drawee is like a bank which has paid a check over an effective stop payment order, and is subrogated as provided in that situation. Section 4-407.

3. A statement in a draft drawn in a set of parts to the effect that the order is effective only if no other part has been honored does not render the draft nonnegotiable as conditional. See Section 3-112(1) (g).

Cross references.Point 2: Section 4-407.

Point 3: Section 3-112.

Definitional cross references."Acceptance". Section 3-410.

"Check". Section 3-104.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Honor". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 58, 378, 505, 602, 644, 901, 925.
Maturity of one or more of series of notes as affecting status of purchaser as holder in due course, 64 A.L.R. 457.
10 C.J.S. Bills and Notes §§ 6, 211.

§ 55-3-802. Effect of instrument on obligation for which it is given.

(1) Unless otherwise agreed where an instrument is taken for an underlying obligation:

(a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.

(2) The taking in good faith of a check which is not postdated does not of itself so extend the time on the original obligation as to discharge a surety.

History: 1953 Comp., § 50A-3-802, enacted by Laws 1961, ch. 96, § 3-802.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The section is new. It is intended to settle conflicts as to the effect of an instrument as payment of the obligation for which it is given.

2. Where a holder procures certification of a check the drawer is discharged under Section 3-411 on check certification. Thereafter the original obligation is regarded as paid, and the holder must look to the certifying bank. The circumstances may indicate a similar intent in other transactions, and the question may be one of fact for the jury. Subsection (1) (a) states a rule discharging the obligation pro tanto when the instrument taken carries the obligation of a bank as drawer, maker or acceptor and there is no recourse on the instrument against the underlying obligor.

3. It is commonly said that a check or other negotiable instrument is "conditional payment." By this it is normally meant that taking the instrument is a surrender of the right to sue on the obligation until the instrument is due, but if the instrument is not paid on due presentment the right to sue on the obligation is "revived." Subsection (1) (b) states this result in terms of suspension of the obligation, which is intended to include suspension of the running of the statute of limitations. On dishonor of the instrument the holder is given his option to sue either on the instrument or on the underlying obligation. If, however, the original obligor has been discharged on the instrument (see Section 3-601) he is also discharged on the original obligation.

4. Subsection (2) is intended to remove any implication that a check given in payment of an obligation discharges a surety. The check is taken as a means of immediate payment; the thirty day period for presentment specified in Section 3-503 does not affect the surety's liability.

Cross references.Point 2: Sections 1-201, 3-411 and 3-601.

Point 4: Section 3-503.

Definitional cross references."Action". Section 1-201.

"Bank". Section 1-201.

"Check". Section 3-104.

"Dishonor". Section 3-507.

"Good faith". Section 1-201.

"Instrument". Section 3-102.

"On demand". Section 3-108.

"Presentment". Section 3-504.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper-Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 9 C.J.S. Banks and Banking § 173; 70 C.J.S. Payment § 17 et seq.; 72 C.J.S. Principal and Surety § 125 et seq.

§ 55-3-803. Notice to third party.

Where a defendant is sued for breach of an obligation for which a third person is answerable over under this article he 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 to him under this article. If the notice states that the person notified may come in and defend and that if the person notified does not do so he will in any action against him by the person giving the notice be bound by any determination of fact common to the two litigations, then unless after seasonable receipt of the notice the person notified does come in and defend he is so bound.

History: 1953 Comp., § 50A-3-803, enacted by Laws 1961, ch. 96, § 3-803.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The section is new. It is intended to supplement, not to displace existing procedures for interpleader or joinder of parties.

The section conforms to the analogous provision in Section 2-607. It extends to such liabilities as those arising from forged indorsements even though not "on the instrument," and is intended to make it clear that the notification is not effective until received. In Hartford Accident & Indemnity Co. v. First Nat. Bank & Trust Co., 281 N.Y. 162, 22 N.E.2d 324, 123 A.L.R. 1149 (1939), the common-law doctrine of "vouching in" was held inapplicable where the party notified had no direct liability to the party giving the notice. In that case the drawer of a check, sued by the payee whose indorsement had been forged, gave notice to a collecting bank. In a second action the drawee was held liable to the drawer; but in an action by the drawee for judgment over against the collecting bank the determinations of fact in the first action were held not conclusive. This section does not disturb this result; the section is limited to cases where the person notified is "answerable over" to the person giving the notice.

Cross reference.Section 2-607.

Definitional cross references."Action". Section 1-201.

"Defendant". Section 1-201.

"Instrument". Section 3-102.

"Notifies". Section 1-201.

"Person". Section 1-201.

"Right". Section 1-201.

"Seasonably". Section 1-204.

"Written". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 C.J.S. Bills and Notes § 554; 42 C.J.S. Indemnity § 32; 67A C.J.S. Parties § 105.

§ 55-3-804. Lost, destroyed or stolen instruments.

The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

History: 1953 Comp., § 50A-3-804, enacted by Laws 1961, ch. 96, § 3-804.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section is new. It is intended to provide a method of recovery on instruments which are lost, destroyed or stolen. The plaintiff who claims to be the owner of such an instrument is not a holder as that term is defined in this act, since he is not in possession of the paper, and he does not have the holder's prima facie right to recover under the section on the burden of establishing signatures. He must prove his case. He must establish the terms of the instrument and his ownership, and must account for its absence.

If the claimant testifies falsely, or if the instrument subsequently turns up in the hands of a holder in due course, the obligor may be subjected to double liability. The court is therefore authorized to require security indemnifying the obligor against loss by reason of such possibilities. There may be cases in which so much time has elapsed, or there

is so little possible doubt as to the destruction of the instrument and its ownership that there is no good reason to require the security. The requirement is therefore not an absolute one, and the matter is left to the discretion of the court.

Cross references.Sections 1-201 and 3-307.

Definitional cross references."Action". Section 1-201.

"Defendant". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Proof of terms of instrument. - One attempting to recover on a lost instrument must provide clear, cogent and convincing evidence of the terms of the instrument. Crawford v. 733 San Mateo Co. 854 F.2d 1220 (10th Cir. 1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 371.
54 C.J.S. Lost Instruments § 9 et seq.

§ 55-3-805. Instruments not payable to order or to bearer.

This article applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.

History: 1953 Comp., § 50A-3-805, enacted by Laws 1961, ch. 96, § 3-805.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section covers the "nonnegotiable instrument." As it has been used by most courts, this term has been a technical one of art. It does not refer to a writing, such as a note containing an express condition, which is not negotiable and is entirely outside of the scope of this article and to be treated as a simple contract. It refers to a

particular type of instrument which meets all requirements as to form of a negotiable instrument except that it is not payable to order or to bearer. The typical example is the check reading merely "Pay John Doe."

Such a check is not a negotiable instrument under this article. At the same time it is still a check, a mercantile specialty which differs in many respects from a simple contract. Commercial and banking practice treats it as a check, and a long line of decisions before and after the original act have made it clear that it is subject to the law merchant as distinguished from ordinary contract law. Although the Negotiable Instruments Law has been held by its terms not to apply to such "nonnegotiable instruments" it has been recognized as a codification and restatement of the law merchant, and has in fact been applied to them by analogy.

Thus the holder of the check reading "Pay A" establishes his case by production of the instrument and proof of signatures; and the burden of proving want of consideration or any other defense is upon the obligor. Such a check passes by indorsement and delivery without words of assignment, and the indorser undertakes greater liabilities than those of an assignor. This section resolves a conflict in the decisions as to the extent of that undertaking by providing in effect that the indorser of such an instrument is not distinguished from any indorser of a negotiable instrument. The indorser is entitled to presentment, notice of dishonor and protest, and the procedure and liabilities in bank collection are the same. The rules as to alteration, the filling of blanks, accommodation parties, the liability of signing agents, discharge and the like are those applied to negotiable instruments.

In short, the "nonnegotiable instrument" is treated as a negotiable instrument, so far as its form permits. Since it lacks words of negotiability there can be no holder in due course of such an instrument, and any provision of any section of this article peculiar to a holder in due course cannot apply to it. With this exception, such instruments are covered by all sections of this article.

Cross reference.Section 3-104.

Definitional cross references."Bearer". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Term". Section 1-201.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 1, 7, 47, 108, 377, 634, 883 to 885, 901.
10 C.J.S. Bills and Notes § 12.

Article 4

Bank Deposits and Collections

Part 1

General Provisions and Definitions

Sec.

Part 2

Collection of Items - Depositary and Collecting Banks

Part 1

GENERAL PROVISIONS AND DEFINITIONS

§ 55-4-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code - Bank Deposits and Collections.

History: 1953 Comp., § 50A-4-101, enacted by Laws 1961, ch. 96, § 4-101.

OFFICIAL COMMENT

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 694 et seq.
9 C.J.S. Banks and Banking § 212 et seq.

§ 55-4-102. Applicability.

(1) To the extent that items within this article are also within the scope of Articles 3 and 8, they are subject to the provisions of those articles. In the event of conflict the provisions of this article govern those of Article 3 but the provisions of Article 8 govern those of this article.

(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.

History: 1953 Comp., § 50A-4-102, enacted by Laws 1961, ch. 96, § 4-102.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The rules governing negotiable instruments, their transfer, and the contracts of the parties thereto apply to the items collected through banking channels wherever no specific provision is found in this article. In the case of conflict, this article governs. See Section 3-103(2).

Bonds and like instruments constituting investment securities under Article 8 may also be handled by banks for collection purposes. Various sections of Article 8 prescribe rules of transfer some of which (see Sections 8-304 and 8-306) may conflict with provisions of this article (Sections 4-205 and 4-207). In the case of conflict, Article 8 governs.

Section 4-208 deals specifically with overlapping problems and possible conflicts between this article and Article 9. However, similar reconciling provisions are not necessary in the case of Articles 5 and 7. Sections 4-301 and 4-302 are consistent with Section 5-112. In the case of Article 7 documents of title frequently accompany items but they are not themselves items. See Section 4-104(g).

2. Subsection (2) is designed to state a workable rule for the solution of otherwise vexatious problems of the conflicts of laws:

a. The routine and mechanical nature of bank collections makes it imperative that one law govern the activities of one office of a bank. The requirement found in some cases that to hold an indorser notice must be given in accordance with the law of the place of indorsement, since that method of notice became an implied term of the indorser's contract, is more theoretical than practical.

b. Adoption of what is in essence a tort theory of the conflict of laws is consistent with the general theory of this article that the basic duty of a collecting bank is one of good faith and the exercise of ordinary care. Justification lies in the fact that, in using an ambulatory instrument, the drawer, payee and indorsers must know that action will be taken with respect to it in other jurisdictions. This is especially pertinent with respect to the law of the place of payment.

c. The phrase "action or nonaction with respect to any item handled by it for purposes of presentment, payment or collection" is intended to make the conflicts rule of Subsection (2) apply from the inception of the collection process of an item through all phases of deposit, forwarding, presentment, payment and remittance or credit of proceeds. Specifically the subsection applies to the initial act of a depositary bank in receiving an item and to the incidents of such receipt. The conflicts rule of Weissman v. Banque de Bruxelles, 254 N.Y. 488, 173 N.E. 835 (1930), is rejected. The subsection applies to questions of possible vicarious liability of a bank for action or non-action of sub-agents (see Section 4-202(3)) and tests these questions by the law of the state of the location of the bank which uses the sub-agent. The conflicts rule of St. Nicholas Bank of New York v. State Nat. Bank, 128 N.Y. 26, 27 N.E. 849, 13 L.R.A. 241 (1891), is rejected. The subsection applies to action or non-action of a payor bank in connection with handling an item (see Sections 4-213(1), 4-301, 4-302 and 4-303) as well as action or non-action of a collecting bank (Sections 4-201 to 4-214); to action or non-action of a bank which suspends payment or is affected by another bank suspending payment (Section 4-214) and to action or non-action of a bank with respect to an item under the rules of Part 4 of Article 4.

d. Where Subsection (2) makes this article applicable, Section 4-103(1) leaves open the possibility of an agreement with respect to applicable law. Such freedom of agreement follows the general policy of Section 1-105.

Cross references.Sections 1-105; 3-103(2) and Article 3; all sections of Article 4; 5-112; Article 7; 8-304 and 8-306 and Article 9.

Definitional cross references."Bank". Section 1-201.

"Branch". Section 1-201.

"Item". Section 4-104.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 694, 700.
Construction and effect of U.C.C. Art. 4, dealing with bank deposits and collections, 18 A.L.R.3d 1376.
9 C.J.S. Banks and Banking § 214.

§ 55-4-103. Variation by agreement; measure of damages; certain action constituting ordinary care.

(1) The effect of the provisions of this article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

(2) Federal reserve regulations and operating letters, clearing hours [house] 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 article or pursuant to federal reserve regulations or operating letters constitutes the exercise of ordinary care and, in the absence of special instructions, action or nonaction consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this article, prima facie constitutes the exercise of ordinary care.

(4) The specification or approval of certain procedures by this article does not constitute disapproval of other procedures which 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 which could not have been realized by the use of ordinary care, and where there is bad faith it includes other damages, if any, suffered by the party as a proximate consequence.

History: 1953 Comp., § 50A-4-103, enacted by Laws 1961, ch. 96, § 4-103.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see Sections 5 and 6 of the American Bankers Association Bank Collection Code.

Purposes.1. Section 1-102 states the general principles and rules for variation of the effect of this act by agreement and the limitations to this power. Section 4-103 states the specific rules for variation of Article 4 by agreement and also certain standards of ordinary care. In view of the technical complexity of the field of bank collections, the enormous number of items handled by banks, the certainty that there will be variations from the normal in each day's work in each bank, the certainty of changing conditions and the possibility of developing improved methods of collection to speed the process, it would be unwise to freeze present methods of operation by mandatory statutory rules. This section, therefore, permits within wide limits variation of provisions of the article by agreement.

2. Subsection (1) confers blanket power to vary all provisions of the article by agreements of the ordinary kind. The agreements may not disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care and may not limit the measure of damages for such lack or failure, but this subsection like Section 1-102(3) approves the practice of parties determining by agreement the standards by which such responsibility is to be measured. In the absence of a showing that the standards manifestly are unreasonable, the agreement controls. Owners of items and other interested parties are not affected by agreements under this subsection unless they are parties to the agreement or are bound by adoption, ratification, estoppel or the like.

As here used "agreement" has the meaning given to it by Section 1-201(3). The agreement may be direct, as between the owner and the depositary bank; or indirect, as where the owner authorizes a particular type of procedure and any bank in the collection chain acts pursuant to such authorization. It may be with respect to a single item; or to all items handled for a particular customer, e. g., a general agreement between the depositary bank and the customer at the time a deposit account is opened. Legends on deposit tickets, collection letters and acknowledgments of items, coupled with action by the affected party constituting acceptance, adoption, ratification, estoppel or the like, are agreements if they meet the tests of the definition of "agreement". See Section 1-201(3). First Nat. Bank of Denver v. Federal Reserve Bank, 6 F.2d 339 (8th Cir. 1925) (deposit slip); Jefferson County Bldg. Ass'n v. Southern Bank & Trust Co., 225 Ala. 25, 142 So. 66 (1932) (signature card and deposit slip); Semingson v. Stock Yards Nat. Bank, 162 Minn. 424, 203 N.W. 412 (1925) (passbook); Farmers State Bank v. Union Nat. Bank, 42 N.D. 449, 454, 173 N.W. 789, 790 (1919) (acknowledgment of receipt of item).

3. Subsection (1) (subject to its limitations with respect to good faith and ordinary care) goes far to meet the requirements of flexibility. However, it does not by itself confer fully effective flexibility. When it is recognized that banks handle probably 25,000,000 items

every business day and that the parties interested in each item include the owner of the item, the drawer (if it is a check), all non-bank indorsers, the payor bank and from one to five or more collecting banks, it is obvious that it is impossible, practically, to obtain direct agreements from all of these parties on all items.

En masse, the interested parties constitute virtually every adult person and business organization in the United States. On the other hand they may become bound to agreements on the principle that collecting banks acting as agents have authority to make binding agreements with respect to items being handled. This conclusion was assumed but was not flatly decided in Federal Reserve Bank of Richmond v. Malloy, 264 U.S. 160, at 167, 44 S.Ct. 296, at 298, 68 L. Ed. 617, 31 A.L.R. 1261 (1924).

To meet this problem Subsection (2) provides that official or quasi-official rules of collection, that is federal reserve regulations and operating letters, clearing house 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. Consequently, such official or quasi-official rules may, standing by themselves but subject to the good faith and ordinary care limitations, vary the effect of the provisions of Article 4.

Federal Reserve regulations. Various sections of the Federal Reserve Act (12 U.S.C.A. § 221 et seq.) authorize the board of governors of the federal reserve system to direct the federal reserve banks to exercise bank collection functions. For example, Section 16 (12 U.S.C.A. § 248(o)) authorizes the board to require each federal reserve bank to exercise the functions of a clearing house for its members and Section 13 (12 U.S.C.A. § 342) authorizes each federal reserve bank to receive deposits from non-member banks solely for the purposes of exchange or of collection. Under this statutory authorization the board has issued Regulation J (Check Clearing and Collection), which has been infrequently amended over the many years during which it has been in force. (Regulation G, issued under comparable statutory authority, covers the handling of "non-cash items".) Where regulations issued by the board in pursuance of its statutory mandate may be said to have some force of law and constitute an effective means of maintaining flexibility, it is appropriate to provide that such regulations may vary this article even though not specifically assented to by all parties interested in items handled.

Federal Reserve operating letters. The regulations of the federal reserve board authorize the federal reserve banks to promulgate rules covering operating details. Regulation J, for example, provides that each bank may promulgate rules "not inconsistent with the terms of the law or of this regulation governing the sorting, listing, packaging and transmission of items and other details of its check clearing and collection operation. Such rules . . . shall be set forth . . . in . . . letters of instructions to . . . member and nonmember clearing banks." The term "operating letters" means these "letters of instructions," sometimes called "operating circulars," issued by the federal reserve banks under appropriate regulation of the board. This article recognizes such "operating letters" issued pursuant to the regulations and concerned with operating details as appropriate means, within their proper sphere, to vary the effect of the article.

Clearing House Rules. Local clearing houses have long issued rules governing the details of clearing; hours of clearing, media of remittance, time for return of mis-sent items and the like. The case law has recognized such rules, within their proper sphere, as binding on affected parties and as appropriate sources for the courts to look to in filling out details of bank collection law. Subsection (2) in recognizing clearing house rules as a means of preserving flexibility continues the sensible approach indicated in the cases. Included in the term "clearing houses" are county and regional clearing houses as well as those within a single city or town. There is, of course, no intention of authorizing a local clearing house or a group of clearing houses to rewrite the basic law generally. The term "clearing house rules" should be understood in the light of functions the clearing houses have exercised in the past.

And the like. This phrase is to be construed in the light of the foregoing. "Federal reserve regulations and operating letters" cover rules and regulations issued by public or quasi-public agencies under statutory authority. "Clearing house rules" cover rules issued by a group of banks which have associated themselves to perform through a clearing house some of their collection, payment and clearing functions. Other such agencies or associations may be established in the future whose rules and regulations could be appropriately looked on as constituting means of avoiding absolute statutory rigidity. The phrase "and the like" leaves open such possibilities of future development. An agreement between a number of banks or even all the banks in an area simply because they are banks, would not of itself, by virtue of the phrase "and the like," meet the purposes and objectives of Subsection (2).

4. Under this article banks come under the general obligations of the use of good faith and the exercise of ordinary care. "Good faith" is defined in this act (Section 1-201(19)) as "honesty in fact in the conduct or transaction concerned." The term "ordinary care" is not defined and is here used with its normal tort meaning and not in any special sense relating to bank collections. No attempt is made in the article to define

in toto what constitutes ordinary care or lack of it. Section 4-202 states respects in which collecting banks must use ordinary care. Subsection (3) of 4-103 provides that action or non-action approved by the article or pursuant to federal reserve regulations or operating letters constitutes the exercise of ordinary care. Where federal reserve regulations and operating letters are issued pursuant to statutory mandate as indicated above, they constitute an affirmative standard of ordinary care equally with the provisions of Article 4 itself.

Subsection (3) further provides that, absent special instructions, action or non-action consistent with clearing house rules and the like or with a general banking usage not disapproved by the article, prima facie constitutes the exercise of ordinary care. Clearing house rules and the phrase "and the like" have the significance set forth above in these comments. The term "general banking usage" is not defined but should be taken to mean a general usage common to banks in the area concerned. See Section 1-205(2). Where the adjective "general" is used, the intention is to require a usage broader than a mere practice between two or three banks but it is not intended to

require anything as broad as a country-wide usage. A usage followed generally throughout a state, a substantial portion of a state, a metropolitan area or the like would certainly be sufficient. Consistently with the principle of Section 1-205(3), action or non-action consistent with clearing house rules or the like or with such banking usages prima facie constitutes the exercise of ordinary care. However, the phrase "in the absence of special instructions" affords owners of items an opportunity to prescribe other standards and where there may be no direct supervision or control of clearing houses or banking usages by official supervisory authorities, the confirmation of ordinary care by compliance with these standards is

prima facie only, thus conferring on the courts the ultimate power to determine ordinary care in any case where it should appear desirable to do so. The

5. Subsection (4), in line with the flexible approach required for the bank collection process is designed to make clear that a novel procedure adopted by a bank is not to be considered unreasonable merely because that procedure is not specifically contemplated by this article or by agreement, or because it has not yet been generally accepted as a bank usage. Changing conditions constantly call for new procedures and someone has to use the new procedure first. If such a procedure when called in question is found to be reasonable under the circumstances, provided, of course, that it is not inconsistent with any provision of the article or other law or agreement, the bank which has followed the new procedure should not be found to have failed in the exercise of ordinary care.

6. Subsection (5) sets forth a rule for determining the measure of damages which, under Subsection (1), cannot be limited by agreement. In the absence of bad faith the maximum recovery is the amount of the item concerned. When it is established that some part or all of the item could not have been collected even by the use of ordinary care the recovery is reduced by the amount which would have been in any event uncollectible. This limitation on recovery follows the case law. Finally, when bad faith is established the rule opens to allow the recovery of other damages, whose "proximateness" is to be tested by the ordinary rules applied in comparable cases. Of course, it continues to be as necessary under Subsection (5) as it has been under ordinary common law principles that, before the damage rule of the subsection becomes operative, liability of the bank and some loss to the customer or owner must be established.

Cross references.Sections 1-102(3), 1-203, 1-205 and 4-202.

Definitional cross references."Bank". Section 1-201.

"Good faith". Section 1-201.

"Item". Section 4-104.

"Usage". Section 1-205.

ANNOTATION

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 567, 702, 737, 838, 839.
Admissibility, in action for negligence against bank by depositor, of evidence as to custom of banks in locality in handling and dealing with checks and other items, 8 A.L.R.2d 446.
Effect on bank depositor's rights and those of bank, of printed rules in passbook not expressly accepted, 60 A.L.R.2d 708.
Bank's liability for payment or withdrawal on less than required number of signatures, 7 A.L.R.4th 655.
Bank's liability for breach of implied contract of good faith and fair dealing, 55 A.L.R.4th 1026.
9 C.J.S. Banks and Banking § 216 et seq.

§ 55-4-104. Definitions and index of definitions.

(1) In this article, unless the context otherwise requires:

(a) "account" means any account with a bank and includes a checking, time, interest or savings account;

(b) "afternoon" means the period of a day between noon and midnight;

(c) "banking day" means that part of any day, excluding Saturday, Sunday and legal holidays for banks as set forth in Section 58-5-7 NMSA 1978, on which a bank is open to the public for carrying on substantially all of its banking functions;

(d) "clearing house" means any association of banks or other payors regularly clearing items;

(e) "customer" means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank;

(f) "day" as shown on the face of a documentary draft means banking day unless otherwise specified;

(g) "documentary draft" means any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft;

(h) "item" means any instrument for the payment of money even though it is not negotiable but does not include money;

(i) "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;

(j) "properly payable" includes the availability of funds for payment at the time of decision to pay or dishonor;

(k) "settle" means to pay in cash, by clearing house settlement, in a charge or credit or by remittance or otherwise as instructed. A settlement may be either provisional or final; and

(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 article and the sections in which they appear are:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

"Collecting bank".
.....Section 55-4-104 [55-4-105] NMSA 1978;
"Depositary bank".
.....Section 55-4-105 NMSA 1978;
"Intermediary bank".
.....Section 55-4-105 NMSA 1978;
"Payor bank".
.....Section 55-4-105 NMSA 1978;
"Presenting bank".
.....Section 55-4-105 NMSA 1978; and
"Remitting bank".
.....Section 55-4-105 NMSA 1978.
(3) The following definitions in other articles apply to this article:
"Acceptance".
.....Section 55-3-410 NMSA 1978;
"Certificate of deposit".
.....Section 55-3-104 NMSA 1978;
"Certification".
.....Section 55-3-411 NMSA 1978;
"Check".
.....Section 55-3-104 NMSA 1978;
"Draft".
.....Section 55-3-104 NMSA 1978;

"Holder in due course".
.....Section 55-3-302 NMSA 1978;
"Notice of dishonor".
.....Section 55-3-508 NMSA 1978;
"Presentment".
.....Section 55-3-504 NMSA 1978;
"Protest".
.....Section 55-3-509 NMSA 1978; and
"Secondary party".
.....Section 55-3-102 NMSA 1978.

(4) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

History: 1953 Comp., § 50A-4-104, enacted by Laws 1961, ch. 96, § 4-104; 1977, ch. 340, § 2; 1987, ch. 102, § 2.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) (c): "Banking Day." Under this definition that part of a business day when a bank is open only for limited functions, e. g., on Saturday evenings to receive deposits and cash checks, but with loan, bookkeeping and other departments closed, is not part of a banking day.

2. Subsection (1) (d): "Clearinghouse." Occasionally express companies, governmental agencies and other non-banks deal directly with a clearinghouse; hence the definition does not limit the term to an association of banks.

3. Subsection (1) (e): "Customer." It is to be noted that this term includes a bank carrying an account with another bank as well as the more typical non-bank customer or depositor.

4. Subsection (1) (g): The word "item" is chosen because it is "banking language" and includes non-negotiable as well as negotiable paper calling for money and also similar paper governed by the article on investment securities (Article 8) as well as that governed by the article on commercial paper (Article 3).

5. Subsection (1) (h): "Midnight Deadline." The use of this phrase is an example of the more mechanical approach used in this article. Midnight is selected as a termination point or time limit to obtain greater uniformity and definiteness than would be possible from other possible termination points, such as the close of the banking day or business day.

6. Subsection (1) (j): The term "settle" is a new term in bank collection language that

has substantial importance throughout Article 4. In the American Bankers Association Bank Collection Code, in deferred posting statutes, in federal reserve regulations and operating letters, in clearing house rules, in agreements between banks and customers and in legends on deposit tickets and collection letters, there is repeated reference to "conditional" or "provisional" credits or payments. Tied in with this concept of credits or payments being in some way tentative, has been a related but somewhat different problem as to when an item is "paid" or "finally paid" either to determine the relative priority of the item as against attachments, stop payment orders and the like or in insolvency situations. There has been extensive litigation in the various states on these problems. To a substantial extent the confusion, the litigation and even the resulting court decisions fail to take into account that in the collection process some debits or credits are provisional or tentative and others are final and that very many debits or credits are provisional or tentative for awhile but later become final. Similarly, some cases fail to recognize that within a single bank, particularly a payor bank, each item goes through a series of processes and that in a payor bank most of these processes are preliminary to the basic act of payment or "final payment."

The term "settle" is used as a convenient term to characterize a broad variety of conditional, provisional, tentative and also final payments of items. Such a comprehensive term is needed because it is frequently difficult or unnecessary to determine whether a particular action is tentative or final or when a particular credit shifts from the tentative class to the final class. Therefore, its use throughout the article indicates that in that particular context it is unnecessary or unwise to determine whether the debit or the credit or the payment is tentative or final. However, when qualified by the adjective "provisional" its tentative nature is intended, and when qualified by the adjective "final" its permanent nature is intended.

Examples of the various types of settlement contemplated by the term include payments in cash; the efficient but somewhat complicated process of payment through the adjustment and off-setting of balances through clearing houses; debit or credit entries in accounts between banks and the forwarding of various types of remittance instruments, sometimes to cover a particular item but more frequently to cover an entire group of items received on a particular day.

7. Subsection (1) (k): "Suspends payments." This term is designed to afford an objective test to determine when a bank is no longer operating as a part of the banking system.

Definitional cross references."Bank". Section 1-201.

"Documents". Section 1-201.

"Money". Section 1-201.

"Negotiable". Section 3-104.

"Notice". Section 1-201.

"Person". Section 1-201.

"Securities". Section 8-102.

ANNOTATION

The 1977 amendment inserted "excluding Saturday, Sunday and legal holidays for banks as set forth in Section 48-2-21A NMSA 1953," in the definition of "banking day" in Subsection (1) and made minor changes in form and punctuation in that subsection.

The 1987 amendment, effective June 19, 1987, in Subsection (1), in Paragraph (c) substituted "58-5-7 NMSA 1978" for "48-2-21A NMSA 1953," inserted Paragraph (f) and relettered the subsequent paragraphs accordingly; and, in Subsections (2) and (3), substituted the NMSA 1978 section references for the UCC references.

Partnership deemed "customer". - Pursuant to 55-1-201 NMSA 1978, Subsections 28 and 30, a partnership may be a customer to whom the bank is required to respond in damages for any wrongful dishonor. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 694, 700, 704, 706, 710, 713, 720, 724, 748, 756, 838; 11 Am. Jur. 2d Bills and Notes §§ 889, 893, 895.
Banks: What is "documentary draft" under UCC § 4-104(1)(f), 65 A.L.R.4th 1095.
9 C.J.S. Banks and Banking § 1; 82 C.J.S. Statutes § 315.

§ 55-4-105. "Depositary bank"; "intermediary bank"; "collecting bank"; "payor bank"; "presenting bank"; "remitting bank."

In this article unless the context otherwise requires:

(a) "depositary bank" means the first bank to which an item is transferred for collection even though it is also the payor bank;

(b) "payor bank" means a bank by which an item is payable as drawn or accepted;

(c) "intermediary bank" means any bank to which an item is transferred in course of collection except the depositary or payor bank;

(d) "collecting bank" means any bank handling the item for collection except the payor

bank;

(e) "presenting bank" means any bank presenting an item except a payor bank;

(f) "remitting bank" means any payor or intermediary bank remitting for an item.

History: 1953 Comp., § 50A-4-105, enacted by Laws 1961, ch. 96, § 4-105.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The definitions in general exclude a bank to which an item is issued, as such bank does not take by transfer except in the particular case covered where the item is issued to a payee for collection, as where a corporation is transferring balances from one account to another. Thus, the definition of "depositary bank" does not include the bank to which a check is made payable where a check is given in payment of a mortgage. Such a bank has the status of a payee under Article 3 on commercial paper and not that of a collecting bank.

2. The term payor bank includes a drawee bank and also a bank at which an item is payable if the item constitutes an order on the bank to pay, for it is then "payable by" the bank. If the "at" item is not an order in the particular state (see Section 3-121), then the bank is not a payor, but will be a presenting or collecting bank.

3. Items are sometimes drawn or accepted "payable through" a particular bank. Under this section and Section 3-120 the "payable through" bank (if it in fact handles the item) will be a collecting (and often a presenting) bank; it is not a "payor bank."

4. The term intermediary bank includes the last bank in the collection process where the payor is not a bank. Usually the last bank is also a presenting bank.

Cross references.Article 3, especially Sections 3-120 and 3-121.

Definitional cross references."Bank". Section 1-201.

"Customer". Section 4-104.

"Item". Section 4-104.

ANNOTATION

Law reviews. - For note, "New Mexico's Uniform Commercial Code: Presentment Warranties and the Myth of the 'Shelter Provision'," see 4 Nat. Resources J. 398 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 703, 704, 706, 710, 720, 724, 748; 15A Am. Jur. 2d Commercial Code §§ 72, 74.
9 C.J.S. Banks and Banking §§ 1, 212; 82 C.J.S. Statutes § 315.

§ 55-4-106. Separate office of a 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 notices or orders shall be given under this article and under Article 3.

History: 1953 Comp., § 50A-4-106, enacted by Laws 1961, ch. 96, § 4-106; 1967, ch. 186, § 12.

Compiler's note. - New Mexico did not adopt the optional language, "maintaining its own deposit ledgers," which follows the first "bank" in the uniform act.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see Section 1, American Bankers Association Bank Collection Code.

Purposes.1. A rule with respect to the status of a branch or separate office of a bank as a part of any statute on bank collections is highly desirable if not absolutely necessary. However, practices in the operations of branches and separate offices vary substantially in the different states and it has not been possible to find any single rule that is logically correct, fair in all situations and workable under all different types of practices.

2. In many states and for many purposes a branch or separate office of the bank needs to be treated as a separate bank. Many branches function as separate banks in the handling and payment of items and require time for doing so similar to that of a separate bank. This is particularly true where branch banking is permitted throughout a state or in different towns and cities. Similarly, where there is this separate functioning a particular branch or separate office is the only proper place for various types of action to be taken or orders or notices to be given. Examples include the drawing of a check on a particular branch by a customer whose account is carried at that branch; the presentment of that same check at that branch and the issuance of an order to the branch to stop payment on the check.

3. Section 1 of the American Bankers Association Bank Collection Code provides simply: "A branch or office of any such bank shall be deemed a bank." Although this rule appears to be brief and simple, as applied to particular sections of the ABA Code it produces illogical and, in some cases, unreasonable results. For example, under Section 11 of the ABA Code it seems anomalous for one branch of a bank to have charged an item to the account of the drawer and another branch to have the power to elect to treat the item as dishonored. Similar logical problems would flow from applying

the same rule to Article 4. Warranties by one branch to another branch under Section 4-207 (each considered a separate bank) do not make sense.

4. Assuming that it is not desirable to make each branch a separate bank for all purposes, this section provides that a branch or separate office is a separate bank for certain purposes. In so doing the single legal entity of the bank as a whole is preserved, thereby carrying with it the liability of the institution as a whole on such obligations as it may be under. On the other hand, where the article provides a number of time limits for different types of action by banks, if a branch functions as a separate bank, it should have the time limits available to a separate bank. Similarly if in its relations to customers a branch functions as a separate bank, notices and orders with respect to accounts of customers of the branch should be given at the branch. For example, whether a branch has notice sufficient to affect its status as a holder in due course of an item taken by it should depend upon what notice that branch has received with respect to the item. Similarly the receipt of a stop payment order at one branch should not be notice to another branch so as to impair the right of the second branch to be a holder in due course of the item, although in circumstances in which ordinary care requires the communication of a notice or order to the proper branch of a bank, such notice or order would be effective at such proper branch from the time it was or should have been received. See Section 1-201(27).

5. Whether a branch functions as a separate bank may vary depending upon the type of activity taking place and upon practices in the different states. If the activity is that of a payor bank paying items, a branch will usually function as a separate bank if it maintains its own deposit ledgers. Similarly whether a branch functions as a separate bank in the collection of items usually depends also on whether it maintains its own deposit ledgers. Conversely, if a particular bank having branches does all of its bookkeeping at its head office, the branches of that bank do not usually function as separate banks either in the payment or collection of items.

On the other hand, in its relations to customers a branch may function as a separate bank regardless of whether it maintains its own deposit ledgers. Checks may be drawn on a particular branch and notices and stop orders delivered to that branch even though all the bookkeeping is done at the head office or another branch.

Where the words "maintaining its own deposit ledgers" are bracketed, the option is given to each state enacting the code to include these words as a test of separateness. In those states where the maintenance by a branch of its own deposit ledgers will serve as a satisfactory standard, the bracketed words should be retained. In those states where these words will cause more problems than benefits, they may be deleted. Insofar as this latter rule allows extra time to banks maintaining branches where such extra time is not needed, it is not ideal. However, it has not been found possible to find a rule that will meet this problem and will work in all cases. Further, it is highly unlikely that large banks maintaining branches will needlessly take advantage of extra time under this rule.

Cross references.Sections 3-504 and 4-102(2).

Definitional cross references."Bank". Section 1-201.

"Branch". Section 1-201.

ANNOTATION

Compiler's notes. - Laws 1967, ch. 186, § 13, is compiled as 55-4-204 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 326.
Construction of UCC § 4-106 defining separate or branch office of bank, 5 A.L.R.4th 938.
9 C.J.S. Banks and Banking §§ 55, 212 et seq.

§ 55-4-107. 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 cut-off 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 cut-off 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.

History: 1953 Comp., § 50A-4-107, enacted by Laws 1961, ch. 96, § 4-107.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. After an item has been received by a bank it goes through a series of processes varying with the type of item that it is. It moves from the teller's window, branch office, or mail desk at which it is received through settlement and proving departments until it is forwarded or presented to a clearing house or another bank, if it is a transit item, or until it reaches the bookkeeping department, if the bank receiving it is the payor bank. In addition, in order that the books of the bank always remain in balance while items are moving through it, the amount of each item is included in lists or proofs of debits or credits several times as it progresses through the bank. The running of proofs, the making of debit and credit entries in subsidiary and general ledgers and the striking of a general balance for each day requires a considerable amount of time. If these processes are to be completed on any particular day during normal working hours without the employment of night forces, a number of banks have found it necessary to establish a "cut-off hour" to allow time to obtain final figures to be incorporated into the

bank's position for the day. Subsection (1) approves a cut-off hour of this type provided it is not earlier than 2 P. M. Subsection (2) provides that if such a cut-off hour is fixed, items received after the cut-off hour may be treated as being received at the opening of the next banking day. Where the number of items received either through the mail or over the counter tends to taper off radically as the afternoon hours progress, a 2 P. M. cut-off hour does not involve a large portion of the items received but at the same time permits a bank using such a cut-off hour to leave its doors open later in the afternoon without forcing into the evening the completion of its settling and proving process.

2. The alternative provision in Subsection (2) that items or deposits received after the close of the banking day may be treated as received at the opening of the next banking day is important in cases where a bank closes at twelve or one o'clock, e. g., on a Saturday, but continues to receive some items by mail or over the counter if, for example, it opens Saturday evening for the limited purpose of receiving deposits and cashing checks.

Definitional cross references."Afternoon". Section 4-104.

"Bank". Section 1-201.

"Banking day". Section 4-104.

"Item". Section 4-104.

"Money". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 699.
Liability of bank in connection with night depositor service, 77 A.L.R.3d 597.
9 C.J.S. Banks and Banking §§ 219, 269.

§ 55-4-108. Delays.

(1) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment may, in the case of specific items and with or without the approval of any person involved, waive, modify or extend time limits imposed or permitted by this act [chapter] for a period not in excess of an additional banking day without discharge of secondary parties and without liability to its transferor or any prior party.

(2) Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this act or by instructions is excused if caused by interruption of communication facilities, suspension of payments by another bank, war, emergency conditions or other circumstances beyond the control of the bank provided it exercises such diligence as the circumstances require.

History: 1953 Comp., § 50A-4-108, enacted by Laws 1961, ch. 96, § 4-108.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Sections 4-202(2), 4-212, 4-301 and 4-302 prescribe various time limits for the handling of items. These are the limits of time within which a bank, in fulfillment of its obligation to exercise ordinary care, must handle items entrusted to it for collection or payment. Under Section 4-103 they may be varied by agreement or by federal reserve regulations or operating letters, clearing house rules, or the like.

2. Subsection (1) of this section permits a limited extension of these time limits in special cases. It permits collecting banks to grant, within a rather narrow field, an additional banking day and to do so with or without the approval of any interested party. Such one-day extension can only be granted in a good faith effort to secure payment and only with respect to specific items. It cannot be exercised if the customer instructs otherwise. Thus limited the escape provision should afford a limited degree of flexibility in special cases but should not interfere with the overall requirement and objective of speedy collections.

3. Notice that an extension granted under Subsection (1) is "without discharge of secondary parties." It therefore extends also the times for presentment or payment, as the case may be, specified in Article 3. See Sections 3-503 and 3-506. Where this article and Article 3 conflict, this article controls. See Sections 3-103(2) and 4-102(1).

4. Subsection (2) is another escape clause from time limits. This clause operates not only with respect to time limits imposed by the article itself but also time limits imposed by special instructions, by agreement or by federal reserve regulations or operating letters, clearing house rules or the like. The latter time limits are "permitted" by the Code. This clause operates, however, only in the types of situation specified. Examples of these situations include blizzards, floods, or hurricanes, and other "act of God" events or conditions, and wrecks or disasters, interfering with mails; suspension of payments by another bank and abnormal operating conditions such as substantial increased volume or substantial shortage of personnel during war or emergency situations. When delay is sought to be excused under this subsection the bank must "exercise such diligence as the circumstances require" and it has the burden of proof. See Section 4-202(2).

Cross references.Sections 3-103(2), 3-503, 3-506, 4-102(1), 4-103, 4-104, 4-202(2), 4-212, 4-213, 4-301 and 4-302.

Definitional cross references."Bank". Section 1-201.

"Banking day". Section 4-104.

"Collecting bank". Section 4-105.

"Good faith". Section 1-201.

"Item". Section 4-104.

"Party". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 711.
9 C.J.S. Banks and Banking § 237 et seq.

§ 55-4-109. Process of posting.

The "process of posting" means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank:

(a) verification of any signature;

(b) ascertaining that sufficient funds are available;

(c) affixing a "paid" or other stamp;

(d) entering a charge or entry to a customer's account;

(e) correcting or reversing an entry or erroneous action with respect to the item.

History: 1953 Comp., § 50A-4-109, enacted by Laws 1967, ch. 186, § 1.

OFFICIAL COMMENT

Prior uniform statutory provisions. None.

Purposes.Completion of the "process of posting" is one of the measuring points for determining when an item is finally paid (Subsection (1) (c) of Section 4-213) and when knowledge, notice, stop order, legal process and set-off come too late to affect a payor bank's right or duty to pay an item (Subsection (1) (d) of Section 4-303). This section defines what is meant by the "process of posting." It is the "usual procedure followed by a payor bank in determining to pay an item and in recording the payment . . . ." It involves the two basic elements of some decision to pay and some recording of the payment with a listing of some of the typical steps that might be involved. Procedures followed by banks in determining to pay an item and in recording the payment vary. Examples of some of these procedures will illustrate what is meant by completion of the

"process of posting."

Example 1. A payor bank receives an item through the clearing on Monday morning. It is sorted under the name of the customer on Monday and under deferred posting routines (Section 4-301) reaches the bookkeeper for that customer on Tuesday morning. The bookkeeper examines the signature, verifies there are sufficient funds and decides at 11 a. m. on Tuesday to pay the item. A debit entry for or including the amount of the item is entered in the customer's account at 12 noon on Tuesday. The process of posting is completed at 12 noon on Tuesday.

Example 2. A payor bank with branches receives an item through the clearing on Monday morning. One branch does all the bookkeeping for itself and nine other branches. The item is sent to that branch and a provisional debit is entered to the customer's account for the amount of the item on Monday. After this entry is made the item is sent to the branch where the customer transacts business and at this branch a clerk verifies the signature on Tuesday, e.g., at 12 noon. If the clerk determines the signature is valid and makes a decision to pay, the process of posting is completed at 12 noon on Tuesday because there has been both a charge to the customer's account and a determination to pay. If, however, the clerk determines the signature is not valid or that the item should not be paid for some other reason, the item is then returned to the presenting bank through the clearing house and an offsetting credit entry is made in the customer's account by the bookkeeping branch. In this case there has been no determination to pay the item, no completion of the process of posting and no payment of the item.

Example 3. A payor bank receives in the mail on Monday an item drawn upon it. The item is sorted and otherwise processed on Monday and during Monday night is provisionally recorded on tape by an electronic computer as charged to the customer's account. On Tuesday a clerk examines the signature on the item and makes other checks to determine finally whether the item should be paid. If the clerk determines the signature is valid and makes a decision to pay and all processing of this item is complete, e. g., at 12 noon on Tuesday, the "process of posting" is completed at that time. If, however, the clerk determines the signature is not valid or that the item should not be paid for some other reason, the item is returned to the presenting bank and in the regular Tuesday night run of the computer the debit to the customer's account for the item is reversed or an offsetting credit entry is made. In this case, as in Example 2, there has been no determination to pay the item, no completion of the process of posting and no payment of the item.

Cross references.Sections 4-213(1) (c) and 4-303(1) (d).

Definitional cross references."Account". Section 4-104(1) (a).

"Customer". Section 4-104(1) (e).

"Item". Section 4-104(1) (g).

"Payor bank". Section 4-105 (b).

ANNOTATION

Compiler's notes. - Laws 1967, ch. 186, § 2, is compiled as 55-8-107 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 494, 699.

Part 2

COLLECTION OF ITEMS - DEPOSITARY AND COLLECTING BANKS

§ 55-4-201. Presumption and duration of agency status of collecting banks and provisional status of credits; applicability of article; item indorsed "pay any bank".

(1) Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final (Subsection (3) of Section 4-211 [55-4-211 NMSA 1978] and Sections 4-212 and 4-213 [55-4-212 and 55-4-213 NMSA 1978]) the bank 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 indorsement or lack of indorsement 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 setoff. When an item is handled by banks for purposes of presentment, payment and collection, the relevant provisions of this article apply even though action of parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(2) After an item has been indorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder:

(a) until the item has been returned to the customer initiating collection; or

(b) until the item has been specially indorsed by a bank to a person who is not a bank.

History: 1953 Comp., § 50A-4-201, enacted by Laws 1961, ch. 96, § 4-201.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see Sections 2 and 4 of the American Bankers Association Bank Collection Code.

Purposes.1. This section states certain basic rules and presumptions of the bank collection process. One basic rule, appearing in the last sentence of Subsection (1), is that, to the extent applicable, the provisions of the article govern without regard to whether a bank handling an item owns the item or is an agent for collection. Historically, much time has been spent and effort expended in determining or attempting to determine whether a bank was a purchaser of an item or merely an agent for collection. See discussion of this subject and cases cited in 11 A.L.R. 1043; 16 A.L.R. 1084; 42 A.L.R. 492; 68 A.L.R. 725 and 99 A.L.R. 486. See also Section 4 of the American Bankers Association Bank Collection Code. The general approach of Article 4, similar to that of other articles, is to provide, within reasonable limits, rules or answers to major problems known to exist in the bank collection process without regard to questions of status and ownership but to keep general principles such as status and ownership available to cover residual areas not covered by specific rules. In line with this approach, the last sentence of Subsection (1) says in effect that Article 4 applies to practically every item moving through banks for the purpose of presentment, payment or collection.

2. Within this general rule of broad coverage, the first two sentences of Subsection (1) state a rule of status in terms of a strong presumption. "Unless a contrary intent clearly appears" the status of a collecting bank is that of an agent or sub-agent for the owner of the item. Although as indicated in Comment 1 it is much less important under Article 4 to determine status than has been the case heretofore, such status may have importance in some residual areas not covered by specific rules. Further, where status has been considered so important in the past, to omit all reference to it might cause confusion. The presumption of agency "applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn." Thus questions heretofore litigated as to whether ordinary indorsements "for deposit," "for collection" or in blank have the effect of creating an agency status or a purchase, no longer have significance in varying the prima facie rule of agency. Similarly, the nature of the credit given for an item or whether it is subject to immediate withdrawal as of right or is in fact withdrawn, do not rebut the general presumption. See A.L.R. references supra in Comment 1.

A contrary intent can rebut the presumption but this must be clear. An example of a clear contrary intent would be if collateral papers established or the item bore a legend stating that the item was sold absolutely to the depositary bank.

3. The prima facie agency status of collecting banks is consistent with prevailing law and practice today. Section 2 of the American Bankers Association Bank Collection Code so provides. Legends on deposit tickets, collection letters and acknowledgments of items and federal reserve operating letters consistently so provide. The status is consistent with rights of chargeback (Section 4-212 and Section 11 of the ABA Code) and risk of loss in the event of insolvency (Section 4-214 and Section 13 of the ABA Code).

4. Affirmative statement of a prima facie agency status for collecting banks requires

certain limitations and qualifications. Under current practices substantially all bank collections sooner or later merge into bank credits, at least if collection is effected. Usually, this takes place within a few days of the initiation of collection. An intermediary bank receives final collection and evidences the result of its collection by a "credit" on its books to the depositary bank. The depositary bank evidences the results of its collection by a "credit" in the account of its customer. As used in these instances the term "credit" clearly indicates a debtor-creditor relationship. At some stage in the bank collection process the agency status of a collecting bank changes to that of debtor, a debtor of its customer. Usually at about the same time it also becomes a creditor for the amount of the item, a creditor of some intermediary, payor or other bank. Thus the collection is completed, all agency aspects are terminated and the identity of the item has become completely merged in bank accounts, that of the customer with the depositary bank and that of one bank with another.

Although Section 4-213(1) provides that an item is finally paid when the payor bank takes certain action with respect to the item such final payment of the item may or may not result in the simultaneous

final settlement for the item in the case of all prior parties. If a series of provisional debits and credits for the item have been entered in accounts between banks, the final payment of the item by the payor bank may result in the automatic firming up of all these provisional debits and credits under Section 4-213(2), and the consequent receipt of final settlement for the item by each collecting bank and the customer of the depositary bank simultaneously with such action of the payor bank. However, if the payor bank or some intermediary bank accounts for the item with a remittance draft, the next prior bank usually does not receive final settlement for the item until such remittance draft finally clears. See Section 4-211(3) (a). The first sentence of Subsection (1) provides that the agency status of a collecting bank (whether intermediary or depositary) continues until the settlement

A number of practical results flow from this rule continuing the agency status of a collecting bank until its settlement for the item is or becomes final, some of which are specifically set forth in this article. One is that risk of loss continues in the owner of the item rather than the agent bank. See Section 4-212. Offsetting rights favorable to the owner are that pending such final settlement, the owner has the preference rights of Section 4-214 and the direct rights of Section 4-302 against the payor bank. It also follows from this rule that the dollar limitations of Federal Deposit Insurance are measured by the claim of the owner of the item rather than that of the collecting bank.

5. In those cases where some period of time elapses between the final payment of the item by the payor bank and the time that the settlement of the collecting bank is or becomes final, e. g., where the payor bank or an intermediary bank accounts for the item with a remittance draft or in straight non-cash collections, the continuance of the agency status of the collecting bank necessarily carries with it the continuance of the owner's status as principal. The second sentence of Subsection (1) provides that whatever rights the owner has to proceeds of the item are subject to the rights of

collecting banks for outstanding advances on the item and other valid rights, if any. The rule provides a sound rule to govern cases of attempted attachment of proceeds of a noncash item in the hands of the payor bank as property of the absent owner. If a collecting bank has made an advance on an item which is still outstanding, its right to obtain reimbursement for this advance should be superior to the rights of the owner to the proceeds or to the rights of a creditor of the owner. The phrase "other valid rights, if any" is broad enough to cover legitimate rights of set-off of accounts between banks without attempting to provide that all set-offs may be valid. An intentional crediting of proceeds of an item to the account of a prior bank known to be insolvent, for the purpose of acquiring a right of set-off, would not produce a valid set-off. See 8 Zollman, Banks and Banking § 5443 (1936).

6. This section and Article 4 as a whole represent an intentional abandonment of the approach to bank collection problems appearing in Section 4 of the American Bankers Association Bank Collection Code. Where the tremendous volume of items handled makes impossible the examination by all banks of all indorsements on all items and where in fact this examination is not made, except perhaps by depositary banks, it is unrealistic to base the rights and duties of all banks in the collection chain on variations in the form of indorsements. It is anomalous to provide throughout the ABA code that the prima facie status of collecting banks is that of agent or sub-agent but in Section 4 to provide that subsequent holders (sub-agents) shall have the right to rely on the presumption that the bank of deposit (the primary agent) is the owner of the item. It is unrealistic, particularly in this background, to base rights and duties on status of agent or owner. This Section 4-201 makes the pertinent provisions of Article 4 applicable to substantially all items handled by banks for presentment, payment or collection, recognizes the prima facie status of most banks as agents, and then seeks to state appropriate limits and some attributes to the general rules and presumptions so expressed.

7. Subsection (2) protects the ownership rights with respect to an item indorsed "pay any bank or banker" or in similar terms of a customer initiating collection or of any bank acquiring a security interest under Section 4-208, in the event the item is subsequently acquired under improper circumstances by a person who is not a bank and transferred by that person to another person, whether or not a bank. Upon return to the customer initiating collection of an item so indorsed, the indorsement may be cancelled (Section 3-208). A bank holding an item so indorsed may transfer the item out of banking channels by special indorsement; however, under Section 4-103(5), such bank would be liable to the owner of the item for any loss resulting therefrom if the transfer had been made in bad faith or with lack of ordinary care. If briefer and more simple forms of bank indorsements are developed under Section 4-206 (e. g., the use of bank transit numbers in lieu of present lengthy forms of bank indorsements), a depositary bank having the transit number "X100" could make Subsection (2) operative by indorsements such as "Pay any bank - X100."

Cross references.Sections 3-206, 3-208, 4-103, 4-206, 4-208, 4-212, 4-213, 4-214 and 4-302.

Definitional cross references."Bank". Section 1-201.

"Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Depositary bank". Section 4-105.

"Holder". Section 1-201.

"Item". Section 4-104.

"Indorsements". Sections 3-202, 3-204, 3-205 and 3-206.

"Person". Section 1-201.

"Settle". Section 4-104.

ANNOTATION

Deposited check presumed for collection. - One who deposits with bank a check drawn on another is presumed to deposit it for collection, in the absence of a special agreement. Bays v. Albuquerque Nat'l Bank, 34 N.M. 656, 288 P. 17 (1930) (decided under former law).

Process of collection is simply attenuated demand for payment. Each collecting bank in the chain of collection becomes an agent for the owner of the item and acts for him to demand payment of the drawee. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 694, 697, 698; 11 Am. Jur. 2d Bills and Notes § 408.
9 C.J.S. Banks and Banking §§ 218 et seq., 358.

§ 55-4-202. Responsibility for collection; when action seasonable.

(1) A collecting bank must use ordinary care in:

(a) presenting an item or sending it for presentment; and

(b) sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor or directly to the depositary bank under Subsection (2) of Section 4-212 [55-4-212 NMSA 1978] after learning that the item has not been paid or accepted, as the case may be; and

(c) settling for an item when the bank receives final settlement; and

(d) making or providing for any necessary protest; and

(e) notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(2) A collecting bank taking proper action before its midnight deadline following receipt of an item, notice or payment acts seasonably; taking proper action within a reasonably longer time may be seasonable but the bank has the burden of so establishing.

(3) Subject to Subsection (1) (a), 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.

History: 1953 Comp., § 50A-4-202, enacted by Laws 1961, ch. 96, § 4-202.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see Sections 5 and 6, American Bankers Association Bank Collection Code.

Purposes.1. Subsection (1) states the basic responsibilities of a collecting bank. Of course, under Section 1-203 a collecting bank is subject to the standard requirement of good faith. By Subsection (1) it must also use ordinary care in the exercise of its basic collection tasks. By Section 4-103(1) neither requirement may be disclaimed.

2. If the bank makes presentment itself, Subsection 1(a) requires ordinary care with respect both to the time and manner of presentment. (Sections 3-503, 3-504 and 4-210.) If it forwards the item to be presented the subsection requires ordinary care with respect to routing (Section 4-204), and also in the selection of intermediary banks or other agents.

3. Subsection (1) describes

types of basic action with respect to which a collecting bank must use ordinary care. Subsection (2) deals with the

4. At common law the so-called New York collection rule subjected the initial collecting bank to liability for the actions of subsequent banks in the collection chain; the so-called

Massachusetts rule was that each bank, subject to the duty of selecting proper intermediaries, was liable only for its own negligence. Subsection (3) adopts the Massachusetts rule. But since this is stated to be subject to Subsection (1) (a) a collecting bank remains responsible for using ordinary care in selecting properly qualified intermediary banks and agents and in giving proper instructions to them.

Cross references.Sections 1-203, 4-103, 4-107, 4-108, 4-301 and 4-302.

Definitional cross references."Collecting bank". Section 4-105.

"Depositary bank". Section 4-105.

"Documentary draft". Section 4-104.

"Item". Section 4-104.

"Midnight deadline". Section 4-104.

"Presentment". Article 3, Part 5.

"Protest". Section 3-509.

ANNOTATION

Compiler's notes. - New Mexico included the optional language of the uniform act, "or directly to the depositary bank under Subsection 2 of Section 4-212," in Subsection (1)(b).

When bank not liable for negligence of subagent. - Where a bank has in good faith employed a suitable subagent, for the purpose of making a collection, it is not thereafter liable for default or negligence of that subagent. Bays v. Albuquerque Nat'l Bank, 34 N.M. 656, 288 P. 17 (1930) (decided under former law).

Ordinary care obligates collecting bank to take seasonable action on the item. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 701, 704, 705, 710, 711, 713, 728, 731.
Negligence action against bank by depositor, admissibility of evidence of custom of banks in locality in handling and dealing with checks and other items involved, 8 A.L.R.2d 446.
Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance, 39 A.L.R.2d 1296.
9 C.J.S. Banks and Banking §§ 235 et seq., 358.

§ 55-4-203. Effect of instructions.

Subject to the provisions of Article 3 concerning conversion of instruments (Section 3-419 [55-3-419 NMSA 1978]) and the provisions of both Article 3 and this article concerning restrictive indorsements only a collecting bank's transferor can 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 pursuant to such instructions or in accordance with any agreement with its transferor.

History: 1953 Comp., § 50A-4-203, enacted by Laws 1961, ch. 96, § 4-203.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see Section 2 of the American Bankers Association Bank Collection Code.

Purposes.This section adopts a "chain of command" theory which renders it unnecessary for an intermediary or collecting bank to determine whether its transferor is "authorized" to give the instructions. Equally the bank is not put on notice of any "revocation of authority" or "lack of authority" by notice received from any other person. The desirability of speed in the collection process and the fact that, by reason of advances made, the transferor may have the paramount interest in the item requires the rule.

The section is made subject to the provisions of Article 3 concerning conversion of instruments (Section 3-419) and other provisions of Article 3 and this article concerning restrictive indorsements (Sections 3-205, 3-206, 3-419, 3-603 and 4-205). Of course instructions from or an agreement with its transferor does not relieve a collecting bank of its general obligation to exercise good faith and ordinary care. See Section 4-103(1). If in any particular case a bank has exercised good faith and ordinary care and is relieved of responsibility by reason of instructions of or an agreement with its transferor, the owner of the item may still have a remedy for loss against the transferor (another bank) if such transferor has given wrongful instructions.

The rules of the section are applied only to collecting banks. Payor banks always have the problem of making proper payment of an item; whether such payment is proper should be based upon all of the rules of Articles 3 and 4 and all of the facts of any particular case, and should not be dependent exclusively upon instructions from or an agreement with a person presenting the item.

Cross references.Sections 3-205, 3-206, 3-419, 3-603, 4-103(1) and 4-205.

Definitional cross references."Collecting bank". Section 4-105.

"Restrictive indorsement". Section 3-205.

ANNOTATION

Collection letter should not be considered in determining whether bank was payor bank. The status of a negotiable instrument is to be determined from its face - from the language used or authorized to be used thereon by its drawer or maker - and not from documents attached thereto by other parties. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 703.
What conduct by drawee of check, before receipt of stop-payment order, renders order ineffectual, 10 A.L.R.2d 428.
9 C.J.S. Banks and Banking § 223 et seq.

§ 55-4-204. Methods of sending and presenting; sending direct to payor bank.

(1) A collecting bank must send items by reasonably prompt method taking into consideration any relevant instructions, the nature of the item, the number of such items on hand, and the cost of collection involved and the method generally used by it or others to present such items.

(2) A collecting bank may send:

(a) any item direct to the payor bank;

(b) any item to any nonbank payor if authorized by its transferor; and

(c) any item other than documentary drafts to any nonbank payor, if authorized by federal reserve regulation or operating letter, clearinghouse rule or the like.

(3) Presentment may be made by a presenting bank at a place where the payor bank has requested that presentment be made.

History: 1953 Comp., § 50A-4-204, enacted by Laws 1961, ch. 96, § 4-204; 1967, ch. 186, § 13.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see Section 6, American Bankers Association Bank Collection Code.

Purposes.1. Subsection (1) prescribes the general standards applicable to proper sending or forwarding of items. Because of the many types of methods available and the desirability of preserving flexibility any attempt to prescribe limited or precise methods is avoided.

2. Subsection (2) (a) codifies the practice of direct mail, express, messenger or like

presentment to payor banks. The practice is now country-wide and is justified by the need for speed, the general responsibility of banks, Federal Deposit Insurance protection and other reasons.

3. Full approval of the practice of direct sending is limited to cases where a bank is a payor. Where non-bank drawees or payors may be of unknown responsibility, substantial risks may be attached to placing in their hands the instruments calling for payments from them. This is obviously so in the case of documentary drafts. However, in some cities practices have long existed under clearing house procedures to forward certain types of items to certain non-bank payors. Examples include insurance loss drafts drawn by field agents on home offices. For the purpose of leaving the door open to legitimate practices of this kind, Subsection (2) (c) affirmatively approves direct sending of any item other than documentary drafts to any non-bank payor, if authorized by federal reserve regulation or operating letter, clearing house rule or the like.

On the other hand Subsection (2) (b) approves sending any item direct to a non-bank payor if authorized by a collecting bank's transferor. This permits special instructions or agreements out of the norm and is consistent with the "chain of command" theory of Section 4-203. However, if a transferor other than the owner of the item, e. g., a prior collecting bank, authorizes a direct sending to a non-bank payor, such transferor assumes responsibility for the propriety or impropriety of such authorization.

4. Section 3-504 states how presentment is made and Subsection (2) of that section affirmatively approves three specific methods by which presentment may be made. The methods so specified are permissive and do not foreclose other possible methods. However, in view of the substantial increase in recent years of presentment at centralized bookkeeping centers and electronic processing centers maintained or used by payor banks, many of which are at locations other than the banks themselves, Subsection (3) specifically approves presentment by a presenting bank at any place requested by the payor bank. [This paragraph was added in 1962.]

Cross references.Sections 3-504, 4-501 and 4-502.

Definitional cross references."Collecting bank". Section 4-105.

"Documentary draft". Section 4-104.

"Item". Section 4-104.

"Payor bank". Section 4-105.

"Presenting bank". Section 4-105.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 710, 720.
9 C.J.S. Banks and Banking §§ 242 et seq., 247.

§ 55-4-205. Supplying missing indorsement; no notice from prior indorsement.

(1) A depositary bank which has taken an item for collection may supply any indorsement of the customer which is necessary to title unless the item contains the words "payee's indorsement required" or the like. In the absence of such a requirement a statement placed on the item by the depositary bank to the effect that the item was deposited by a customer or credited to his account is effective as the customer's indorsement.

(2) An intermediary bank, or payor bank which is not a depositary bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor.

History: 1953 Comp., § 50A-4-205, enacted by Laws 1961, ch. 96, § 4-205.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) is designed to speed up collections by eliminating any necessity to return to a non-bank depositor any items he may have failed to indorse.

2. For the purpose of permitting items to move rapidly through banking channels, intermediary banks and payor banks which are not also depositary banks are permitted to ignore restrictive indorsements of any person except the bank's immediate transferor. However, depositary banks may not so ignore restrictive indorsements. If an owner of an item indorses it "for deposit" or "for collection" he usually does so in the belief such indorsement will guard against further negotiation of the item to a holder in due course by a finder or a thief. This belief is reasonably justified if at least one bank in any chain of banks collecting the item has a responsibility to act consistently with the indorsement.

Cross references.Sections 3-205, 3-206, 3-419, 3-603 and 4-203.

Definitional cross references."Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Depositary bank". Section 4-105.

"Intermediary bank". Section 4-105.

"Item". Section 4-104.

"Payor bank". Section 4-105.

"Restrictive indorsement". Section 3-205.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 700.
Construction and application of U.C.C. § 4-205(1) allowing depositary bank to supply customer's indorsement on item for collection, 29 A.L.R.4th 631.
9 C.J.S. Banks and Banking § 235 et seq.

§ 55-4-206. Transfer between banks.

Any agreed method which identifies the transferor bank is sufficient for the item's further transfer to another bank.

History: 1953 Comp., § 50A-4-206, enacted by Laws 1961, ch. 96, § 4-206.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section is designed to permit the simplest possible form of transfer from one bank to another, once an item gets in the bank collection chain, provided only identity of the transferor bank is preserved. This is important for tracing purposes and if recourse is necessary. However, since the responsibilities of the various banks appear in the article it becomes unnecessary to have liability or responsibility depend on more formal indorsements. Simplicity in the form of transfer is conducive to speed. Where the transfer is between banks this section takes the place of the more formal requirements of Section 3-202.

Cross references.Sections 3-201 and 3-202.

Definitional cross references."Bank". Section 1-201.

"Item". Section 4-104.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 403, 700.
9 C.J.S. Banks and Banking § 235 et seq.

§ 55-4-207. Warranties of customer and collecting bank on transfer or presentment of items; time for claims.

(1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that:

(a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

(b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith:

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

(iii) to an acceptor of an item if the holder in due course took the item after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

(c) the item has not been materially altered, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith:

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee; or

(iii) to the acceptor of an item with respect to an alteration made prior to the acceptance if the holder in due course took the item after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or

(iv) to the acceptor of an item with respect to an alteration made after the acceptance.

(2) Each customer and collecting bank who transfers an item and receives a settlement or other consideration for it warrants to his transferee and to any subsequent collecting bank who takes the item in good faith that:

(a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

(b) all signatures are genuine or authorized; and

(c) the item has not been materially altered; and

(d) no defense of any party is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted item.

In addition each customer and collecting bank so transferring an item and receiving a settlement or other consideration engages that upon dishonor and any necessary notice of dishonor and protest he will take up the item.

(3) The warranties and the engagement to honor set forth in the two preceding subsections arise notwithstanding the absence of indorsement or words of guaranty or warranty in the transfer or presentment and a collecting bank remains liable for their breach despite remittance to its transferor. Damages for breach of such warranties or engagement to honor shall not exceed the consideration received by the customer or collecting bank responsible plus finance charges and expenses related to the item, if any.

(4) Unless a claim for breach of warranty under this section is made within a reasonable time after the person claiming learns of the breach, the person liable is discharged to the extent of any loss caused by the delay in making claim.

History: 1953 Comp., § 50A-4-207, enacted by Laws 1961, ch. 96, § 4-207.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see American Bankers Association Bank Collection Code, Section 4.

Purposes.1. Subject to certain exceptions peculiar to the bank collection process and except that they apply only to customers and collecting banks, the warranties and engagements to honor in this section are identical in substance with those provided in the article on commercial paper (Article 3). See Sections 3-414 and 3-417. For a more complete explanation of the purposes of these warranties and engagements see the comments to Sections 3-414 and 3-417.

2. In addition to imposing upon customers and collecting banks the warranties and engagements imposed by the original Sections 65 and 66 of the Uniform Negotiable Instruments Law and those of Sections 3-414 and 3-417 of Article 3, with some variations, this Section 4-207 is intended to give the effect presently obtained in bank collections by the words "prior indorsements guaranteed" in collection transfers and presentments between banks. The warranties and engagements arise automatically as a part of the bank collection process. Receipt of a settlement or other consideration by a customer or collecting bank is a requirement but any settlement is sufficient regardless of whether the settlement is concurrent with the transfer, as in the case of a cash item,

or delayed, as in the case of a non-cash straight collection item. Further, the warranties and engagements run with the item with the result that a collecting bank may sue a remote prior collecting bank or a remote customer and thus avoid multiplicity of suits. This section is also intended to make it clear that the so-called equitable defense of "payment over" does not apply to a collecting bank and that no statute of frauds provision will defeat recovery. Subsections (2) and (3) indicate that these results are intended notwithstanding the absence of indorsement or words of guarantee or warranty in a transfer or presentment. Consequently, if for purposes of simplification or the speeding up of the bank collection process, banks desire to cut down the length or size of indorsements (Section 4-206), they may do so and the standard warranties and engagements to honor still apply.

3. With respect to the exceptions to the warranties in favor of a holder in due course specified in Subparagraphs (b) and (c) of Subsection (1), collecting banks usually have holder in due course status (Sections 4-208 and 4-209). However, if in any case there is a holder in due course but a subsequent collecting bank does not have holder in due course status (e. g., in a straight non-cash collection where no settlement of any kind is made until the bank itself receives final settlement) the bank still has the benefit of the exceptions (if it acts in good faith) under the shelter provisions of Section 3-201. It is to be noted that these shelter provisions, by virtue of successive transfers, benefit not only the immediate transferee from a holder in due course but also subsequent transferees.

4. In this section as in Section 3-417, the (a), (b) and (c) warranties to transferees and collecting banks under Subsection (2) are in general similar to the (a), (b) and (c) warranties to payors under Subsection (1); but the warranties to payors are less inclusive because of exceptions reflecting the rule of Price v. Neal, 3 Burr. 1354 (1762), and related principles. See comment to Section 3-417. Thus collecting banks are given not only all the warranties given to payors by Subsection (1), without those exceptions, but also the (d) and (e) warranties of Subsection (2).

5. The last sentence of Subsection (3) provides that damages for breach of warranties or the engagement to honor shall not exceed the consideration received by the customer or collecting bank responsible "plus finance charges and expenses related to the item, if any." The "expenses" referred to in this phrase may be ordinary collecting expenses and in appropriate cases could also include such expenses as attorneys' fees. "Finance charges" are also referred to because in some cases interest or a finance charge is charged by the collecting bank for the time that the bank's advance on the item is outstanding prior to receipt of proceeds of collection. An example of this type of case would be where a bank undertakes a foreign collection in South America or Europe and makes an advance on the item at the time of receipt but may not receive proceeds of the foreign collection for three months or more.

Cross references.Sections 3-201, 3-414, 3-417, 3-418, 4-206, 4-208, 4-209 and 4-406.

Definitional cross references."Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Draft". Section 3-104.

"Genuine". Section 1-201.

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Insolvency proceedings". Section 1-201.

"Item". Section 4-104.

"Party". Section 1-201.

"Payor bank". Section 4-105.

"Person". Section 1-201.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Unauthorized signature". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 403, 710; 11 Am. Jur. 2d Bills and Notes §§ 646, 649.
Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank, 69 A.L.R.4th 778.
9 C.J.S. Banks and Banking §§ 254, 358.

§ 55-4-208. Security interest of collecting bank in items, accompanying documents and proceeds.

(1) A 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 amount [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 and whether or not there is a right of charge-back; or

(c) if it makes an advance on or against the item.

(2) When credit which has been given for several items received at one time or pursuant to 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 Article 9 except that:

(a) no security agreement is necessary to make the security interest enforceable (Subsection (1)(b) of Section 9-203 [55-9-203 NMSA 1978]); and

(b) no filing is required to perfect the security interest; and

(c) the security interest has priority over conflicting perfected security interests in the item, accompanying documents or proceeds.

History: 1953 Comp., § 50A-4-208, enacted by Laws 1961, ch. 96, § 4-208.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see American Bankers Association Bank Collection Code, Section 2.

Purposes.1. Subsection (1) states a rational rule for the interest of a bank in an item. The customer of the depositary bank is normally the owner of the item and the several collecting banks are his agents (Section 4-201). A collecting agent may properly make advances on the security of paper held by him for collection, and when he does acquire at common law a possessory lien for his advances. Subsection (1) applies an analogous principle to a bank in the collection chain which extends credit on items in the course of collection. The bank has a security interest to the extent stated in this section. To the extent of its security interest it is a holder for value (Sections 3-303 and 4-209) and a holder in due course if it satisfies the other requirements for that status (Section 3-302). Subsection (1) does not derogate from the banker's general common law lien or right of setoff against indebtedness owing in deposit accounts. See Section 1-103. Rather Subsection (1) specifically implements and extends the principle as a part of the bank collection process.

2. Subsection (2) spreads the security interest of the bank over all items in a single deposit or received under a single agreement and a single giving of credit. It also adopts the "first-in, first-out" rule.

3. Collection statistics establish that in excess of ninety-nine per cent of items handled for collection are in fact collected. The first sentence of Subsection (3) reflects the fact that in such normal case the bank's security interest is self-liquidating. The remainder of the subsection correlates the security interest with the provisions of Article 9, particularly for use in the cases of non-collection where the security interest may be important.

Cross references.Sections 3-302, 3-303, 4-201, 4-209, 9-203(1) (b) and 9-302.

Definitional cross references."Account". Section 4-104.

"Agreement". Section 1-201.

"Bank". Section 1-201.

"Item". Section 4-104.

"Security interest". Section 1-201.

"Settlement". Section 4-104.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 660, 699; 11 Am. Jur. 2d Bills and Notes § 339.
Lien of bank upon commercial paper delivered to it by debtor for collection, 22 A.L.R.2d 478.
9 C.J.S. Banks and Banking § 250.

§ 55-4-209. When bank gives value for purposes of holder in due course.

For purposes of determining its status as a holder in due course, the bank has given value to the extent that it has a security interest in an item provided that the bank otherwise complies with the requirements of Section 3-302 [55-3-302 NMSA 1978] on what constitutes a holder in due course.

History: 1953 Comp., § 50A-4-209, enacted by Laws 1961, ch. 96, § 4-209.

OFFICIAL COMMENT

Prior uniform statutory provision. Negotiable Instruments Law, Section 27.

Purpose.The section completes the thought of the previous section and makes clear that a security interest in an item is "value" for the purpose of determining the holder's status as a holder in due course. The provision is in accord with the prior law (N.I.L. Section 27) and with Article 3 (Section 3-303). The section does not prescribe a security interest under Section 4-208 as a test of "value" generally because the meaning of "value" under other articles is adequately defined in Section 1-201.

Cross references.Sections 1-201, 3-302, 3-303 and 4-208.

Definitional cross references."Bank". Section 1-201.

"Holder in due course". Section 3-302.

"Item". Section 4-104.

"Security interest". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 694; 11 Am. Jur. 2d Bills and Notes §§ 337, 339.
Crediting proceeds of negotiable paper to depositor's account, as constituting bank a holder in due course, 59 A.L.R.2d 1173.
9 C.J.S. Banks and Banking § 218 et seq.; 10 C.J.S. Bills and Notes § 316.

§ 55-4-210. Presentment by notice of item not payable by, through or at a bank; liability of secondary parties.

(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 3-505 [55-3-505 NMSA 1978] by the close of the bank's next banking day after it knows of the requirement.

(2) Where presentment is made by notice and neither honor nor request for compliance with a requirement under Section 3-505 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 secondary party by sending him notice of the facts.

History: 1953 Comp., § 50A-4-210, enacted by Laws 1961, ch. 96, § 4-210.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section codifies a practice extensively followed in presentation of trade acceptances and documentary and other drafts drawn on non-bank payors. It imposes a duty on the payor to respond to the notice of the item if the item is not to be considered dishonored. Notice of such a dishonor charges parties secondarily liable. Presentment under this section is good presentment under Article 3. See Section 3-504(5).

2. A drawee not receiving notice is not, of course, liable to the drawer for wrongful dishonor.

3. A bank so presenting an instrument must be sufficiently close to the drawee to be able to exhibit the instrument on the day it is requested to do so or the next business day at the latest.

Cross references.Sections 3-501 to 3-508, 4-501 and 4-502.

Definitional cross references."Acceptance". Section 3-410.

"Banking day". Section 4-104.

"Collecting bank". Section 4-105.

"Item". Section 4-104.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Secondary party". Section 3-102.

"Send". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 710.
9 C.J.S. Banks and Banking § 235 et seq.

§ 55-4-211. Media of remittance; provisional and final settlement in remittance cases.

(1) A collecting bank may take in settlement of an item:

(a) a check of the remitting bank or of another bank on any bank except the remitting bank; or

(b) a cashier's check or similar primary obligation of a remitting bank which is a member of or clears through a member of the same clearinghouse or group as the collecting bank; or

(c) appropriate authority to charge an account of the remitting bank or of another bank with the collecting bank; or

(d) if the item is drawn upon or payable by a person other than a bank, a cashier's check, certified check or other bank check or obligation.

(2) If before its midnight deadline the collecting bank properly dishonors a remittance check or authorization to charge on itself or presents or forwards for collection a remittance instrument of or on another bank which is of a kind approved by Subsection (1) or has not been authorized by it, the collecting bank is not liable to prior parties in the event of the dishonor of such check, instrument or authorization.

(3) A settlement for an item by means of a remittance instrument or authorization to charge is or becomes a final settlement as to both the person making and the person receiving the settlement:

(a) if the remittance instrument or authorization to charge is of a kind approved by Subsection (1) or has not been authorized by the person receiving the settlement and in either case the person receiving the settlement acts seasonably before its midnight deadline in presenting, forwarding for collection or paying the instrument or authorization - at the time the remittance instrument or authorization is finally paid by the payor by which it is payable;

(b) if the person receiving the settlement has authorized remittance by a nonbank check or obligation or by a cashier's check or similar primary obligation of or a check upon the payor or other remitting bank which is not of a kind approved by Subsection (1) (b) - at the time of the receipt of such remittance check or obligation; or

(c) if in a case not covered by Subparagraphs (a) or (b) the person receiving the settlement fails to seasonably present, forward for collection, pay or return a remittance instrument or authorization to it to charge before its midnight deadline - at such midnight deadline.

History: 1953 Comp., § 50A-4-211, enacted by Laws 1961, ch. 96, § 4-211.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see Sections 9 and 10, American Bankers Association Bank Collection Code.

Purposes.1. Subsection (1) states various types of remittance instruments and authorities to charge which may be received by a collecting bank in a settlement for an item, without the collecting bank being responsible if such form of remittance is not itself paid. The action of the collecting bank in receiving these provisional forms of remittance is approved and the risk that they are not paid is placed on the owner of the item, and not on the collecting bank. Justification for these results lies in the fact that with the tremendous volume of items collected it is simply not mechanically feasible to remit or pay in money or other forms of technical "legal tender". Since it is not feasible for banks to perform their collection functions except with the use of these provisional remittances, they should not be penalized for acting in the only way they can act.

2. The first approved form of provisional remittance having these results is a check of the remitting bank or of another bank on any bank except the remitting bank (Subsection (1) (a)). A check on the remitting bank itself is not approved because this would merely be substituting for the original item another item on the same payor.

3. A cashier's check or similar primary obligation of the remitting bank which is a member of or clears through a member of the same clearing house or group as the collecting bank is approved by Subsection (1) (b) because this is just as speedy and effective a means of settlement through a clearing house as any other type of instrument or a check on another bank. On the other hand such cashier's checks or primary obligations are not approved for use, at the owner's risk, outside a single clearing house or clearing area because when so used they do not constitute a means of final settlement but merely substitute one item on the remitting bank for another one on the same bank. To the remitting bank they may have benefit in maintaining "float" or having the use of money even though drawn against, but this is not looked upon as sound practice.

4. Subsection (1) (d) recognizes and approves the general and consistent practice of collecting banks to accept cashier's checks, certified checks or other bank checks or obligations as a proper means of remittance from non-bank payors, with the owner of the original item carrying the risk of non-payment of these bank instruments rather than the collecting bank, to the extent there is any risk. Here again this rule and practice is justified by the fact that payment in money for all practical purposes is no longer feasible and consequently is not used except in rare instances. Subsection (1) (d) recognizes the standard medium that is used.

5. This section does not purport to deal with all kinds of settlements for items. It does not purport to deal with settlements for "cash items" (described in comments to Section 4-212), settlements merely by debits and credits in accounts between banks (Section 4-213) or settlements through clearing houses. The section is limited to those situations where a collecting or payor bank or a non-bank payor receives an item and accounts for it by "remitting" or "sending back" something for the item, usually some form of a remittance instrument, order or authorization. Some specific rules are needed for remittance cases because of time required to process the remittance instrument.

Failure to mention in Subsection (1) entries in accounts between banks and clearing house settlements carries no implication of impropriety of these types of provisional or final settlement. Approval of these means of settlement is evidenced by the definition of "settle" in Section 4-104(j), provision for charge-back and refund in Section 4-212, and provisions regarding settlements becoming final (Section 4-213). Further, the specific listing in Subsection (1) of certain usual types of remittances does not imply that all other types of remittances are improper (Section 4-103(4)).

6. Subsection (2) provides that if a remittance is one of the kinds approved by Subsection (1) and the collecting bank receiving the item acts seasonably in handling it before the bank's midnight deadline, the bank is not liable to prior parties in the event of dishonor. The subsection also provides for an additional situation. If without any authorization whatsoever the payor or remitting bank or person remits with an improper remittance instrument, the collecting bank should not be penalized where it is without fault. Nevertheless, the owner of the item may not be served if the collecting bank rejects the improper instrument. In many cases the best course would be to collect the instrument as rapidly as possible. Subsection (2) provides that if this is done the collecting bank is not responsible in the event of dishonor.

7. Subsection (3) complements Subsections (1) and (2) by providing when a settlement by means of a remittance instrument or authorization to charge becomes final. Subparagraph (a) provides that in situations specified in Subsection (2) the settlement becomes final at the time the remittance instrument or authorization is finally paid by the payor by which it is payable. The standards determining this final payment are those prescribed in Section 4-213. Conversely, under Subparagraph (b) if the person receiving the settlement has authorized remittance by certain specified media not approved by Subsection (1) the settlement becomes final at the time of receipt of such check or obligation. In this event the person receiving the settlement assumes the risk that the remittance instrument is not itself paid. A prior course of dealing of receiving unapproved forms of remittances from the payor or remitting person in question would be the equivalent of an authorization and effective as such. Subparagraph (c) provides for most, if not all, remaining remittance situations. Here settlement becomes final at the midnight deadline of the person receiving the remittance.

Subsection (3) provides that the times of final settlement prescribed apply both to the person making and the person receiving the settlement. Further, by use of the term "person", these rules also apply to non-bank payors of items and non-bank customers for whom items are being collected, as well as to collecting and payor banks.

8. When settlement is by credit in an account with another bank Section 4-213 controls.

Cross reference.Section 4-213.

Definitional cross references."Account". Section 4-104.

"Bank". Section 1-201.

"Clearing house". Section 4-104.

"Collecting bank". Section 4-105.

"Item". Section 4-104.

"Midnight deadline". Section 4-104.

"Money". Section 1-201.

"Payor bank". Section 4-105.

"Person". Section 1-201.

"Remitting bank". Section 4-105.

"Settle". Section 4-104.

ANNOTATION

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 724.
9 C.J.S. Banks and Banking § 243 et seq.

§ 55-4-212. Right of charge-back or refund.

(1) If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a 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. 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 (Subsection (3) of Section 4-211 [55-4-211 NMSA 1978] and Subsections (2) and (3) of Section 4-213 [55-4-213 NMSA 1978]).

(2) Within the time and manner prescribed by this section and Section 4-301 [55-4-301 NMSA 1978], an intermediary or payor bank, as the case may be, may return an unpaid item directly to the depositary bank and may send for collection a draft on the depositary bank and obtain reimbursement. In such case, if the depositary bank has received

provisional settlement for the item, it must reimburse the bank drawing the draft and any provisional credits for the item between banks shall become and remain final.

(3) A depositary bank which is also the payor may charge-back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (Section 4-301 [55-4-301 NMSA 1978]).

(4) The right to charge-back is not affected by:

(a) prior use of the credit given for the item; or

(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 or any other party.

(6) If credit is given in dollars as the equivalent of the value of an item payable in a foreign currency the dollar amount of any charge-back or refund shall be calculated on the basis of the buying sight rate for the foreign currency prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.

History: 1953 Comp., § 50A-4-212, enacted by Laws 1961, ch. 96, § 4-212.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see Sections 2 and 11, American Bankers Association Bank Collection Code.

Purposes.1. Under current bank practice, in a major portion of cases banks make provisional settlement for items when they are first received and then await subsequent determination of whether the item will be finally paid. This is the principal characteristic of what are referred to in banking parlance as "cash items." Statistically, this practice of settling provisionally first and then awaiting final payment is justified because more than ninety-nine per cent of such cash items are finally paid, with the result that in this great preponderance of cases it becomes unnecessary for the banks making the provisional settlements to make any further entries. In due course the provisional settlements become final simply with the lapse of time. However, in those cases where the item being collected is not finally paid or where for various reasons the bank making the provisional settlement does not itself receive final payment, under the American Bankers Association Bank Collection Code, under federal reserve regulations and operating letters and under various types of agreements between banks and between customers and banks, provision is made for the reversal of the provisional settlements, charge-back of provisional credits and the right to obtain refund. Subsection (1) codifies

and simplifies the statement of these rights.

2. Various causes of a bank not receiving final payment, with the resulting right of charge-back or refund, are stated or suggested in Subsection (1). These include dishonor of the original item; dishonor of a remittance instrument given for it; reversal of a provisional credit for the item and suspension of payments by another bank. The causes stated are illustrative; the right of charge-back or refund is stated to exist whether the failure to receive final payment in ordinary course arises through one of them "or otherwise."

3. The right of charge-back or refund exists if a collecting bank has made a provisional settlement for an item with its customer but terminates if and when a settlement received by the bank for the item is or becomes final. If the bank fails to receive such a final settlement the right of charge-back or refund must be exercised promptly after the bank learns the facts. The right exists (if so promptly exercised) whether or not the bank is able to return the item.

4. Subsection (2) is an affirmative provision for so-called "direct returns." This is a new practice that is currently in the process of developing in a few sections of the country. Its purpose is to speed up the return of unpaid items by avoiding handling by one or more intermediate banks. The subsection is bracketed because the practice is not yet well established and some bankers and bank lawyers would prefer to let the practice develop by agreement. The contention is made that substantive rights between banks may be affected, e. g. available set-offs, but proponents contend advantages of direct returns outweigh possible detriments. However, if the subsection were omitted, the election to use direct returns would be on the depositary bank and it would probably be necessary for that bank to specifically authorize direct returns with each outgoing letter. This is a cumbersome way of meeting the problem. If the subsection is retained, the payor bank, unless it has been specifically directed otherwise, will have the right to make the decision whether it will return an unpaid item directly. Since the subsection is permissive and its inclusion tends toward greater flexibility, its retention is recommended.

5. The rule of Subsection (4) relating to charge-back (as distinguished from claim for refund) applies irrespective of the cause of the nonpayment, and of the person ultimately liable for nonpayment. Thus charge-back is permitted even where nonpayment results from the depositary bank's own negligence. Any other rule would result in litigation based upon a claim for wrongful dishonor of other checks of the customer, with potential damages far in excess of the amount of the item. Any other rule would require a bank to determine difficult questions of fact. The customer's protection is found in the general obligation of good faith (Sections 1-203 and 4-103). If bad faith is established the customer's recovery "includes other damages, if any, suffered by the party as a proximate consequence" (Section 4-103(5); see also Section 4-402).

6. It is clear that the charge-back does not relieve the bank from any liability for failure to exercise ordinary care in handling the item. The measure of damages for such failure is

stated in Section 4-103(5).

7. Subsection (6) states a rule fixing the time for determining the rate of exchange if there is a charge-back or refund of a credit given in dollars for an item payable in a foreign currency. Compare Section 3-107(2). Fixing such a rule is desirable to avoid disputes. If in any case the parties wish to fix a different time for determining the rate of exchange, they may do so by agreement.

Cross references.Sections 1-203, 3-107, 4-103, 4-211(3), 4-213(2) and (3) and 4-402.

Definitional cross references.''Account''. Section 4-104.

"Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Depositary bank". Section 4-105.

"Intermediary bank". Section 4-105.

"Item". Section 4-104.

"Midnight deadline". Section 4-104.

"Payor bank". Section 4-105.

"Send". Section 1-201.

"Settlement". Section 4-104.

"Suspension of payment". Section 4-104.

ANNOTATION

Compiler's notes. - New Mexico adopted the optional Subsection 2 of the uniform act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 404, 699; 11 Am. Jur. 2d Bills and Notes § 895.
9 C.J.S. Banks and Banking § 220 et seq.

§ 55-4-213. 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; or

(b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearinghouse rule or agreement; or

(c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or

(d) 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.

Upon a final payment under Subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

(2) 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 item by the payor bank.

(3) If a collecting bank receives a settlement for an item which is or becomes final (Subsection (3) of Section 4-211 [55-4-211 NMSA 1978], Subsection (2) of Section 4-213 [this section]) 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.

(4) Subject to any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in an account with its customer becomes available for withdrawal as of right:

(a) in any case where the bank has received a provisional settlement for the item - when such settlement becomes final and the bank has had a reasonable time to learn that the settlement is final;

(b) in any case where the bank is both a depositary bank and a payor bank and the item is finally paid - at the opening of the bank's second banking day following receipt of the item.

(5) A deposit of money in a bank is final when made but, subject to any right of the bank to apply the deposit to an obligation of the customer, the deposit becomes available for withdrawal as of right at the opening of the bank's next banking day following receipt of the deposit.

History: 1953 Comp., § 50A-4-213, enacted by Laws 1961, ch. 96, § 4-213.

OFFICIAL COMMENT

Prior uniform statutory provisions. None; but see Section 11, American Bankers Association Bank Collection Code.

Purposes.1. By the definition and use of the term "settle" (Section 4-104(j)) this article recognizes that various debits or credits, remittances, settlements or payments given for an item may be either provisional or final, that settlements sometimes are provisional and sometimes are final and sometimes are provisional for awhile but later become final. Subsection (1) of Section 4-213 defines when settlement for an item or other action with respect to it constitutes final payment.

Final payment of an item is important for a number of reasons. It is one of several factors determining the relative priorities between items and notices, stop-orders, legal process and setoffs (Section 4-303). It is the "end of the line" in the collection process and the "turn around" point commencing the return flow of proceeds. It is the point at which many provisional settlements become final. See Section 4-213(2). Final payment of an item by the payor bank fixes preferential rights under Section 4-214(1) and (2).

2. If an item being collected moves through several states, e.g., is deposited for collection in California, moves through two or three California banks to the federal reserve bank of San Francisco, to the federal reserve bank of Boston, to a payor bank in Maine, the collection process involves the eastward journey of the item from California to Maine and the westward journey of the proceeds from Maine to California. Subsection (1) adopts the basic policy that final payment occurs at some point in the processing of the item by the payor bank. This policy recognizes that final payment does not take place, in such hypothetical case, on the journey of the item eastward. It also adopts the view that neither does final payment occur on the journey westward because what in fact is journeying westward are

proceeds of the item. Because the true tests of final payment are the same in all cases and to avoid the confusion resulting from variable standards, the rule basing final payment exclusively on action of the payor bank is not affected by whether payment is made by a remittance draft or whether such draft is itself paid. Consequently, Subsection (1) rejects those cases which base time of payment of the item in remittance cases on whether the remittance draft was

3. In fixing the point of time within the payor bank when an item is finally paid, Subsection (1) recognizes and is framed on the basis that in a payor bank an item goes through a series of processes before its handling is completed. The item is received first from the clearing house or over the counter or through the mail. When received over the counter, the bank may receipt for it in some way by making a notation in the customer's passbook or by receipting a duplicate deposit slip. After the initial receipt the item moves to the sorting and proving departments. When sorted and proved it may be

photographed. Still later it moves to the bookkeeping department where it is examined for form and signature and compared against the ledger account of the customer to whom it is to be charged. If it is in good form and there are funds to cover it, it is posted to the drawer's account, either immediately or at a later time. If paid, it is so marked and filed with other items of the same customer. This process may take either a few hours or substantially all of the day of receipt and of the next banking day.

Within this period of processing by the payor bank Subsection (1) first recognizes two types of overt external acts constituting final payment. Traditionally and under various decisions payment in cash of an item by a payor bank has been considered final payment. Chambers v. Miller, 13 C.B.N.S. 125 (Eng.1862); Fidelity & Casualty Co. of New York v. Planenscheck, 200 Wis. 304, 309, 227 N.W. 387, 389, 71 A.L.R. 331 (1929); see Bellevue Bank of Allen Kimberly & Co. v. Security Nat. Bank of Sioux City, 168 Iowa 707, 712, 150 N.W. 1076, 1077 (1915); 1 Paton's Digest 1066. Subsection (1) (a) first recognizes and provides that payment of an item in cash by a payor bank is final payment.

4. Section 4-104(j) defines "settle" as meaning "to pay in cash, by clearing house settlement, in a charge or credit or by remittance, or otherwise as instructed. A settlement may be either provisional or final;" Subsection (1) (b) of Section 4-213 provides that an item is finally paid by a payor bank when the bank has "settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement." Subsection (1) (b) provides in effect that if the payor bank finally settles for an item this constitutes final payment of the item. The subsection operates if nothing has occurred and no situation exists making the settlement provisional. If at the time of settlement the payor bank reserves a right to revoke the settlement, the settlement is provisional. In the alternative, if under statute, clearing house rule or agreement, a right of revocation of the settlement exists the settlement is provisional. Conversely, if there is an absence of a reservation of the right to revoke and also an absence of a right to revoke under statute, clearing house rule or agreement, the settlement is final and such final settlement constitutes final payment of the item.

A primary example of a statutory right on the part of the payor bank to revoke a settlement is the right to revoke conferred by Section 4-301. The underlying theory and reason for deferred posting statutes (Section 4-301) is to require a settlement on the date of receipt of an item but to keep that settlement provisional with the right to revoke prior to the midnight deadline. In any case where Section 4-301 is applicable, any settlement by the payor bank is provisional solely by virtue of the statute, Subsection (1) (b) of Section 4-213 does not operate and such provisional settlement does not constitute final payment of the item.

A second important example of a right to revoke a settlement is that arising under clearing house rules. It is very common for clearing house rules to provide that items exchanged and settled for in a clearing, (e. g., before 10:00 a.m. on Monday) may be returned and the settlements revoked up to but not later than 2:00 p.m on the same day

(Monday) or under deferred posting at some hour on the next business day (e. g., 2:00 p.m. Tuesday). Under this type of rule the Monday morning settlement is provisional and being provisional does not constitute a final payment of the item.

An example of a reservation of a right to revoke a settlement is where the payor bank is also the depositary bank and has signed a receipt or duplicate deposit ticket or has made an entry in a passbook acknowledging receipt, for credit to the account of A, of a check drawn on it by B. If the receipt, deposit ticket, passbook or other agreement with A is to the effect that any credit so entered is provisional and may be revoked pending the time required by the payor bank to process the item to determine if it is in good form and there are funds to cover it, such reservation or agreement keeps the receipt or credit provisional and avoids it being either final settlement or final payment.

In other ways the payor bank may keep settlements provisional: by general or special agreement with the presenting party or bank; by simple reservation at the time the settlement is made or otherwise. Thus a payor bank (except in the case of statutory provisions) has control whether a settlement made by it is provisional or final, by participating in general agreements or clearing house rules or by special agreement or reservation. If it fails to keep a settlement provisional and if no applicable statute keeps the settlement provisional, its settlement is final and, unless the item had previously been paid by one of the other methods prescribed in Subsection (1), such final settlement constitutes final payment. In this manner payor banks may without difficulty avoid the effect of such cases as: Cohen v. First Nat. Bank of Nogales, 22 Ariz. 394, 400, 198 P. 122, 124, 15 A.L.R. 701 (1921); Briviesca v. Coronado, 19 Cal.2d 244, 120 P.2d 649 (1941); White Brokerage Co. v. Cooperman, 207 Minn. 239, 290 N.W. 790 (1940); Scotts Bluff County v. First Nat. Bank of Gering, 115 Neb. 273, 212 N.W. 617 (1927); Provident Savings Bank & Trust Co. v. Hildebrand, 49 Ohio App. 207, 196 N.E. 790, 791 (1934); Schaer v. First Nat. Bank of Brenham, 132 Tex. 499, 124 S.W.2d 108 (1939) (bill of exchange); Union State Bank of Lancaster v. Peoples State Bank of Lancaster, 192 Wis. 28, 33, 211 N.W. 931, 933 (1927); 1 Paton's Digest 1067.

5. If a payor bank has not previously paid an item in cash or finally settled for it, certain internal acts or procedures will produce final payment of the item. Exclusive of the external acts of payment in cash or final settlement, the key point at which the decision of the bank to pay or dishonor is made is when the bookkeeper for the drawer's account determines or verifies that the check is in good form and that there are sufficient funds in the drawer's account to cover it. Previous steps in the processing of an item are preliminary to this vital step and in no way indicate a decision to pay. However, a more tangible measuring point is desirable than a mere examination of the account of the person to be charged. The mechanical step that usually indicates that the examination has been completed and the decision to pay has been made is the posting of the item to the account to be charged. Therefore, Subsection (1) (c) adopts as the third measuring point the completion of the process of posting. The phrase "completed the process of posting" is used rather than simple "posting" because under current machine operations posting is a process and something more than simply making entries on the customer's ledger. Subsection (1) follows fairly closely the New York statute, 37 McKinney's

Consolidated Laws of New York, Negotiable Instruments, Art. 19-A, Sec. 350-b as amended by L. 1950, c. 153, sec. 1. However, Subsections (1) (a) and (b) furnish more precise rules for determining "final settlement" by the payor bank than does the New York statute in using the term "irrevocable credit," the definition of which is not helpful.

6. Subsection (1) (d) covers the situation where the payor bank makes a provisional settlement for an item, which settlement becomes final at a later time by reason of the failure of the payor bank to revoke it in the time and manner permitted by statute, clearing house rule or agreement. An example of this type of situation is the clearing house settlement referred to in Comment 4. In the illustration there given if the time limit for the return of items received in the Monday morning clearing is 2:00 p. m. on Tuesday and the provisional settlement has not been revoked at that time in a manner permitted by the clearing house rules, the provisional settlement made on Monday morning becomes final at 2:00 p. m. on Tuesday. Subsection (1) (d) provides specifically that in this situation the item is finally paid at 2:00 p. m. Tuesday. If on the other hand a payor bank receives an item in the mail on Monday and makes some provisional settlement for the item on Monday, it has until midnight on Tuesday to return the item or give notice and revoke any settlement under Section 4-301. In this situation Subsection (1) (d) of Section 4-213 provides that if the provisional settlement made on Monday is not revoked before midnight on Tuesday as permitted by Section 4-301, the item is finally paid at midnight on Tuesday even if the process of posting the item to the account of the drawer has not been completed at that time.

7. Subsection (1) provides that an item is finally paid by the payor bank when any one of the four events set forth in Subparagraphs (a), (b), (c) and (d) have occurred, whichever happens first, and then provides that upon a final payment under Subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item. It is not made accountable if it has paid the item in cash because such payment is itself a sufficient accounting. The term "accountable" is used as imposing a duty to account, which duty is met if and when a settlement for the item satisfactorily clears. The fact that determination of the time of final payment is based exclusively upon action of the payor bank is not detrimental to the interests of owners of items or collecting banks because of the general obligations of payors to honor or dishonor and the time limits for action imposed by Sections 4-301 and 4-302.

8. Subsection (2) states the country-wide usage that when the item is finally paid by the payor bank under Subsection (1) this final payment automatically without further action "firms up" other provisional settlements made for it. However, the subsection makes clear that this "firming up" occurs only where the settlement between the presenting and payor banks was made either through a clearing house or by debits and credits in accounts between them. It does not take place where the payor bank remits for the item with some form of remittance instrument. Further, the "firming up" continues only to the extent that provisional debits and credits are entered seriatim in accounts between banks which are successive to the presenting bank. The automatic "firming up" is broken at any time that any collecting bank remits for the item with a remittance draft, because final payment to the remittee then usually depends upon final payment of the

remittance draft.

9. Subsection (3) states the general rule that if a collecting bank receives settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the item. One means of accounting is to remit to its customer the amount it has received on the item. If previously it gave to its customer a provisional credit for the item in an account its receipt of final settlement for the item "firms up" this provisional credit and makes it final. When this credit given by it so becomes final, in the usual case its agency status terminates and it becomes a debtor to its customer for the amount of the item. See Section 4-201(1). If the accounting is by a remittance instrument or authorization to charge further time will usually be required to complete its accounting (Section 4-211).

10. Subsection (4) states when certain credits given by a bank to its customer become available for withdrawal as of right. Subsection (4) (a) deals with the situation where a bank has given a credit (usually provisional) for an item to its customer and in turn has received a provisional settlement for the item from an intermediary or payor bank to which it has forwarded the item. In this situation before the provisional credit entered by the collecting bank in the account of its customer becomes available for withdrawal as of right, it is not only necessary that the provisional settlement received by the bank for the item becomes final but also that the collecting bank has a reasonable time to learn that this is so. Hence, Subsection (4) (a) imposes both of these conditions. If the provisional settlement received is a provisional debit or credit in an account with the intermediary or payor bank or a remittance instrument on some bank other than the collecting bank itself, the collecting bank will usually learn that this debit or credit is final or that the remittance instrument has been paid merely by not learning the opposite within a reasonable time. How much time is "reasonable" for these purposes will of course depend on the distance the item has to travel and the number of banks through which it must pass (having in mind not only travel time by regular lines of transmission but also the successive midnight deadlines of the several banks) and other pertinent facts. Also, if the provisional settlement received is some form of a remittance instrument or authorization to charge, the "reasonable" time depends on the identity and location of the payor of the remittance instrument, the means for clearing such instrument and other pertinent facts.

11. Subsection (4) (b) deals with the situation of a bank which is both a depositary bank and a payor bank. The subsection recognizes that where A and B are both customers of a depositary-payor bank and A deposits B's check on the depositary-payor in A's account on Monday, time must be allowed to permit the check under the deferred posting rules of Section 4-301 to reach the bookkeeper for B's account at some time on Tuesday, and if there are insufficient funds in B's account to reverse or charge back the provisional credit in A's account. Consequently this provisional credit in A's account does not become available for withdrawal as of right until the opening of business on Wednesday. If it is determined on Tuesday that there are insufficient funds in B's account to pay the check the credit to A's account can be reversed on Tuesday. On the other hand if the item is in fact paid on Tuesday, the rule of Subsection (4) (b) is

desirable to avoid uncertainty and possible disputes between the bank and its customer as to exactly what hour within the day the credit is available.

12. Subsection (5) recognizes that even when A makes a deposit of cash in his account on Monday it takes some period of time to record that cash deposit and communicate it to A's bookkeeper (the bookkeeper handling A's account) so that A's bookkeeper has a record of it when she considers whether there are available funds to pay A's check. Where as indicated in Comment 5 A's bookkeeper is the particular employee in the bank to determine, in most cases and subject to supervisory control, whether the item may be paid, the effectiveness of a deposit of cash as a basis for paying a check must of necessity rest upon when the record of that deposit reaches such bookkeeper rather than when it passes through the teller's window. Consequently, although the bank is charged with responsibility for cash deposited from the moment it is received on Monday the cash is not effective as a basis for paying checks until the opening of business on Tuesday.

Cross references.Sections 3-418, 4-107, 4-201, 4-211, 4-212, 4-214, 4-301, 4-302 and 4-303.

Definitional cross references."Account". Section 4-104.

"Agreement". Section 1-201.

"Banking day". Section 4-104.

"Clearing house". Section 4-104.

"Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Depositary bank". Section 4-105.

"Item". Section 4-104.

"Money". Section 1-201.

"Notice". Section 1-201.

"Payor bank". Section 4-105.

"Presenting bank". Section 4-105.

"Settlement". Section 4-104.

ANNOTATION

Bank not liable for refusing withdrawals against drafts before settlement. - Defendant was not entitled as a matter of right to make withdrawals as against the uncollected drafts before settlement became final, and in view of the condition of the account with respect to unpaid credits at the time of the presentation of the draft, the bank incurred no liability in declining payment. Merchant v. Worley, 79 N.M. 771, 449 P.2d 787 (Ct. App. 1969).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 494, 699, 838, 841.
What constitutes final payment under UCC § 4-213, 23 A.L.R.4th 203.
Crediting proceeds of negotiable paper to depositor's account, as constituting bank a holder in due course, 59 A.L.R.2d 1173.

§ 55-4-214. Insolvency and preference.

(1) Any item in or coming into the possession of a payor or collecting bank which suspends payment and which item is not finally paid shall 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 (Subsection (3) of Section 4-211 [55-4-211 NMSA 1978], Subsections (1) (d), (2) and (3) of Section 4-213 [55-4-213 NMSA 1978]).

(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 such collecting bank.

History: 1953 Comp., § 50A-4-214, enacted by Laws 1961, ch. 96, § 4-214.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see Section 13, American Bankers Association Bank Collection Code.

Purposes.1. The underlying purpose of the provisions of this section is not to confer upon banks, holders of items or anyone else preferential positions in the event of bank failures over general depositors or any other creditors of the failed banks. The purpose is to fix as definitely as possible the cutoff point of time for the completion or cessation of the collection process in the case of items that happen to be in such process at the time a particular bank suspends payments. It must be remembered that in bank collections as a whole and in the handling of items by an individual bank, items go through a whole series of processes. It must also be remembered that at any particular point of time a particular bank (at least one of any size) is functioning as a depositary bank for some items, as an intermediary bank for others, as a presenting bank for still others and as a payor bank for still others, and that when it suspends payments it will have close to its normal load of items working through its various processes. For the convenience of receivers, owners of items, banks, and in fact substantially everyone concerned, it is recognized that at the particular moment of time that a bank suspends payment, a certain portion of the items being handled by it have progressed far enough in the bank collection process that it is preferable to permit them to continue the remaining distance, rather than to send them back and reverse the many entries that have been made or the steps that have been taken with respect to them. Therefore, having this background and these purposes in mind, the section states what items must be turned backward at the moment suspension intervenes and what items have progressed far enough that the collection process with respect to them continues, with the resulting necessary statement of rights of various parties flowing from this prescription of the cutoff time.

2. The rules stated are similar to those stated in the American Bankers Association Bank Collection Code, but with the abandonment of any theory of trust. Although for practical purposes Federal Deposit Insurance affects materially the result of bank failures on holders of items and banks, no attempt is made to vary the rules of the section by reason of such insurance.

3. It is recognized that in view of Jennings v. United States Fidelity & Guaranty Co., 294 U.S. 216, 55 S.Ct. 394, 79 L.Ed. 869, 99 A.L.R. 1248 (1935), amendment of the National Bank Act would be necessary to have this section apply to national banks. But there is no reason why it should not apply to others. See Section 1-108.

Cross references.Sections 1-108, 4-211(3) and 4-213.

Definitional cross references."Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Item". Section 4-104.

"Payor bank". Section 4-105.

"Presenting bank". Section 4-105.

"Settlement". Section 4-104.

"Suspends payment". Section 4-104.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 704, 748, 756. 9 C.J.S. Banks and Banking §§ 251 to 253, 487 et seq.

Part 3

COLLECTION OF ITEMS - PAYOR BANKS

§ 55-4-301. Deferred posting; recovery of payment by return of items; time of dishonor.

(1) Where an authorized settlement for a demand item (other than a documentary draft) received by a payor bank otherwise than for immediate payment over the counter has been made before midnight of the banking day of receipt the payor bank may revoke the settlement and recover any payment if before it has made final payment (Subsection (1) of Section 4-213 [55-4-213 NMSA 1978]) and before its midnight deadline it:

(a) returns the item; or

(b) sends written notice of dishonor or nonpayment if the item is held for protest or is otherwise unavailable for return.

(2) If a demand item is received by a payor bank for credit on its books, it may return such 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 the preceding subsection.

(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 in accordance with this section.

(4) An item is returned:

(a) as to an item received through a clearinghouse, when it is delivered to the presenting or last collecting bank or to the clearinghouse or is sent or delivered in accordance with its rules; or

(b) in all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to his instructions.

History: 1953 Comp., § 50A-4-301, enacted by Laws 1961, ch. 96, § 4-301.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see American Bankers Association Model Deferred Posting Statute.

Purposes.1. Deferred posting and delayed returns is that practice whereby a payor bank sorts and proves items received by it on the day they are received, e. g. Monday, but does not post the items to the customer's account or return "not good" items until the next day, e. g. Tuesday. The practice typifies "production line" methods currently used in bank collection and is based upon the necessity of an even flow of items through payor banks on a day by day basis in a manner which can be handled evenly by employee personnel without abnormal peak load periods, night work, and other practices objectionable to personnel. Since World War II statutes authorizing deferred posting and delayed returns have been passed in almost all of the forty-eight states. This section codifies the content of these statutes and approves the practice.

2. The time limits for action imposed by Subsection (1) are adopted by Subsection (2) for cases where the payor bank is also the depositary bank, but in this case the requirement of a settlement on the day of receipt is omitted.

3. Subsection (3) fixes a base point from which to measure the time within which notice of dishonor must be given. See Section 3-508.

4. Subsection (4) leaves banks free to agree upon the manner of returning items but establishes a precise time when an item is "returned." For definition of "sent" as used in Subsections (a) and (b) see Section 1-201(38).

5. Obviously the section assumes that the item has not been "finally paid" under Section 4-213(1). If it has been, this section has no operation.

Cross references.Sections 3-508, 4-213 and 4-302.

Definitional cross references."Banking day". Section 4-104.

"Clearing house". Section 4-104.

"Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Documentary draft". Section 4-104.

"Item". Section 4-104.

"Midnight deadline". Section 4-104.

"Notice of dishonor". Section 3-508.

"Payor bank". Section 4-105.

"Presenting bank". Section 4-105.

"Sent". Section 1-201(38).

"Settlement". Section 4-104.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 699, 838, 841; 11 Am. Jur. 2d Bills and Notes § 893.
Construction and effect of UCC §§ 4-301 and 4-302 making payor bank accountable for failure to act promptly on item presented for payment, 22 A.L.R.4th 10.
9 C.J.S. Banks and Banking § 245 et seq.

§ 55-4-302. Payor bank's responsibility for late return of item.

In the absence of a valid defense such as breach of a presentment warranty (Subsection (1) of Section 4-207 [55-4-207 NMSA 1978]), settlement effected or the like, if an item is presented on 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 where it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(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.

History: 1953 Comp., § 50A-4-302, enacted by Laws 1961, ch. 96, § 4-302.

OFFICIAL COMMENT

Prior uniform statutory provision. None; but see American Bankers Association Model Deferred Posting Statute.

Purposes.Under Section 4-301, time limits are prescribed within which a payor bank must take action if it receives an item payable by it. Section 4-302 states the rights of the customer if the payor bank fails to take the action required within the time limits prescribed.

Cross reference.Section 4-301.

Definitional cross references."Acceptance". Section 3-410.

"Banking day". Section 4-104.

"Customer". Section 4-104.

"Depositary bank". Section 4-105.

"Documentary draft". Section 4-104.

"Item". Section 4-104.

"Midnight deadline". Section 4-104.

"Notice of dishonor". Section 3-508.

"Payor bank". Section 4-105.

"Properly payable". Section 4-104.

"Settle". Section 4-104.

ANNOTATION

Liability created by this section is independent of negligence and is absolute or strict liability for the full amount of the items which a payor bank fails to return. Even where a draft is arguably ambiguous as to whether the bank is the drawee or someone else is, where it handles the item which it in fact is obligated to pay, it takes the risk of loss if it fails to comply with this section. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Award of interest justified. - Where a bank held drafts for an unreasonable period a petitioner is entitled to interest on its claim at the legal rate. Not to award interest where

there has been an unreasonable and unjustified delay would be an abuse of discretion. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 494, 568, 704.
Construction and effect of UCC §§ 4-301 and 4-302 making payor bank accountable for failure to act promptly on item presented for payment, 22 A.L.R.4th 10.
9 C.J.S. Banks and Banking §§ 245, 330 et seq.

§ 55-4-303. When items subject to notice, stop order, legal process or setoff; order in 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, whether or not effective under other rules of law 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, comes too late to so terminate, suspend or modify such right or duty 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 bank has done any of the following:

(a) accepted or certified the item;

(b) paid the item in cash;

(c) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearinghouse rule or agreement;

(d) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or

(e) become accountable for the amount of the item under Subsection (1) (d) of Section 4-213 [55-4-213 NMSA 1978] and Section 4-302 [55-4-302 NMSA 1978] dealing with the payor bank's responsibility for late return of items.

(2) Subject to the provisions of Subsection (1) items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank.

History: 1953 Comp., § 50A-4-303, enacted by Laws 1961, ch. 96, § 4-303.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The comments to Section 4-213 describe the process through which an item passes in the payor bank. Prior to this process or at any time while it is going on, the payor bank may receive knowledge or a legal notice affecting the item, such as knowledge or a notice that the drawer has filed a petition in bankruptcy or made an assignment for the benefit of creditors; may receive an order of the drawer stopping payment on the item; may have served on it an attachment of the account of the drawer or the bank itself may exercise a right of setoff against the drawer's account. Each of these events affects the account of the drawer and may eliminate or freeze all or part of whatever balance is available to pay the item. Subsection (1) states the rule for determining the relative priorities between these various legal events and the item.

2. The rule is that if any one of several things has been done to the item or if it has reached any one of several stages in its processing at the time 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, the knowledge, notice, stop order, legal process or setoff comes too late, the item has priority and a charge to the customer's account may be made and is effective. Certain of the tests determining the priority status of the item are the same as for final payment under Section 4-213(1), but additional tests apply in the context of the present section. The first event mentioned, namely, acceptance, means formal acceptance as that term is used and defined in Section 3-410. Certification is the type of certification defined in Section 3-411. Payment of the item in cash under Section 4-213(1) (a), final settlement for the item under Section 4-213(1) (b) and completion of the process of posting under Section 4-213(1) (c) all constitute final payment of the item and confer priority. After a cash payment, final settlement or the completion of the process of posting, any knowledge, notice, stop order, legal process or setoff comes too late and cannot interfere with either the payment of the item or a charge to the customer's account based upon such payment.

3. The sixth event conferring priority is stated by the language "or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item." This general "omnibus" language is necessary to pick up other possible types of action impossible to specify particularly but where the bank has examined the account to see if there are sufficient funds and has taken some action indicating an intention to pay. An example is what has sometimes been called "sight posting" where the bookkeeper examines the account and makes a decision to pay but postpones posting. The clause should be interpreted in the light of Nineteenth Ward Bank v. First Nat. Bank of South Weymouth, 184 Mass. 49, 67 N.E. 670 (1903). It is not intended to refer to various preliminary acts in no way close to a true decision of the bank to pay the item, such as receipt of the item over the counter for deposit, entry of a provisional credit in a passbook or the making of a provisional settlement for the item through the clearing house, by entries in accounts, remittance or otherwise. All actions of this type are provisional and none of them evidences the bank's decision to pay the item. In this section as in Section 4-213 reasoning such as appears in Cohen v. First Nat. Bank of Nogales, 22 Ariz. 394, 400, 198 P. 122, 124, 15 A.L.R. 701 (1921); Briviesca v.

Coronado, 19 Cal.2d 244, 120 P.2d 649 (1941); White Brokerage Co. v. Cooperman, 207 Minn. 239, 290 N.W. 790 (1940); Scotts Bluff County v. First Nat. Bank of Gering, 115 Neb. 273, 212 N.W. 617, 618 (1927); Provident Savings Bank & Trust Co. v. Hildebrand, 49 Ohio App. 207, 196 N.E. 790, 791 (1934); Schaer v. First Nat. Bank of Brenham, 132 Tex. 499, 124 S.W.2d 108 (1939) (bill of exchange); Union State Bank of Lancaster v. People's State Bank of Lancaster, 192 Wis. 28, 33, 211 N.W. 931, 933 (1927) and 1 Paton's Digest 1067, is rejected.

4. The seventh and last event conferring priority for an item and a charge to the customer's account based upon the item is stated by the language "become accountable for the amount of the item under Subsection (1) (d) of Section 4-213 and Section 4-302 dealing with the payor bank's responsibility for late return of items." Under Section 4-213(1) (d) if a payor bank makes a provisional settlement for an item and fails to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement, such combination of events constitutes final payment of the item. Under Section 4-302 a payor bank may also become accountable for the amount of an item in certain other situations even though there has been no provisional settlement for the item or such action as constitutes final payment under Section 4-213(1). Expiration of the deadlines under Sections 4-213(1) (d) or 4-302 with resulting accountability by the payor bank for the amount of the item, establish priority of the item over notices, stop orders, legal process or setoff.

5. In the case of knowledge, notice, stop orders and legal process the effective time for determining whether they were received too late to affect the payment of an item and a charge to the customer's account by reason of such payment, is receipt plus a reasonable time for the bank to act on any of these communications. Usually a relatively short time is required to communicate to the bookkeeping department advice of one of these events but certainly some time is necessary. Compare Sections 1-201(27) and 4-403. In the case of setoff the effective time is when the setoff is actually made.

6. As between one item and another no priority rule is stated, other than the convenience of the bank. This rule is justified because of the impossibility of stating a rule that would be fair in all cases, having in mind the almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer's account; the possible methods of receipt; and other difficulties. Further, where the drawer has drawn all the checks, he should have funds available to meet all of them and has no basis for urging one should be paid before another; and the holders have no direct right against the payor bank in any event, unless of course, the bank has accepted, certified or finally paid a particular item, or has become liable for it under Section 4-302. Under Subsection (2) the bank obviously has the right to pay items for which it is itself liable ahead of those for which it is not.

Cross references.Sections 3-410, 3-411, 4-213(1), 4-301 and 4-302.

Definitional cross references."Accepted". Section 3-410.

"Account". Section 4-104.

"Agreement". Section 1-201.

"Certified". Section 3-411.

"Clearing house". Section 4-104.

"Customer". Section 4-104.

"Item". Section 4-104.

"Notice". Section 1-201.

"Payor bank". Section 4-105.

"Settle". Section 4-104.

ANNOTATION

Where bank controls order of payment of items. - Where a draft and two checks issued to a bank were presented against defendant's account, and the account contained insufficient funds to cover the three items, the bank, in good faith, can charge items against the account in any order convenient to it. Merchant v. Worley, 79 N.M. 971, 449 P.2d 787 (Ct. App. 1969).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 494, 542, 641.
Stipulation relieving bank from, or limiting its liability for disregard of, stop payment order, 1 A.L.R.2d 1155.
What conduct of drawee of check, before receipt of stop payment order, renders order ineffectual, 10 A.L.R.2d 428.
Bank's liability for payment of check drawn by one depositor after stop payment order by joint depositor, 55 A.L.R.2d 975.
Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order, 97 A.L.R.3d 714.
Special bank deposits as subject of attachment or garnishment to satisfy depositor's general obligations, 8 A.L.R.4th 998.
9 C.J.S. Banks and Banking § 344 et seq.

Part 4

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER

§ 55-4-401. When bank may charge customer's account.

(1) As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft.

(2) A bank which in good faith makes payment to a holder may charge the indicated account of its customer according to:

(a) the original tenor of his altered item; or

(b) the tenor of his completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

History: 1953 Comp., § 50A-4-401, enacted by Laws 1961, ch. 96, § 4-401.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. It is fundamental that upon proper payment of a draft the drawee may charge the account of the drawer. This is true even though the draft is an overdraft since the draft itself authorizes the payment for the drawer's account and carries an implied promise to reimburse the drawee.

2. Subsection (2) parallels the provision which protects a holder in due course against discharge by reason of alteration and permits him to enforce the instrument according to its original tenor. Section 3-407(3). It adopts the rule of cases extending the same protection to a drawee who pays in good faith. The subsection also follows the policy of Sections 3-115 and 3-407(3) by protecting the drawee who pays a completed instrument in good faith according to the instrument as completed.

Cross references.Sections 3-115 and 3-407.

Definitional cross references."Account". Section 4-104.

"Bank". Section 1-201.

"Customer". Section 4-104.

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Item". Section 4-104.

"Properly payable". Section 4-104.

ANNOTATION

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 494.
Effect on bank depositor's rights and those of bank of printed rules in passbook not expressly accepted, 60 A.L.R.2d 708.
Bank's liability for paying postdated check, 76 A.L.R.2d 1301.
Bank's liability for payment or withdrawal on less than required number of signatures, 7 A.L.R.4th 655.
Recovery by bank of money paid out to customer by mistake, 10 A.L.R.4th 524.
Nondrawing cosigner's liability for joint checking account overdraft, 48 A.L.R.4th 1136.
9 C.J.S. Banks and Banking § 352 et seq.

§ 55-4-402. Bank's liability to customer for wrongful dishonor.

A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages 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 to be determined in each case.

History: 1953 Comp., § 50A-4-402, enacted by Laws 1961, ch. 96, § 4-402.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is new to the uniform laws, although similar statutory provisions are in existence in twenty-three jurisdictions.

2. The liability of the drawee for dishonor has sometimes been stated as one for breach of contract, sometimes as for negligence or other breach of a tort duty and sometimes as for defamation. This section does not attempt to specify a theory. "Wrongful

dishonor" excludes any permitted or justified dishonor, as where the drawer has no credit extended by the drawee, or where the draft lacks a necessary indorsement or is not properly presented.

3. This section rejects decisions which have held that where the dishonored item has been drawn by a merchant, trader or fiduciary he is defamed in his business, trade or profession by a reflection on his credit and hence that substantial damages may be awarded on the basis of defamation "per se" without proof that damage has occurred. The merchant, trader and fiduciary are placed on the same footing as any other drawer and in all cases of dishonor by mistake damages recoverable are limited to those actually proved.

4. Wrongful dishonor is different from "failure to exercise ordinary care in handling an item," and the measure of damages is that stated in this section, not that stated in Section 4-103(5).

5. The fourth sentence of the section rejects decisions holding that as a matter of law the dishonor of a check is not the "proximate cause" of the arrest and prosecution of the customer, and leaves to determination in each case as a question of fact whether the dishonor is or may be the "proximate cause."

Definitional cross references."Bank". Section 1-201.

"Customer". Section 4-104.

"Item". Section 4-104.

ANNOTATION

I. General Consideration.
II. Customer.
III. Dishonor.
IV. Damages.

I. General Consideration.

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

For comment on Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966), see 8 Nat. Resources J. 169 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 567, 575, 576.
Necessity of pleading that maker or drawer was given notice of dishonor of check, 6 A.L.R.2d 985.
Liability for negligently causing arrest or prosecution of another, 99 A.L.R.3d 1113.
Liability of check printer for errors in identification or routing codes printed on check, 18 A.L.R.4th 923.
9 C.J.S. Banks and Banking § 359.

II. Customer.

Partnership deemed customer through contract with bank. - The relationship between a bank and its depositor is a contractual relationship of debtor and creditor and a partnership can enter into the contractual relationship of debtor and creditor, as a customer of the bank, in accordance with the express provisions of the code. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

But not individual partners. - Although tortious conduct may be tortious as to two or more persons, and these persons may be a partnership and one or more of the individual partners, where the relationship, in connection with which the wrongful conduct of the bank arose, was the relationship between the bank and the partnership, the partnership was the customer and any damages arising from the dishonor belonged to the partnership and not to the partners individually. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

Therefore action on injury to partner properly dismissed. - Claim for loss of income in the amount allegedly sustained by the partnership as a result of the illness and disability of a partner by reason of his ulcer was properly dismissed even if the court were to assume that a tortious act had been committed by defendants, because the right to recover for the injuries would be in the partner alone, not in the partnership. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

III. Dishonor.

"Wrongful dishonor" means a dishonor done in a wrong manner, unjustly, unfair, in a manner contrary to justice. Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (Ct. App.), rev'd on other grounds, 85 N.M. 511, 514 P.2d 30 (1973).

"Mistaken dishonor" means a dishonor done erroneously, unintentionally, a state of mind that is not in accord with the facts. Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (Ct. App.), rev'd on other grounds, 85 N.M. 511, 514 P.2d 30 (1973).

IV. Damages.

Damages recoverable by customer. - The provisions of this section limit the damages of a customer, whose checks are wrongfully dishonored, to those proximately caused by the wrongful dishonor, and such includes any consequential damages so proximately caused. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

"Consequential damage" is defined as such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from the consequences or results of such act and it includes injuries to credit as a result of wrongful dishonor. Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (Ct. App.), rev'd on other grounds, 85 N.M. 511, 514 P.2d 30 (1973).

And damages recoverable for injury to credit compensatory. - Damages recoverable for injuries to credit as a result of a wrongful dishonor are more than mere nominal damages and are referred to as compensatory, general, substantial, moderate or temperate, damages as would be fair and reasonable compensation for the injury which the depositor must have sustained, but not harsh or inordinate damages. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

If dishonor occurs through mistake, damages are limited to actual damages proved. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

However willful dishonor permits punitive damages. - This section does not deal with intentional or willful or malicious dishonor; however, intentional, willful or malicious dishonor permits an award of punitive damages. Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (Ct. App.), rev'd on other grounds, 85 N.M. 511, 514 P.2d 30 (1973).

§ 55-4-403. Customer's right to stop payment; burden of proof of loss.

(1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in Section 4-303 [55-4-303 NMSA 1978].

(2) An oral order is binding upon the bank only for fourteen calendar days unless confirmed in writing within that period. A written order is effective for only six months unless renewed in writing.

(3) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer.

History: 1953 Comp., § 50A-4-403, enacted by Laws 1961, ch. 96, § 4-403.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is new. It is intended to replace separate statutes in twenty-nine states which regulate stop-payment orders.

2. The position taken by this section is that stopping payment is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense. The inevitable occasional losses through failure to stop should be borne by the banks as a cost of the business of banking.

3. Subsection (1) follows the decisions holding that a payee or indorsee has no right to stop payment. This is consistent with the provision governing payment or satisfaction. See Section 3-603. The sole exception to this rule is found in Section 4-405 on payment after notice of death, by which any person claiming an interest in the account can stop payment.

4. Payment is commonly stopped only on checks; but the right to stop payment is not limited to checks, and extends to any item payable by any bank. Where the maker of a note payable at a bank is in a position analogous to that of a drawer (Section 3-121) he may stop payment of the note. By analogy the rule extends to drawees other than banks.

5. There is no right to stop payment after certification of a check or other acceptance of a draft, and this is true no matter who procures the certification. See Sections 3-411 and 4-303. The acceptance is the drawee's own engagement to pay, and he is not required to impair his credit by refusing payment for the convenience of the drawer.

6. Normally a direction to stop payment is first given by telephone. Notwithstanding statutes which require a written order, banks customarily accept such directions, and have been held to waive the writing. Subsection (2) is intended to protect both parties by making the oral direction effective for only a short time during which the drawer must confirm it in writing, and by eliminating thereafter any claim of waiver by acceptance of the oral direction.

7. The existing statutes all specify a time limit after which any direction to stop payment becomes ineffective unless it is renewed in writing; and the majority of them have specified six months. The purpose of the provision is, of course, to facilitate stopping payment by clearing the records of the drawee of accumulated unrevoked stop orders, as where the drawer has found a lost instrument or has settled his controversy with the payee, but has failed to notify the drawee. The last sentence of Subsection (2), together with the second clause in Section 4-404, rejects the reasoning of such cases as Goldberg v. Manufacturers Trust Company, 199 Misc. 167, 102 N.Y.S.2d 144 (1951).

8. A payment in violation of an effective direction to stop payment is an improper

payment, even though it is made by mistake or inadvertence. Any agreement to the contrary is invalid under Section 4-103(1) if in paying the item over the stop payment order the bank has failed to exercise ordinary care. The drawee is, however, entitled to subrogation to prevent unjust enrichment (Section 4-407); retains common law defenses, e. g., that by conduct in recognizing the payment the customer has ratified the bank's action in paying over a stop payment order (Section 1-103) and retains common-law rights, e. g., to recover money paid under a mistake (Section 1-103) in cases where the payment is not made final by Section 3-418. It has sometimes been said that payment cannot be stopped against a holder in due course, but the statement is inaccurate. The payment can be stopped but the drawer remains liable on the instrument to the holder in due course (Sections 3-305 and 3-413) and the drawee, if he pays, becomes subrogated to the rights of the holder in due course against the drawer (Section 4-407). Any defenses available against a holder in due course remain available to the drawer, but other defenses are cut off to the same extent as if the holder himself were bringing the action.

Cross references.Point 3: Sections 3-603(1) and 4-405.

Point 4: Section 3-121.

Point 5: Sections 3-411 and 4-303.

Point 8: Sections 3-305, 3-413, 3-418, 4-103 and 4-407.

Definitional cross references."Account". Section 4-104.

"Bank". Section 1-201.

"Burden of establishing". Section 1-201.

"Customer". Section 4-104.

"Item". Section 4-104.

"Send". Section 1-201.

ANNOTATION

Bank making erroneous payment over stop order can recover from drawer or payee: if the drawer has no defense to payment of the check, the bank recovers by charging the drawer's account; if the drawer has a defense, then the bank recovers as a subrogee to the drawer's right against the payee. Swiss Credit Bank v. Balink, 614 F.2d 1269 (10th Cir. 1980).

Bank should bear cost of litigation stemming from negligent cashing of check. Ward v. First Nat'l Bank, 94 N.M. 701, 616 P.2d 414 (1980).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 641, 645, 653.
Stipulation relieving bank from or limiting its liability for disregard of stop payment order, 1 A.L.R.2d 1155.
What conduct by drawee of check before receipt of stop payment order renders order ineffectual, 10 A.L.R.2d 428.
Liability of bank for payment of check drawn by one depositor after stop payment order by joint depositor, 55 A.L.R.2d 975.
Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order, 97 A.L.R.3d 714.
Recovery by bank of money paid out to customer by mistake, 10 A.L.R.4th 524.
Banks and banking: construction and effect of U.C.C. § 4-403(2) regulating oral or written nature of stop-payment order, 29 A.L.R.4th 228.
Sufficiency of description of check in stop-payment order under UCC § 4-403, 35 A.L.R.4th 985.
9 C.J.S. Banks and Banking § 344.

§ 55-4-404. Bank not obligated 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.

History: 1953 Comp., § 50A-4-404, enacted by Laws 1961, ch. 96, § 4-404.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section incorporates a type of statute adopted in twenty-six jurisdictions. The time limit is set at six months because banking and commercial practice regards a check outstanding for longer than that period as stale, and a bank will normally not pay such a check without consulting the depositor. It is therefore not required to do so, but is given the option to pay because it may be in a position to know, as in the case of dividend checks, that the drawer wants payment made.

Certified checks are excluded from the section because they are the primary obligation of the certifying bank (Sections 3-411 and 3-413), which obligation runs direct to the holder of the check. The customer's account was charged when the check was certified.

Cross references.Sections 3-411 and 3-413.

Definitional cross references."Account". Section 4-104.

"Bank". Section 1-201.

"Check". Section 3-104.

"Customer". Section 4-104.

"Good faith". Section 1-201.

"Present". Section 3-504.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 552.
Bank's liability for paying postdated checks, 76 A.L.R.2d 1301.
9 C.J.S. Banks and Banking § 342 et seq.

§ 55-4-405. 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 such 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 prior to that date unless ordered to stop payment by a person claiming an interest in the account.

History: 1953 Comp., § 50A-4-405, enacted by Laws 1961, ch. 96, § 4-405.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is new, although similar statutory provisions are in existence in seven states.

2. Subsection (1) follows existing decisions which hold that a drawee (payor) bank is not liable for the payment of a check before it has notice of the death or incompetence of the drawer. The justice and necessity of the rule are obvious. A check is an order to pay which the bank must obey under penalty of possible liability for dishonor. Further, with

the tremendous volume of items handled any rule which required banks to verify the continued life and competency of drawers would be completely unworkable.

One or both of these same reasons apply to other phases of the bank collection and payment process and the rule is made wide enough to apply to these other phases. It applies to all kinds of "items"; to "customers" who own items as well as "customers" who draw or make them; to the function of collecting items as well as the function of accepting or paying them; to the carrying out of instructions to account for proceeds even though these may involve transfers to third parties; to depositary and intermediary banks as well as payor banks and to incompetency existing at the time of the issuance of an item or the commencement of the collection or payment process as well as to incompetency occurring thereafter. Further, the requirement of actual knowledge makes inapplicable the rule of some cases that an adjudication of incompetency is constructive notice to all the world because obviously it is as impossible for banks to keep posted on such adjudications (in the absence of actual knowledge) as it is to keep posted as to death of immediate or remote customers.

3. Subsection (2) provides a limited period after death during which a bank may continue to pay checks (as distinguished from other items) even though it has notice. The purpose of the provision, as of the existing statutes, is to permit holders of checks drawn and issued shortly before death to cash them without the necessity of filing a claim in probate. The justification is that such checks normally are given in immediate payment of an obligation, that there is almost never any reason why they should not be paid, and that filing in probate is a useless formality, burdensome to the holder, the executor, the court and the bank.

This section does not prevent an executor or administrator from recovering the payment from the holder of the check. It is not intended to affect the validity of any gift causa mortis or other transfer in contemplation of death, but merely to relieve the bank of liability for the payment.

4. Any surviving relative, creditor or other person who claims an interest in the account may give a direction to the bank not to pay checks, or not to pay a particular check. Such notice has the same effect as a direction to stop payment. The bank has no responsibility to determine the validity of the claim or even whether it is "colorable." But obviously anyone who has an interest in the estate, including the person named as executor in a will, even if the will has not yet been admitted to probate, is entitled to claim an interest in the account.

Definitional cross references."Accept". Section 3-410.

"Bank". Section 1-201.

"Certify". Section 3-411.

"Check". Section 3-104.

"Customer". Section 4-104.

"Depositary bank". Section 4-105.

"Item". Section 4-104.

"Payor bank". Section 4-105.

ANNOTATION

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of the Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 559, 648.
9 C.J.S. Banks and Banking §§ 217, 344.

§ 55-4-406. Customer's duty to discover and report unauthorized signature or alteration.

(1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by Subsection (1) the customer is precluded from asserting against the bank:

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

(b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under Subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

(4) 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 and items are made available to the customer (Subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

History: 1953 Comp., § 50A-4-406, enacted by Laws 1961, ch. 96, § 4-406.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is new to uniform laws. It is to replace statutes in forty jurisdictions dealing with the general subject of a depositor's duty to discover and report forgeries and alterations. In these statutes there is substantial variation in rules prescribed as to the following matters: application of the statute to unauthorized signatures, raised checks or altered checks; inclusion of special provisions with respect to fictitious payees; periods of time prescribed for termination of right of customer to assert claims against bank; time when limitation period begins to run and restriction of rights of customer stated in terms of liability for loss, preclusion of rights or limitations on time in which suits may be brought.

2. Subsection (1) states the general duty of a customer to exercise reasonable care and promptness to examine his bank statements and items to discover his unauthorized signature or any alteration and to promptly notify the bank if he discovers an unauthorized signature or alteration. This duty becomes operative when the bank does any one of three things with respect to the statement of account and supporting items paid in good faith. The first action is the sending of the statement and items to the customer. The sending may be either by mailing or any other action within the definition of "send" (Section 1-201). The second action is the holding of such statement and items available for the customer pursuant to a request for instructions of the customer. The third action is stated as "or otherwise in a reasonable manner makes the statement and items available to the customer." Such wider residual language is desirable to cover unusual situations. An example might be where the bank knows a customer has left a former address but does not know any new address to which to send the statement or item or to obtain instructions from the customer. The third residual type of action, however, must be "reasonable" and any court has the power to determine that a particular action or practice of a bank, other than sending statements and items or holding them pursuant to instructions, is not reasonable.

3. Subsection (2) states the effect of a failure of a customer to comply with Subsection (1). The first effect stated in Subparagraph (a) is that he is precluded from asserting against the bank his unauthorized signature and alteration if the bank establishes that it suffered a loss by reason of the customer's failure. The bank has the burden of establishing that it suffered some loss.

Under Subparagraph (b) if, after the first item and statement becomes available plus a reasonable period not exceeding fourteen calendar days, the bank pays in good faith any other item on which there is an unauthorized signature or alteration by the same wrongdoer, which payment is prior to receipt by the bank of notification of such unauthorized signature or alteration on the first item, the customer is precluded from asserting the additional unauthorized signature or alteration. This rule follows substantial case law that payment of an additional item or items bearing an unauthorized signature or alteration by the same wrongdoer is a loss suffered by the bank traceable to the customer's failure to exercise reasonable care in examining his statement and notifying the bank of objections to it. One of the most serious consequences of failure of the customer to comply with the requirements of Subsection (1) is the opportunity presented to the wrongdoer to repeat his misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine his statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items. Hence, the rule of Subparagraph (b) is prescribed and to avoid dispute a specific time limit for action by the customer is designated, namely fourteen calendar days.

4. The two effects on the customer of his failure to comply with Subsection (1) (Subparagraphs (a) and (b) of Subsection (2)) are stated in terms of preclusion from asserting a claim against the bank. However, these two effects occur only if the customer has failed to exercise reasonable care and promptness in examining his statement and items and notifying the bank and as to this question of fact the burden is upon the bank to establish such failure. Further, even if the bank succeeds in establishing that the customer has failed to exercise ordinary care, if in turn the customer succeeds in establishing that the bank failed to exercise ordinary care in paying the item(s) the preclusion rule does not apply. This distribution of the burden of establishing between the customer and the bank provides reasonable equality of treatment and requires each person asserting the negligence to establish such negligence rather than requiring either person to establish that his entire course of conduct constituted ordinary care.

5. Whether the preclusion rule of Subsection (2) operates or does not operate depends upon determinations as to ordinary care of the customer and possibly of the bank. However, Subsection (4) places an absolute time limit on the right of a customer to make claim for payment of altered or forged paper without regard to care or lack of care of either the customer or the bank. In the case of alteration or the unauthorized signature of the customer himself the absolute time limit is one year. In the case of unauthorized indorsements it is three years. This recognizes that there is little excuse

for a customer not detecting an alteration of his own check or a forgery of his own signature. However, he does not know the signatures of indorsers and may be delayed in learning that indorsements are forged. The three year absolute time limit on the discovery of forged indorsements should be ample, because in the great preponderance of cases the customer will learn of the forged indorsements within this time and if in any exceptional case he does not, the balance in favor of a mechanical termination of the liability of the bank outweighs what few residuary risks the customer may still have. In thirteen of the existing statutes there are limitations on the liability of a bank for payment of items bearing forged indorsements which limitation periods range from thirty days to two years. In the remaining twenty-seven no provision is made for forged indorsements.

6. Nothing in this section is intended to affect any decision holding that a customer who has notice of something wrong with an indorsement must exercise reasonable care to investigate and to notify the bank. It should be noted that under the rules relating to impostors and signatures in the name of the payee (Section 3-405) certain forged indorsements on which the bank has paid the item in good faith may be treated as effective notwithstanding such discovery and notice. If the alteration or forgery results from the drawer's negligence the drawee who pays in good faith is also protected. Section 3-406.

7. The forty existing statutes on the subject as well as Section 4-406 evidence a public policy in favor of imposing on customers the duty of prompt examination of their bank statements and the notification of banks of forgeries and alterations and in favor of reasonable time limitations on the responsibility of banks for payment of forged or altered items. In two New York cases, however, it has been held that a payor bank may waive defenses of the kind prescribed by the section and ignore the public policy indicated by these defenses and recover the full amount of a forged or altered item from a collecting bank. Fallick v. Amalgamated Bank of New York, 232 App. Div. 127, 249 N.Y.S. 238 (1st Dep't 1931); National Surety Corp. v. Federal Reserve Bank of New York, 188 Misc. 207, 70 N.Y.S.2d 636 (1946), affirmed without opinion 188 Misc. 213, 70 N.Y.S.2d 642 (1946). Subsection (5) is intended to reject the holding of these and like cases. Although the principle of Subsection (5) might well be applied to other types of claims of customers against banks and defenses to these claims, the rule of the subsection is limited to defenses of a payor bank under this section. No present need is known to give the rule wider effect.

Cross references.Sections 3-404, 3-405, 3-406, 3-407, 3-417 and 4-207.

Definitional cross references."Alteration". Section 3-407.

"Bank". Section 1-201.

"Collecting bank". Section 4-105.

"Customer". Section 4-104.

"Good faith". Section 1-201.

"Indorsement". Section 3-204.

"Item". Section 4-104.

"Payor bank". Section 4-105.

"Send". Section 1-201.

"Unauthorized signature". Section 1-201.

ANNOTATION

Bank not insulated from own negligence. - It is certainly not the intention of this section to allow a bank to be insulated from the effect of its own negligence. Rutherford v. Darwin, 95 N.M. 340, 622 P.2d 245 (Ct. App. 1980).

Law reviews. - For comment on Cooper v. Albuquerque Nat'l Bank, 75 N.M. 295, 404 P.2d 125 (1965), see 6 Nat. Resources J. 142 (1966).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Accounts and Accounting § 32; 10 Am. Jur. 2d Banks §§ 511, 515 to 519.
Construction and effect of statutes relieving bank from its liability to depositor for payment of forged or raised check unless within a specified time after the return of a voucher representing payment he notifies the bank as to the forgery or raising, 50 A.L.R.2d 1115.
Bank's liability for payment or withdrawal on less than required number of signatures, 7 A.L.R.4th 655.
Construction and application of UCC § 4-406, requiring customer to discover and report unauthorized signature, in cases involving bank's payment of check or withdrawal on less than required number of signatures, 7 A.L.R.4th 1111.
9 C.J.S. Banks and Banking § 356.

§ 55-4-407. 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 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:

(a) of any holder in due course on the item against the drawer or maker; and

(b) of 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; and

(c) of 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.

History: 1953 Comp., § 50A-4-407, enacted by Laws 1961, ch. 96, § 4-407.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Section 4-403 states that a stop payment order is binding on a bank. If a bank pays an item over such a stop order it is prima facie liable, but under Subsection (3) of 4-403 the burden of establishing the fact and amount of loss from such payment is on the customer. A defense frequently interposed by a bank in an action against it for wrongful payment over a stop order is that the drawer or maker suffered no loss because he would have been liable to a holder in due course in any event. On this argument some cases have held that payment cannot be stopped against a holder in due course. Payment can be stopped, but if it is, the drawer or maker is liable and the sound rule is that the bank is subrogated to the rights of the holder in due course. The preamble and Subsection (a) of this section state this rule.

2. Subsection (b) also subrogates the bank to the rights of the payee or other holder against the drawer or maker either on the item or under the transaction out of which it arose. It may well be that the payee is not a holder in due course but still has good rights against the drawer. These may be on the check but also may not be as, for example, where the drawer buys goods from the payee and the goods are partially defective so that the payee is not entitled to the full price, but the goods are still worth a portion of the contract price. If the drawer retains the goods he is obligated to pay a part of the agreed price. If the bank has paid the check it should be subrogated to this claim of the payee against the drawer.

3. Subsection (c) subrogates the bank to the rights of the drawer or maker against the payee or other holder with respect to the transaction out of which the item arose. If, for example, the payee was a fraudulent salesman inducing the drawer to issue his check for defective securities, and the bank pays the check over a stop order but reimburses the drawer for such payment, the bank should have a basis for getting the money back from the fraudulent salesman.

4. The limitations of the preamble prevent the bank itself from getting any double recovery or benefits out of its subrogation rights conferred by the section.

5. The spelling out of the affirmative rights of the bank in this section does not destroy other existing rights (Section 1-103). Among others these may include the defense of a payor bank that by conduct in recognizing the payment a customer has ratified the bank's action in paying in disregard of a stop payment order or rights to recover money paid under a mistake.

Cross reference.Section 4-403.

Definitional cross references."Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Item". Section 4-104.

"Payor bank". Section 4-105.

ANNOTATION

This section is intended to provide broad, liberal remedy that incorporates and is based upon the common-law equitable principles of unjust enrichment and restitution and is to be applied even where the technical mechanical requirements of common-law subrogation have not been met. Swiss Credit Bank v. Balink, 614 F.2d 1269 (10th Cir. 1980).

Bank making erroneous payment over stop order can recover from drawer or payee: if the drawer has no defense to payment of the check, the bank recovers by charging the drawer's account; if the drawer has a defense, then the bank recovers as a subrogee to the drawer's right against the payee. Swiss Credit Bank v. Balink, 614 F.2d 1269 (10th Cir. 1980).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who Is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 654.
Rights and liabilities of drawee bank, as to persons other than drawer with respect to uncertified paid check which was altered, 75 A.L.R.2d 611.
Extent of bank's liability for paying postdated check, 31 A.L.R.4th 329.
83 C.J.S. Subrogation § 22.

Part 5

COLLECTION OF DOCUMENTARY DRAFTS

§ 55-4-501. Handling of documentary drafts; duty to send for presentment and to notify customer of dishonor.

A bank which 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 such fact

even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

History: 1953 Comp., § 50A-4-501, enacted by Laws 1961, ch. 96, § 4-501.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To state the duty of a bank handling a documentary draft for a customer. "Documentary draft" is defined in Section 4-104. Notice that the duty stated exists even when the bank has bought the draft. This is because to the customer the draft normally represents an underlying commercial transaction, and if that is not going through as planned he should know it promptly.

Cross references.In Article 4: Sections 4-201, 4-202, 4-203, 4-204 and 4-210.

In Article 5: Sections 5-110, 5-111, 5-112 and 5-113.

Definitional cross references."Documentary draft". Sections 4-104 and 5-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 713.
Duties of collecting bank with respect to presenting draft for acceptance, 39 A.L.R.2d 1296.
9 C.J.S. Banks and Banking § 241.

§ 55-4-502. 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 such refusal but need not present the draft again until it is instructed to do so or learns of the arrival of the goods.

History: 1953 Comp., § 50A-4-502, enacted by Laws 1961, ch. 96, § 4-502.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The section is designed to establish a definite rule for "on arrival" drafts. The term includes not only drafts drawn payable "on arrival" but also drafts forwarded with

instructions to present "on arrival". The term refers to the arrival of the relevant goods. Unless a bank has actual knowledge of the arrival of the goods, as for example, when it is the "notify" party on the bill of lading, the section only requires the exercise of such judgment in estimating time as a bank may be expected to have. Commonly the buyer-drawee will want the goods and will therefore call for the documents and take up the draft when they do arrive.

Cross references.In Article 4: Sections 4-202 and 4-203.

In Article 5: Section 5-112.

Definitional cross references."Collecting bank". Section 4-105.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 713.
9 C.J.S. Banks and Banking §§ 241 et seq., 342.

§ 55-4-503. 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 Article 5 a bank presenting a documentary draft:

(a) must deliver the documents to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment; and

(b) 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 his 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 such expenses.

History: 1953 Comp., § 50A-4-503, enacted by Laws 1961, ch. 96, § 4-503.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 131(3), Uniform Negotiable Instruments Law.

Changes. Completely rewritten and enlarged.

Purposes.1. To state the rules governing, in the absence of instructions, the duty of the presenting bank in case either of honor or of dishonor of a documentary draft. The section should be read in connection with Section 2-514 on when documents are deliverable on acceptance, when on payment.

2. If the draft is drawn under a letter of credit, Article 5 controls. See Sections 5-109 to 5-114.

Cross references.Point 1: Section 2-514; see also Section 4-504.

Point 2: Article 5, especially Sections 5-109 to 5-114.

Definitional cross references."Documentary draft". Sections 4-104 and 5-103.

"Presenting bank". Section 4-105.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks §§ 706, 713.
9 C.J.S. Banks and Banking § 241 et seq.

§ 55-4-504. Privilege of presenting bank to deal with goods; security interest for expenses.

(1) A presenting bank which, 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.

History: 1953 Comp., § 50A-4-504, enacted by Laws 1961, ch. 96, § 4-504.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To give the presenting bank, after dishonor, a privilege to deal with the goods in any commercially reasonable manner pending instructions from its transferor and, if still unable to communicate with its principal after a reasonable time, a right to realize its expenditures as if foreclosing on an unpaid seller's lien (Section 2-706). The provision includes situations in which storage of goods or other action becomes commercially

necessary pending receipt of any requested instructions, even if the requested instructions are later received.

The "reasonable manner" referred to means one reasonable in the light of business factors and the judgment of a businessman.

Cross references.Sections 4-503 and 2-706.

Definitional cross references."Presenting bank". Section 4-105.

"Documentary draft". Sections 4-104 and 5-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 706.
9 C.J.S. Banks and Banking § 241 et seq.

Article 5

Letters of Credit

§ 55-5-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code - Letters of Credit.

History: 1953 Comp., § 50A-5-101, enacted by Laws 1961, ch. 96, § 5-101.

OFFICIAL COMMENT

Cross references.Sections 5-102, 5-103 and 3-410.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 2.
9 C.J.S. Banks and Banking § 174 et seq.

§ 55-5-102. Scope.

(1) This article applies:

(a) to a credit issued by a bank if the credit requires a documentary draft or a

documentary demand for payment; and

(b) to a credit issued by a person other than a bank if the credit requires that the draft or demand for payment be accompanied by a document of title; and

(c) to a credit issued by a bank or other person if the credit is not within Subparagraphs (a) or (b) but conspicuously states that it is a letter of credit or is conspicuously so entitled.

(2) Unless the engagement meets the requirements of Subsection (1), this article does not apply to engagements to make advances or to honor drafts or demands for payment, to authorities to pay or purchase, to guarantees or to general agreements.

(3) This article deals with some but not all of the rules and concepts of letters of credit as such rules or concepts have developed prior to this act [chapter] or may hereafter develop. The fact that this article states a rule does not by itself require, imply or negate application of the same or a converse rule to a situation not provided for or to a person not specified by this article.

History: 1953 Comp., § 50A-5-102, enacted by Laws 1961, ch. 96, § 5-102.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To define the transactions to which this article applies and to indicate that the rules stated are not intended to be exhaustive of the law applicable to letters of credit.

1. Although letters of credit are commonly thought of as being issued by banks and private bankers, other financing institutions can and do enter into transactions which fit the traditional concept of letters of credit. This is particularly true when the financing institution at the request of a buyer of goods promises the seller of the goods that it will pay or accept drafts or demands for payment on either the buyer or itself if the drafts are accompanied by documents of title covering the goods involved in the sales contract. Banks and private bankers also issue money credits which do not require documents of title to be presented as one of the conditions of honor. So far as these institutions are concerned the accompanying papers can range from a certification that certain building contracts have been performed in whole or in part or a notice that goods have been sent or a notice of default of some kind into the more traditional document of title. Subsection (1) attempts to make clear that automatic application of this article to the transaction in question depends upon the nature of the issuer. Paragraph (1) (a) is applicable to banks and states that whenever the promise to honor is conditioned on presentation of any piece of paper, the transaction is within this article whereas Paragraph (1) (b) makes automatic application of the article to transactions involving issuers other than banks dependent upon the requirement of a document of title.

Since banks issue "clean" as well as "documentary" credits and since other persons may desire to bring transactions involving papers other than documents of title within the coverage of this article, Paragraph (1) (c) permits the issuer to do so by conspicuous notation that the paper is a letter of credit. Whether a transaction falls within the mandatory or the permissive paragraphs of Subsection (1) is also of importance on the question of payment of funds held by an issuer at the time of its insolvency (See Section 5-117).

Subsection (2) states the negative of the rules of applicability of Subsection (1) for greater clarity but is not intended to either enlarge or limit the tests of applicability there laid down.

2. Subsection (3) recognizes that in the present state of the law and variety of practices as to letters of credit, no statute can effectively or wisely codify all the possible law of letters of credit without stultifying further development of this useful financing device. The more important areas not covered by this article revolve around the question of when documents in fact and in law do or do not comply with the terms of the credit. In addition such minor matters as the absence of expiration dates and the effect of extending shipment but not expiration dates are also left untouched for future adjudication. The rules embodied in the article can be viewed as those expressing the fundamental theories underlying letters of credit. For this reason the second sentence of Subsection (3) makes explicit the court's power to apply a particular rule by analogy to cases not within its terms, or to refrain from doing so. Under Section 1-102(1) such application is to follow the canon of liberal interpretation to promote underlying purposes and policies. Since the law of letters of credit is still developing, conscious use of that canon and attention to fundamental theory by the court are peculiarly appropriate.

Cross reference.Section 1-102.

Definitional cross references."Agreement". Section 1-201.

"Bank". Section 1-201.

"Conspicuous". Section 1-201.

"Credit". Section 5-103.

"Documentary draft". Section 5-103.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Honor". Section 1-201.

"Person". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards §§ 2, 3, 13.
Construction and effect of U.C.C. Article 5, dealing with letters of credit, 35 A.L.R.3d 1404.
What is a letter of credit under UCC §§ 5-102, 5-103, 44 A.L.R.4th 172.
9 C.J.S. Banks and Banking § 174 et seq.

§ 55-5-103. Definitions.

(1) In this article, unless the context otherwise requires:

(a) "credit" or "letter of credit" means an engagement by a bank or other person made at the request of a customer and of a kind within the scope of this article (Section 55-5-102 NMSA 1978) that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. A credit may be either revocable or irrevocable. The engagement may be either an agreement to honor or a statement that the bank or other person is authorized to honor;

(b) a "documentary draft" or a "documentary demand for payment" is one honor of which is conditioned upon the presentation of a document or documents. "Document" means any paper including document of title, security, invoice, certificate, notice of default and the like;

(c) an "issuer" is a bank or other person issuing a credit;

(d) a "beneficiary" of a credit is a person who is entitled under its terms to draw or demand payment;

(e) an "advising bank" is a bank which gives notification of the issuance of a credit by another bank;

(f) a "confirming bank" is a bank which engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank;

(g) a "customer" is a buyer or other person who causes an issuer to issue a credit. The term also includes a bank which procures issuance or confirmation on behalf of that bank's customer; and

(h) "day" as shown on the face of a documentary draft means banking day unless otherwise specified.

(2) Other definitions applying to this article and the sections in which they appear are:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

"Notation of credit".
.....Section 55-5-108 NMSA 1978; and
"Presenter".
.....Section 55-5-112(3) NMSA 1978.
(3) Definitions in other articles applying to this article and the sections in which they appear are:
"Accept" or "Acceptance".
.....Section 55-3-410 NMSA 1978;
"Banking day".
.....Section 55-4-104 NMSA 1978;
"Contract for sale".
.....Section 55-2-106 NMSA 1978;
"Draft".
.....Section 55-3-104 NMSA 1978;
"Holder in due course".
.....Section 55-3-302 NMSA 1978;
"Midnight deadline".
.....Section 55-4-104 NMSA 1978; and
"Security".
.....Section 55-8-102 NMSA 1978.

(4) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

History: 1953 Comp., § 50A-5-103, enacted by Laws 1961, ch. 96, § 5-103; 1987, ch. 102, § 3.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To define terms used in this article.

1. Paragraph (a) of Subsection (1) in defining a "credit" or "letter of credit" sets forth the requirement that the engagement of the bank or other person to honor drafts or other demands for payment be at the request of another and involve a transaction falling within the scope of this article (Section 5-102). It then makes clear that the "engagement" may be by way of agreement, that is, a promise to honor, or by way of an authority to honor, thus including within the definition of letter of credit, papers called "authorities to purchase or pay." The definition also makes clear that the engagement may be either revocable or irrevocable, the legal consequences of which are spelled out in Section 5-106 on the time and effect of establishment of a credit. Neither the definition nor any other section of this article deals with the issue of when a credit, not

clearly labelled as either revocable or irrevocable falls within the one or the other category although the code settles this issue with respect to the sales contract (Section 2-325). This issue so far as it effects an issuer under this article is intentionally left to the courts for decision in the light of the facts and general law (Section 1-103) with due regard to the general provisions of the code in Article 1 particularly Section 1-205 on course of dealing and usage of trade.

2. Paragraph (b) is intended to show that the word "document" is far broader than "document of title" for the purposes of this article. This is of special importance with respect to the application of the article to banks under Section 5-102(1) (a) and differs from the definition of "document" in Article 9 on secured transactions which is there limited to documents of title. See Section 9-105(1) (e).

3. The legal relations between the issuer (1) (c) and the beneficiary (1) (d) and between the issuer and the customer (1) (g) are spelled out in other sections of this article. The legal relations between the customer and the beneficiary turn on the underlying transaction between them: if that transaction be one of sale of goods, their rights depend upon Article 2; if the transaction involves the sale of investment securities, Article 8 will be applicable; if the transaction involves the transfer of commercial paper, Article 3 will be applicable; if documents of title are transferred, Article 7 will be applicable and if the transaction is intended to create a security interest, Article 9 will apply. The issuer is not a guarantor of the performance of these underlying transactions. See Section 5-109.

4. The definition of customer in Subsection (1) (g) is explicitly made to include a bank which is acting for its customer, so that a particular transaction may well involve a metropolitan issuing bank and two customers, one of whom is the ultimate customer as, e.g., the buyer of goods and the other of whom is the buyer's local bank which has requested the metropolitan bank to issue the credit.

5. The definitions of "advising" and "confirming" banks in Subsection (1) (e) and (f) do not include a statement of their legal consequences. These are set out primarily in Section 5-107 on advice of credit; confirmation; error in statement.

Cross references.Point 1: Sections 5-102, 5-106, 1-103, 1-205, 2-325 and Article 1.

Point 2: Sections 5-102, 1-201 and 9-105.

Point 3: Articles 2, 3, 7, 8 and 9; Section 5-109.

Point 5: Section 5-107.

Definitional cross references."Agreement". Section 1-201.

"Bank". Section 1-201.

"Document of title". Section 1-201.

"Gives notification". Section 1-201.

"Honor". Section 1-201.

"Person". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, in Subsection (1), in Paragraph (a) substituted "55-5-102 NMSA 1978" for "5-102" and added Paragraph (h); and, in Subsections (2) and (3), substituted the appropriate NMSA 1978 section references for the UCC references.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards §§ 3, 8, 13.
What constitutes letter of credit, 30 A.L.R. 1310.
What is a letter of credit under UCC §§ 5-102, 5-103, 44 A.L.R.4th 172.
9 C.J.S. Banks and Banking § 174 et seq.; 82 C.J.S. Statutes § 315.

§ 55-5-104. Formal requirements; signing.

(1) Except as otherwise required in Subsection (1) (c) of Section 5-102 [55-5-102 NMSA 1978] on scope, no particular form of phrasing is required for a credit. A credit must be in writing and signed by the issuer and a confirmation must be in writing and signed by the confirming bank. A modification of the terms of a credit or confirmation must be signed by the issuer or confirming bank.

(2) A telegram may be a sufficient signed writing if it identifies its sender by an authorized authentication. The authentication may be in code and the authorized naming of the issuer in an advice of credit is a sufficient signing.

History: 1953 Comp., § 50A-5-104, enacted by Laws 1961, ch. 96, § 5-104.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) is to make clear that, except for the statement or title required by Section 5-102(1) (c) to bring certain transactions within the scope of this article, no particular form need be followed; it is sufficient that the credit is in writing and signed by the issuer. The subsection also states that any modification is subject to the same requirements of signing and writing. Compare Section 2-209(3) on sale of goods. Questions of mistake, waiver or estoppel are left to supplementary principles of law.

See Section 1-103.

2. Subsection (2), although perhaps unnecessary in view of the definition of "signed" in Section 1-201, is inserted here to make certain that code and authorized naming of an issuer is a sufficient signing. These forms of signing are so customary that their explicit inclusion is useful to eliminate all controversy on the point.

Cross references.Point 1: Sections 5-102, 2-209 and 1-103.

Point 2: Section 1-201.

Definitional cross references."Confirming bank". Section 5-103.

"Credit". Section 5-103.

"Issuer". Section 5-103.

"Signed". Section 1-201.

"Telegram". Section 1-201.

"Term". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 10.
9 C.J.S. Banks and Banking § 174 et seq.

§ 55-5-105. Consideration.

No consideration is necessary to establish a credit or to enlarge or otherwise modify its terms.

History: 1953 Comp., § 50A-5-105, enacted by Laws 1961, ch. 96, § 5-105.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.It is not to be expected that a financial institution will engage its credit without some form of expected remuneration. But it is not expected that the beneficiary will know what the issuer's remuneration was, or whether in fact there was any identifiable

remuneration in a given case. And it would be extraordinarily difficult for the beneficiary to

Definitional cross references."Credit". Section 5-103.

"Terms". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 11.
9 C.J.S. Banks and Banking § 174 et seq.

§ 55-5-106. Time and effect of establishment of credit.

(1) Unless otherwise agreed a credit is established:

(a) as regards the customer as soon as a letter of credit is sent to him or the letter of credit or an authorized written advice of its issuance is sent to the beneficiary; and

(b) as regards the beneficiary when he receives a letter of credit or an authorized written advice of its issuance.

(2) Unless otherwise agreed once an irrevocable credit is established as regards the customer it can be modified or revoked only with the consent of the customer and once it is established as regards the beneficiary it can be modified or revoked only with his consent.

(3) Unless otherwise agreed after a revocable credit is established it may be modified or revoked by the issuer without notice to or consent from the customer or beneficiary.

(4) Notwithstanding any modification or revocation of a revocable credit any person authorized to honor or negotiate under the terms of the original credit is entitled to reimbursement for or honor of any draft or demand for payment duly honored or negotiated before receipt of notice of the modification or revocation and the issuer in turn is entitled to reimbursement from its customer.

History: 1953 Comp., § 50A-5-106, enacted by Laws 1961, ch. 96, § 5-106.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To define when a letter of credit is established in relation to the customer and the beneficiary, and to set forth for both irrevocable and revocable credits the legal

consequences of the fact of establishment.

1. The primary purpose of determining the time of establishment of an irrevocable credit is to determine the point at which the issuer is no longer free to take unilateral action with respect to the cancellation of the credit or modification of its terms. So far as the customer is concerned this point of time is reached when the issuer "sends" (as that term is defined in Section 1-201), the credit or when its authorized agent, the advising bank, sends the advice of the credit to the beneficiary. Since the sending is pursuant to an agreement between the issuer and the customer, it is the issuer's performance of the first stage of the contract and under Section 5-107(4) the risk of transmission is on the customer. The beneficiary, however, cannot rely upon the credit until and unless he receives it. His right to protest to the issuer in the event of cancellation or modification, therefore, turns on receipt. Nothing in this section affects the beneficiary's right to protest the improper nature of the credit or its cancellation (i. e., its non-receipt) as against the customer, who will normally have agreed to have a letter of credit issued in favor of the beneficiary under some underlying contract. See, e. g., Section 2-325(1) on buyer's failure to seasonably furnish an agreed letter of credit pursuant to a sales contract.

2. So far as a revocable letter of credit is concerned, the rules stated in Subsections (3) and (4) are intended to show that so far as the customer or beneficiary are concerned establishment of such a credit has no legal significance unless the parties provide otherwise in their contracts with the issuer. The primary significance of the establishment of a revocable letter of credit is the obligation it imposes upon the issuer to innocent third parties who have negotiated or honored drafts drawn under the credit before receiving notice of its cancellation or change. The purpose of this rule is to further the movement of goods which the underlying transaction typically envisages and to preserve the solidity of American credits. As a necessary consequence of the imposition of this duty upon the issuer, a duty of reimbursement of the issuer is placed upon the customer by explicit mention here even though it would fall within the general duty of reimbursement imposed by Section 5-114(3).

Cross references.Point 1: Sections 5-107 and 2-325.

Point 2: Section 5-114.

Definitional cross references."Beneficiary". Section 5-103.

"Credit". Section 5-103.

"Customer". Section 5-103.

"Draft". Section 3-104.

"Honor". Section 1-201.

"Issuer". Section 5-103.

"Notice". Section 1-201.

"Person". Section 1-201.

"Receive notice". Section 1-201.

"Send". Section 1-201.

"Written". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards §§ 8, 15.
9 C.J.S. Banks and Banking § 178 et seq.

§ 55-5-107. Advice of credit; confirmation; error in statement of terms.

(1) Unless otherwise specified an advising bank by advising a credit issued by another bank does not assume any obligation to honor drafts drawn or demands for payment made under the credit but it does assume obligation for the accuracy of its own statement.

(2) A confirming bank by confirming a credit becomes directly obligated on the credit to the extent of its confirmation as though it were its issuer and acquires the rights of an issuer.

(3) Even though an advising bank incorrectly advises the terms of a credit it has been authorized to advise the credit is established as against the issuer to the extent of its original terms.

(4) Unless otherwise specified the customer bears as against the issuer all risks of transmission and reasonable translation or interpretation of any message relating to a credit.

History: 1953 Comp., § 50A-5-107, enacted by Laws 1961, ch. 96, § 5-107.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. An "advising bank" is defined in Section 5-103. Subsection (1) of this section states its obligations to transmit accurately but not to honor drafts. The advice may of course not be accurate. The advising bank is responsible for its own error; under Subsection (3), however, the issuer is bound to honor only in accordance with the original terms of the credit.

2. A "confirming bank" is defined in Section 5-103. Subsection (2) of this section states its obligations and rights. The obligation, to the extent of the confirmation, is that of an issuer and so too is the right of reimbursement. The most important aspect of this rule is that a beneficiary who has received a confirmed credit has the independent engagements of both the issuer and the confirming bank. A confirming bank may of course be an advising bank so far as the issuer's engagement is concerned but this is rarely of importance because its own engagement if the terms be improperly advised will be to honor in accordance with those terms.

3. Subsection (4) distributes the risks, as between customer and issuer, of errors in transmission and translation by placing them on the customer in the absence of specific agreement to the contrary. See also Section 5-109(1) (b).

Cross references.Sections 5-103 and 5-109.

Definitional cross references."Advising bank". Section 5-103.

"Bank". Section 1-201.

"Confirming bank". Section 5-103.

"Credit". Section 5-103.

"Customer". Section 5-103.

"Draft". Section 3-104.

"Honor". Section 1-201.

"Issuer". Section 5-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards §§ 14, 24.
9 C.J.S. Banks and Banking § 174 et seq.

§ 55-5-108. "Notation credit"; exhaustion of credit.

(1) A credit which specifies that any person purchasing or paying drafts drawn or demands for payment made under it must note the amount of the draft or demand on the letter or advice of credit is a "notation of credit."

(2) Under a notation credit:

(a) a person paying the beneficiary or purchasing a draft or demand for payment from him acquires a right to honor only if the appropriate notation is made and by transferring or forwarding for honor the documents under the credit such a person warrants to the issuer that the notation has been made; and

(b) unless the credit or a signed statement that an appropriate notation has been made accompanies the draft or demand for payment the issuer may delay honor until evidence of notation has been procured which is satisfactory to it but its obligation and that of its customer continue for a reasonable time not exceeding thirty days to obtain such evidence.

(3) If the credit is not a notation credit:

(a) the issuer may honor complying drafts or demands for payment presented to it in the order in which they are presented and is discharged pro tanto by honor of any such draft or demand;

(b) as between competing good faith purchasers of complying drafts or demands the person first purchasing has priority over a subsequent purchaser even though the later purchased draft or demand has been first honored.

History: 1953 Comp., § 50A-5-108, enacted by Laws 1961, ch. 96, § 5-108.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Practice has varied in regard to requiring notation on a letter of credit of the drafts drawn thereunder, and dispute has been rife for more than a century over the effect of failure by a purchaser to make such notations when they are required. The confusion has been due to a failure to distinguish two different types of credit and the different results which flow from each.

Under Subsection (3), if an issuer chooses to issue a credit not requiring notation or if the credit is available in portions (see Section 5-110) without requirement of notation the issuer avoids all troubles attendant on any purchaser's failure to make notations, but he also imperils the utility of the credit to a beneficiary by reason of its possible exhaustion before any particular purchaser may have discounted drafts under it, so that there may be no market at all for such drafts. Yet this way of operation becomes useful and

desirable at least whenever the credit is "domiciled," i.e., when it is explicitly made available only through one particular named correspondent, who will have his own records of prior drafts.

Subsection (3) expressly protects the issuer under such a credit (almost exactly as in the case of drafts drawn in a set under Section 3-801) in regard to any drafts which he honors in good faith, even though they are in the hands of a party who as against some other purchaser of drafts is not entitled to their proceeds. Similarly, in the last sentence, the rights of successive good faith purchasers are regulated as with drafts in a set.

2. Under Subsection (2), on the other hand, the notation machinery is made available where the credit provides for notation in accordance with Subsection (1). This is useful particularly where the credit is intended (as a traveler's letter would be) for roving use, but the responsibility is put upon the purchaser to make the appropriate notation on pain of reimbursing the issuer for any loss occasioned by the failure. The provision in regard to delay of honor while evidence of notation is being procured is novel in the law, but is believed to be a necessary addition first, to protect the issuer, and second, to educate purchasers.

Subsection (2) (a) avoids a difficult question of conflict of laws by making the obligation to note a condition of the credit itself, governed, therefore, by the law which controls the issue of the credit.

Cross references.Sections 3-801 and 5-110.

Definitional cross references."Beneficiary". Section 5-103.

"Credit". Section 5-103.

"Customer". Section 5-103.

"Document". Section 5-103.

"Draft". Section 3-104.

"Good faith". Section 1-201.

"Honor". Section 1-201.

"Issuer". Section 5-103.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Purchaser". Section 1-201.

"Rights". Section 1-201.

"Signed". Section 1-201.

ANNOTATION

Compiler's notes. - New Mexico's version of the uniform act reads "notation of credit" at the end of Subsection (1), where the 1972 Official Text of the uniform act reads "notation credit."

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards §§ 3, 29, 35, 36.

§ 55-5-109. Issuer's obligation to its customer.

(1) An issuer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed does not include liability or responsibility:

(a) for performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or

(b) for any act or omission of any person other than itself or its own branch or for loss or destruction of a draft, demand or document in transit or in the possession of others; or

(c) based on knowledge or lack of knowledge of any usage of any particular trade.

(2) An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed assumes no liability or responsibility for the genuineness, falsification or effect of any document which appears on such examination to be regular on its face.

(3) A nonbank issuer is not bound by any banking usage of which it has no knowledge.

History: 1953 Comp., § 50A-5-109, enacted by Laws 1961, ch. 96, § 5-109.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The extent of the issuer's obligation to its customer is based upon the agreement between the two. Like all agreements within the code, that agreement is the bargain of the parties in fact as defined in Section 1-201(3) and includes the obligation of good faith imposed by Section 1-203 and the observance of any course of dealing or

usage of trade made applicable by Section 1-205. Subsection (1) of this section states, as a particular application of those general rules, the issuer's standard obligation of good faith and observance of general banking usage. Disclaimer of the obligation of good faith is governed by Section 1-102(3); conflict between express terms and a usage otherwise applicable is governed by Section 1-205(4).

Subsection (1) also clarifies the areas over which the issuer assumes no liability or responsibility except as the agreement of the parties may indicate the contrary. Paragraph (a) rests on the assumptions that the issuer has had no control over the making of the underlying contract or over the selection of the beneficiary, and that the issuer receives compensation for a payment service rather than for a guaranty of performance. The customer will normally have direct recourse against the beneficiary if performance fails, whereas the issuer will have such recourse only by assignment of or in a proper case subrogation to the rights of the customer.

Paragraph (b) also rests in part on the assumption that the issuer has not selected the other persons who may be involved in the transaction. Even though this assumption fails, however, as where the issuer selects the advising bank, the customer by entering the underlying transaction has assumed the risks inherent in it, including the risk of loss or destruction of the papers involved. The allocation of such risks between the parties to the underlying transaction is a proper subject for agreement between them, and the small charge for the issuance of a letter of credit ordinarily indicates that the issuer assumes minimum risks as against its customer. For comparable reasons Section 5-107(4) puts risks of transmission and translation upon the customer.

Paragraph (c) again emphasizes that normally an issuer performs a banking and not a trade function. This paragraph makes an exception to Section 1-205(3), giving effect to usages of which the parties "are or should be aware." The comparable provision for non-bank issuers in Subsection (3) of this section is limited to unknown banking usages and is thus merely a definition of a particular type of case not included by the words "should be aware" in Section 1-205(3).

2. Subsection (2) states the basic obligation of the issuer to examine with care the documents required under the credit. Under Section 1-102(3) this obligation cannot be disclaimed but standards of performance can be determined by agreement if not manifestly unreasonable. There are not infrequent cases in which both parties understand that peculiar circumstances make any check-up on some particular type of document impossible and it is agreed that the issuer may take it "as presented" - so, e.g., export licenses in politically disturbed conditions, or "shipping documents" when no document in standard or regular form can be procured. These agreements will be controlling provided they are not manifestly unreasonable.

The purpose of the examination is to determine whether the documents appear regular on their face. The fact that the documents may be false or fraudulent or lacking in legal effect is not one for which the issuer is bound to examine. His duty is limited to apparent regularity on the face of the documents. The duties, privileges and rights of an issuer

who has received documents which are regular on their face but are in fact improper because forged or fraudulent are dealt with in Section 5-114.

Cross references.Point 1: Sections 1-102, 1-201, 1-203, 1-205 and 5-107.

Point 2: Sections 1-102 and 5-114.

Definitional cross references."Bank". Section 1-201.

"Beneficiary". Section 5-103.

"Branch". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Credit". Section 5-103.

"Customer". Section 5-103.

"Document". Section 5-103.

"Draft". Section 3-104.

"Genuine". Section 1-201.

"Good faith". Section 1-201.

"Issuer". Section 5-103.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards §§ 19, 20.
Construction of provision for letter of credit in contract of sale, 38 A.L.R. 608.
9 C.J.S. Banks and Banking § 174 et seq.

§ 55-5-110. Availability of credit in portions; presenter's reservation of lien or claim.

(1) Unless otherwise specified a credit may be used in portions in the discretion of the beneficiary.

(2) Unless otherwise specified a person by presenting a documentary draft or demand for payment under a credit relinquishes upon its honor all claims to the documents and a person by transferring such draft or demand or causing such presentment authorizes such relinquishment. An explicit reservation of claim makes the draft or demand noncomplying.

History: 1953 Comp., § 50A-5-110, enacted by Laws 1961, ch. 96, § 5-110.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The beneficiary may desire to draw more than one draft under the credit, each draft accompanied, for instance, by documents evidencing a single shipment under the underlying sales contract. Subsection (1) makes clear that unless otherwise specified he may do so. Of course, if he does, each draft and its accompanying documents must satisfy the terms of the credit and their total must not exceed its amount. See comment to Section 5-108(3) on exhaustion of a credit on the rule governing the situation in which the total drafts drawn do total more than the maximum amount of the credit.

2. The entire purpose of the usual letter of credit transaction, from the customer's point of view, is to induce the beneficiary to deliver to him through the issuer the documents described in the credit. The buying customer wants the goods, and arranges the transaction in order to get the documents controlling the goods. Therefore, upon honor of the draft, the documents must be delivered free of claims even though the letter of credit is not for the full invoice price and any reservation of claim makes the draft non-complying. A beneficiary who wishes to prevent such delivery must do so by agreement with the customer in the underlying contract and must treat the failure to provide a sufficient letter of credit as a breach of that contract (Section 2-325). So far as the issuer's duty to honor is concerned, the terms of the letter of credit are controlling and the rule of Subsection (2) is applicable.

Cross references.Point 1: Section 5-108.

Point 2: Sections 2-325 and 5-114.

Definitional cross references."Beneficiary". Section 5-103.

"Credit". Section 5-103.

"Documentary draft". Section 5-103.

"Document". Section 5-103.

"Draft". Section 3-104.

"Honor". Section 1-201.

"Person". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards §§ 32, 33.
9 C.J.S. Banks and Banking § 178 et seq.

§ 55-5-111. Warranties on transfer and presentment.

(1) Unless otherwise agreed the beneficiary by transferring or presenting a documentary draft or demand for payment warrants to all interested parties that the necessary conditions of the credit have been complied with. This is in addition to any warranties arising under Articles 3, 4, 7 and 8.

(2) Unless otherwise agreed a negotiating, advising, confirming, collecting or issuing bank presenting or transferring a draft or demand for payment under a credit warrants only the matters warranted by a collecting bank under Article 4 and any such bank transferring a document warrants only the matters warranted by an intermediary under Articles 7 and 8.

History: 1953 Comp., § 50A-5-111, enacted by Laws 1961, ch. 96, § 5-111.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purpose.The purpose of this section is to state the peculiar warranty of performance made by a beneficiary and to make clear the intermediary character of the persons moving the documents from the beneficiary to the customer. The beneficiary's warranty of compliance with the conditions of the credit in Subsection (1) is expressly extended to all interested parties unless agreed to the contrary. So far as the draft or the relevant documents are concerned, the beneficiary's warranties are usually those of an ordinary transferor or indorser for value although varying circumstances may alter this. The usual warranties of an intermediary, listed in Subsection (2), are primarily its own good faith and authority. See also comment to Section 5-114(2).

Cross references.Sections 3-417, 4-207, 7-507, 7-508 and 8-306.

Definitional cross references."Advising bank". Section 5-103.

"Bank". Section 1-201.

"Beneficiary". Section 5-103.

"Collecting bank". Section 4-105.

"Confirming bank". Section 5-103.

"Credit". Section 5-103.

"Documentary draft". Section 5-103.

"Draft". Section 3-104.

"Party". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 31.
9 C.J.S. Banks and Banking § 178 et seq.

§ 55-5-112. Time allowed for honor or rejection; withholding honor or rejection by consent; "presenter."

(1) A bank to which a documentary draft or demand for payment is presented under a credit may without dishonor of the draft, demand or credit:

(a) defer honor until the close of the third banking day following receipt of the documents; and

(b) further defer honor if the presenter has expressly or impliedly consented thereto.

Failure to honor within the time here specified constitutes dishonor of the draft or demand and of the credit except as otherwise provided in Subsection (4) of Section 5-114 [55-5-114 NMSA 1978] on conditional payment.

(2) Upon dishonor the bank may unless otherwise instructed fulfill its duty to return the draft or demand and the documents by holding them at the disposal of the presenter and sending him an advice to that effect.

(3) "Presenter" means any person presenting a draft or demand for payment for honor

under a credit even though that person is a confirming bank or other correspondent which is acting under an issuer's authorization.

History: 1953 Comp., § 50A-5-112, enacted by Laws 1961, ch. 96, § 5-112.

Compiler's note. - New Mexico included, at the end of Subsection (1), the exception clause which is optional under the uniform act.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. A bank called on to honor drafts under a credit must examine the accompanying documents with care. See Section 5-109(2). That may take time. Subsection (1) of this section therefore allows a longer period than in the case of ordinary drafts (Section 3-506) for the decision. The language in the postamble to Subsection (1) particularizes for letters of credit the general rule on what constitutes dishonor for negotiable instruments (Section 3-507) and makes it clear that not only the draft but the credit is dishonored. If the particular draft is for a portion of the credit only, its wrongful dishonor is anticipatory repudiation of the entire credit and the beneficiary may proceed under Section 5-115(2) as well as 5-115(1).

2. Many letters of credit involve transactions in international trade and include as required documents the documents of title controlling the possession of goods on their way to the place of issuance of the credit. The ordinary rule requiring physical return of dishonored documentary drafts (Section 4-302) would therefore frequently work commercial hardship on the mercantile parties to the transaction; resale of the goods might be more difficult if the controlling documents of title were not available at the place of arrival of the goods. Subsection (2) therefore expressly permits the issuer to retain the documents as bailee for the presenter if it advises the presenter of its retention for that purpose. Compare Sections 4-202(1) (b), 4-503 and 4-504 on the duties of presenting banks.

3. The definition of "presenter" is to make clear that the term may include a bank which has rights in the documentary draft or which is in one sense the agent of the issuer. Such a bank may nevertheless give consent under Subsection (1), and the advice authorized in Subsection (2) may be sent to it.

4. Insofar as the banks involved may also be depositary, collecting or paying banks, Article 4 is applicable. Article 3 applies to the extent that a negotiable instrument is involved.

Cross references.Point 1: Sections 3-506, 3-507, 5-109, 5-114 and 5-115.

Point 2: Sections 4-202, 4-302, 4-503 and 4-504.

Point 4: Articles 3 and 4.

Definitional cross references."Bank". Section 1-201.

"Confirming bank". Section 5-103.

"Credit". Section 5-103.

"Documentary draft". Section 5-103.

"Draft". Section 3-104.

"Honor". Section 1-201.

"Issuer". Section 5-103.

"Send". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 892; 50 Am. Jur. 2d Letters of Credit and Credit Cards §§ 3, 35.
9 C.J.S. Banks and Banking § 178 et seq.

§ 55-5-113. Indemnities.

(1) A bank seeking to obtain (whether for itself or another) honor, negotiation or reimbursement under a credit may give an indemnity to induce such honor, negotiation or reimbursement.

(2) An indemnity agreement inducing honor, negotiation or reimbursement:

(a) unless otherwise explicitly agreed applies to defects in the documents but not in the goods; and

(b) unless a longer time is explicitly agreed expires at the end of ten business days following receipt of the documents by the ultimate customer unless notice of objection is sent before such expiration date. The ultimate customer may send notice of objection to the person from whom he received the documents and any bank receiving such notice is under a duty to send notice to its transferor before its midnight deadline.

History: 1953 Comp., § 50A-5-113, enacted by Laws 1961, ch. 96, § 5-113.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. A draft and accompanying documents may almost comply with the terms of the credit, but fail in some particular. The issuer is then not obligated to honor the draft, but it may be willing to do so if properly indemnified against the particular defect. Subsection (1) makes clear that it is proper for a bank seeking payment, acceptance, negotiation or reimbursement under the credit to give such indemnities, and that doing so is a proper part of the business of banking and therefore not ultra vires.

2. Subsection (2) (a) limits the agreed indemnity to defects in the documents, since under Section 5-109(1) (a) the issuer is ordinarily not responsible for performance of the underlying transaction. The parties are free to agree further on the scope of the indemnity, but the agreement must be explicit, since an indemnity against defects in the goods would be most unusual.

3. Subsection (2) (b) makes it clear that the indemnity in the absence of explicit agreement for a longer time continues for ten days after the receipt of the document by the ultimate customer, i.e., the customer who is a party to the underlying transaction. This ten day period may not be shortened. If the customer fails to send notice of objection within the period, he loses his right to object and the need for the indemnity disappears. Compare Section 2-605 (2). Thus indemnitors are free of the possibility of unknown long-continuing contingent liability, a danger under existing law.

4. The question whether a particular banking usage may require honor of documentary drafts accompanied by indemnities for particular defects goes to the meaning of the terms of the credit and is beyond the scope of this section. See, e.g., Dixon, Irmaos & Cia, Ltda., v. Chase Nat. Bank of City of New York, 144 F.2d 759 (2d Cir., 1944). If by virtue of indemnities and usage the credit is complied with, the rights of the customer rest on the implications of the usage rather than on breach of the issuer's duty under this article. Even so, the policy of this section and its terms require notice before the expiration date.

Cross references.Point 2: Section 5-109.

Point 3: Section 2-605.

Point 4: Section 1-205.

Definitional cross references."Bank". Section 1-201.

"Credit". Section 5-103.

"Customer". Section 5-103.

"Documents". Section 5-103.

"Honor". Section 1-201.

"Midnight deadline". Section 4-104.

"Person". Section 1-201.

"Send". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 34.
42 C.J.S. Indemnity § 1 et seq.

§ 55-5-114. Issuer's duty and privilege to honor; right to reimbursement.

(1) An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary. The issuer is not excused from honor of such a draft or demand by reason of an additional general term that all documents must be satisfactory to the issuer, but an issuer may require that specified documents must be satisfactory to it.

(2) Unless otherwise agreed when documents appear on their face to comply with the terms of a credit but a required document does not in fact conform to the warranties made on negotiation or transfer of a document of title (Section 55-7-507 NMSA 1978) or of a certificated security (Section 55-8-306 NMSA 1978) or is forged or fraudulent or there is fraud in the transaction:

(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 which would make it a holder in due course (Section 55-3-302 NMSA 1978) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (Section 55-7-502 NMSA 1978) or a bona fide purchaser of a certificated security (Section 55-8-302 NMSA 1978); and

(b) in all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents but a court of appropriate jurisdiction may enjoin such honor.

(3) Unless otherwise agreed an issuer which has duly honored a draft or demand for payment is entitled to immediate reimbursement of any payment made under the credit

and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit.

(4) When a credit provides for payment by the issuer on receipt of notice that the required documents are in the possession of a correspondent or other agent of the issuer:

(a) any payment made on receipt of such notice is conditional; and

(b) the issuer may reject documents which do not comply with the credit if it does so within three banking days following its receipt of the documents; and

(c) in the event of such rejection, the issuer is entitled by charge back or otherwise to return of the payment made.

(5) In the case covered by Subsection (4) of this section failure to reject documents within the time specified in Subparagraph (b) of Subsection (4) of this section constitutes acceptance of the documents and makes the payment final in favor of the beneficiary.

History: 1953 Comp., § 50A-5-114, enacted by Laws 1961, ch. 96, § 5-114; 1987, ch. 248, § 2.

Compiler's note. - New Mexico adopted optional Subsections (4) and (5) of the uniform act.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To define the areas in which the issuer must honor drafts or demands for payment under a credit and those in which he has an option to do so and to make explicit the customer's duty of reimbursement.

1. The letter of credit is essentially a contract between the issuer and the beneficiary and is recognized by this article as independent of the underlying contract between the customer and the beneficiary (See Section 5-109 and comment thereto). In view of this independent nature of the letter of credit engagement, the issuer is under a duty to honor the drafts or demands for payment which in fact comply with the terms of the credit without reference to their compliance with the terms of the underlying contract. This is stated in Subsection (1). Attempts by the issuer to reserve a right to dishonor by including a clause that all documents must be satisfactory to itself are declared invalid as essentially repugnant to an irrevocable letter of credit. Such a reservation can be made by issuing a revocable credit. See Section 5-106. Particular documents, such as bills of lading or inspection or weight certificates can, of course, be required to be satisfactory to the issuer. The duty of the issuer to honor where there is factual

compliance with the terms of the credit is also independent of any instructions from its customer once the credit has been issued and received by the beneficiary. See Section 5-106.

2. Documents, however, may appear regular on their face and apparently conforming to the credit whereas in fact they are forged or fraudulent or in other respects non-conforming to the warranties which arise under other articles of the code on their transfer or negotiation. Since the issuer's duties to its customer are limited to examination of the documents with care (Section 5-109) and since it is important to preserve both the independent character of the issuer's engagement and the reasonable reliance on that engagement of persons dealing with papers regular on their face and in apparent compliance with the terms of the credit, Subsection (2) (a) includes as an area in which the issuer's duty to honor exists cases in which persons have acted in a manner which would make them the equivalent of holders in due course under Article 3 or, where relevant, persons to whom documents have been duly negotiated under Article 7 or bona fide purchasers of securities under Article 8. The risk of the original bad-faith action of the beneficiary is thus thrown upon the customer who selected him rather than upon innocent third parties or the issuer. So, too, is the risk of fraud in the transaction placed upon the customer.

When, however, no innocent third parties as defined in Subsection (a) are involved the issuer is no longer under a duty to honor; but since these matters frequently involve situations in which the determination of the fact of the non-conformance may be difficult or time-consuming, the issuer if he acts in good faith is given the privilege of honoring the draft as against its customer, that is to say, with a right of reimbursement against him. The issuer may, however, refuse honor. In the event of honor, an action by the customer against the beneficiary will lie by virtue of either the underlying contract or Section 5-111(1) of this article. In the event of dishonor, if the presenter is a person who has parted with value, he also may recover against the beneficiary under Section 5-111(1).

3. Subsection (3) represents the standard form for reimbursement. The words "duly honored" include not only situations where the issuer has honored because it was his duty to do so but also where he was privileged to do so as in Subsection (2) (b) or has done so as under Section 5-106(4).

4. Optional Subsections (4) and (5) are for the purpose of clarifying a situation which has arisen under the currency restrictions of a few nations and in which payment is required to be made under the credit before opportunity exists to examine the documents. The article resolves this situation by making clear that the payment is conditional in nature and may be reversed by subsequent timely discovery of defects in the documents.

Cross references.Point 1: Sections 5-106 and 5-109.

Point 2: Sections 5-106, 5-109, 5-111 and Articles 3, 7 and 8.

Point 3: Section 5-106.

Definitional cross references."Bank". Section 1-201.

"Beneficiary". Section 5-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Credit". Section 5-103.

"Customer". Section 5-103.

"Document". Section 5-103.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Honor". Section 1-201.

"Issuer". Section 5-103.

"Notification". Section 1-201.

"Receives notice". Section 1-201.

"Security". Section 8-102.

"Term". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted NMSA citations for UCC citations at several places throughout the section, twice substituted "certificated security" for "security" in Subsection (2), and made minor stylistic changes in Subsection (5).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards §§ 22, 23, 29.

Rights and remedies of holder of draft issued under letter of credit which is dishonored, 53 A.L.R. 57.
What constitutes fraud or forgery justifying refusal to honor, or injunction against honoring, letter of credit under UCC § 5-114(1)(2), 25 A.L.R.4th 239.
9 C.J.S. Banks and Banking § 178 et seq.

§ 55-5-115. Remedy for improper dishonor or anticipatory repudiation.

(1) When an issuer wrongfully dishonors a draft or demand for payment presented under a credit the person entitled to honor has with respect to any documents the rights of a person in the position of a seller (Section 2-707 [55-2-707 NMSA 1978]) and may recover from the issuer the face amount of the draft or demand together with incidental damages under Section 2-710 [55-2-710 NMSA 1978] on seller's incidental damages and interest but less any amount realized by resale or other use or disposition of the subject matter of the transaction. In the event no resale or other utilization is made the documents, goods or other subject matter involved in the transaction must be turned over to the issuer on payment of judgment.

(2) When an issuer wrongfully cancels or otherwise repudiates a credit before presentment of a draft or demand for payment drawn under it the beneficiary has the rights of a seller after anticipatory repudiation by the buyer under Section 2-610 [55-2-610 NMSA 1978] if he learns of the repudiation in time reasonably to avoid procurement of the required documents. Otherwise the beneficiary has an immediate right of action for wrongful dishonor.

History: 1953 Comp., § 50A-5-115, enacted by Laws 1961, ch. 96, § 5-115.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) states the rights of a person entitled to honor, both with respect to any documents and against the issuer, when there is wrongful dishonor. Whether dishonor is wrongful and whether a particular person is entitled to honor depend on the terms of the credit and on the provisions of this article, particularly Section 5-114 on the issuer's duty to honor and Section 5-116 on transfer and assignment.

2. Subsection (2) states the rights of the beneficiary upon repudiation of the credit, both against the issuer and with respect to any documents or goods. Note that wrongful dishonor of a draft for a portion of the credit is dishonor of the credit under Section 5-112(1), and makes applicable Subsection (2) of this section as well as Subsection (1).

3. Both subsections are limited to irrevocable credits. Since under Section 5-106(3)

revocable credits may be modified or revoked without notice to the customer or the beneficiary, rights against the issuer like those here provided can hardly arise under them. The rights of innocent third persons under revocable credits are governed by Section 5-106(4) rather than by this section.

Cross references.Point 1: Sections 2-707, 2-710, 5-114 and 5-116.

Point 2: Sections 2-610, 2-611, 2-703 to 2-706 and 5-112.

Point 3: Section 5-106.

Definitional cross references."Action". Section 1-201.

"Beneficiary". Section 5-103.

"Credit". Section 5-103.

"Document". Section 5-103.

"Draft". Section 3-104.

"Issuer". Section 5-103.

"Person". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 37.
Dishonor of draft issued under letter of credit, rights and remedies of holder, 53 A.L.R. 57.
Damages recoverable for wrongful dishonor of letter of credit under UCC § 5-115, 2 A.L.R.4th 665.
9 C.J.S. Banks and Banking § 178 et seq.

§ 55-5-116. Transfer and assignment.

(1) The right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable.

(2) Even though the credit specifically states that it is non-transferable or nonassignable the beneficiary may before performance of the conditions of the credit assign his right to proceeds. Such an assignment is an assignment of an account under Article 9 on

secured transactions and is governed by that article except that

(a) the assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee which delivery constitutes perfection of the security interest under Article 9; and

(b) the issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignee; and

(c) after what reasonably appears to be such a notification has been received the issuer may without dishonor refuse to accept or pay even to a person otherwise entitled to honor until the letter of credit or advice of credit is exhibited to the issuer.

(3) Except where the beneficiary has effectively assigned his right to draw or his right to proceeds, nothing in this section limits his right to transfer or negotiate drafts or demands drawn under the credit.

History: 1953 Comp., § 50A-5-116, enacted by Laws 1961, ch. 96, § 5-116; 1985, ch. 193, § 4.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The situation involved is typified by that of an exporter who has made a contract for sale with a foreign buyer and is beneficiary of a letter of credit initiated by the buyer, especially where the subject matter involves goods still to be manufactured. The exporter is frequently in need of the wherewithal not only to finance payment to his supplier but to assure the latter against cancellation of the order during the process of manufacture. For this purpose assignment of the exporter's rights under the letter of credit is frequently desirable.

Since, however, there is general confusion of thought as to the meaning of "assignment or transfer of a credit," the law remains uncertain. If "assignment of the credit" includes delegation of performance of the conditions under the credit then the initiating customer, who in many cases has put his faith in performance or supervision of performance by a beneficiary of established reputation, may be deprived of real and intended security. See comment to Section 2-210 on the comparable situation as to the sales contract. On the other hand, all "negotiation credits" involve a transfer of the rights of the beneficiary by way of negotiations of the draft and such transfer involves no important loss of the initiating party's intended safety. Meanwhile, the exceedingly useful institution of "back to back" credits, in which an American bank issues a credit with the exporter as the initiating customer and the exporter's supplier as the beneficiary, is dangerous for the banker unless he can secure in advance an effective assignment from the exporter of

the latter's rights under the initial credit issued on behalf of his foreign buyer. Against this background, the section is drawn.

2. Subsection (1) requires the beneficiary's signature on drafts drawn under the credit unless it is expressly designated as assignable or transferable. If it is so designated, the normal rules of assignment apply and both the right to draw and the performance of the beneficiary can be transferred, subject to the beneficiary's continuing liability, if any, for the nature of the performance.

3. Subsection (2) makes clear that to safeguard among other things the letter of credit "back to back" practice, the assignability of proceeds in advance of performance cannot be prohibited in advance of performance. In this respect the letter of credit is treated like any other contract calling for money to be earned. See Section 9-318 generally and Section 2-210 as to sales contracts. But the special nature of the letter of credit as evidence of the right to proceeds is recognized by the additional requirement of delivery of the letter to the assignee as a condition precedent to the perfection of the assignment. Similarly, the fact that letters of credit normally require presentation of drafts or demands for payment which are drawn under it and that as a result notice of assignment of proceeds can exist simultaneously with a draft payable by order or indorsement to either the beneficiary or another third person leads to the necessity for permitting an issuer to protect itself against exhibition of the letter or advice of credit.

4. Subsection (3) makes clear that the section has no application to the normal case of negotiation of a draft or the transfer of a demand for payment unless effective assignment under the section has taken place.

Cross references.Point 1: Section 2-210.

Point 3: Sections 2-210 and 9-318 and Article 9.

Definitional cross references."Accept". Section 3-410.

"Account". Section 9-106.

"Beneficiary". Section 5-103.

"Credit". Section 5-103.

"Draft". Section 3-104.

"Honor". Section 1-201.

"Issuer". Section 5-103.

"Receive" notification. Section 1-201.

ANNOTATION

The 1985 amendment substituted "an assignment of an account" for "an assignment of a contract right" near the end of Subsection (2).

Effective dates. - Laws 1985, ch. 193, § 38 makes the act effective on January 1, 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 17.
6A C.J.S. Assignments § 1 et seq.; 9 C.J.S. Banks and Banking § 174 et seq.

§ 55-5-117. Insolvency of bank holding funds for documentary credit.

(1) Where an issuer or an advising or confirming bank or a bank which has for a customer procured issuance of a credit by another bank becomes insolvent before final payment under the credit and the credit is one to which this article is made applicable by Paragraphs (a) or (b) of Section 5-102 (1) [55-5-102 NMSA 1978] on scope, the receipt or allocation of funds or collateral to secure or meet obligations under the credit shall have the following results:

(a) to the extent of any funds or collateral turned over after or before the insolvency as indemnity against or specifically for the purpose of payment of drafts or demands for payment drawn under the designated credit, the drafts or demands are entitled to payment in preference over depositors or other general creditors of the issuer or bank; and

(b) on expiration of the credit or surrender of the beneficiary's rights under it unused any person who has given such funds or collateral is similarly entitled to return thereof; and

(c) a charge to a general or current account with a bank if specifically consented to for the purpose of indemnity against or payment of drafts or demands for payment drawn under the designated credit falls under the same rules as if the funds had been drawn out in cash and then turned over with specific instructions.

(2) After honor or reimbursement under this section the customer or other person for whose account the insolvent bank has acted is entitled to receive the documents involved.

History: 1953 Comp., § 50A-5-117, enacted by Laws 1961, ch. 96, § 5-117.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.A bank which issues a letter of credit acts as a principal, not as agent for its customer, and engages its own credit. But the resulting liability is not like that to its depositors, and the security and indemnity furnished by the customer against it and the documents which it receives on honor of complying drafts are not like its own investments.

The typical letter of credit transaction facilitates the movement of goods. The bank's credit is engaged, but it expects to be put in funds by its customer before it makes disbursements, or to be reimbursed immediately afterwards. And everybody understands that the documents received upon honor of complying drafts are to be turned over to the customer at once when he makes reimbursement or signs trust receipts. Only the bank's commission, if the transaction is completed, will enter the bank's general assets and join the other backing of its deposit liabilities.

It is therefore proper, when insolvency occurs before the letter of credit transaction is completed, to regard both the outstanding liabilities, the security held and funds provided to indemnify against those liabilities, and the related drafts and documents, as separate from deposit liabilities and from general assets, and to deal with them as separate. To do so carries out the original purpose, which is to facilitate the underlying mercantile transaction, and does no wrong to the bank's depositors and other general creditors.

This section states appropriate rules to carry out these principles. The section is limited to transactions under Section 5-102(1) (a) and (b) to prevent abuse in situations where the commercial purpose of facilitating the movement of goods, securities or the like may be lacking.

Cross reference.Compare Section 4-214 and the comment thereto.

Definitional cross references."Advising Bank". Section 5-103.

"Bank". Section 1-201.

"Beneficiary". Section 5-103.

"Confirming Bank". Section 5-103.

"Credit". Section 5-103.

"Customer". Section 5-103.

"Document". Section 5-103.

"Draft". Section 3-104.

"Honor". Section 1-201.

"Insolvent". Section 1-201.

"Issuer". Section 5-103.

"Person". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Letters of Credit and Credit Cards § 18.
Insolvency of bank issuing letter before payment of draft, rights and remedies of parties to letter of credit or draft issued thereunder, 80 A.L.R. 803.
9 C.J.S. Banks and Banking §§ 178 to 183, 488 et seq.

Article 6

Bulk Transfers

§ 55-6-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code - Bulk Transfers.

History: 1953 Comp., § 50A-6-101, enacted by Laws 1961, ch. 96, § 6-101.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This article attempts to simplify and make uniform the bulk sales laws of the states that adopt this act.

2. Many states have bulk sales laws, of varying type and coverage. Their central purpose is to deal with two common forms of commercial fraud, namely:

(a) The merchant, owing debts, who sells out his stock in trade to a friend for less than it is worth, pays his creditors less than he owes them, and hopes to come back into the business through the back door some time in the future.

(b) The merchant, owing debts, who sells out his stock in trade to anyone for any price, pockets the proceeds, and disappears leaving his creditors unpaid.

3. The first is one form of fraudulent conveyance. The substantive law concerning it has been codified by the commissioners in the Uniform Fraudulent Conveyance Act. No

change in that act is proposed. The contribution of the bulk sales laws to the problem is in the requirement that creditors receive advance notice of bulk sales. Having such notice, they can investigate the price and other circumstances of the sale before it occurs, and determine then instead of later whether they should try to stop it. This is a valuable policing measure, and is continued. To be effective, it requires a longer notice than five days. This article therefore follows in this respect those laws which require a longer notice (Sections 6-105 and 6-108).

4. The second form of fraud suggested above represents the major bulk sales risk, and its prevention is the central purpose of the existing bulk sales laws and of this article. Advance notice to the seller's creditors of the impending sale is an important protection against it, since with notice the creditors can take steps to impound the proceeds if they think it necessary. In many states, typified for instance by New York, such notice is substantially the only protection which bulk sales statutes give. Other states, typified for instance by Pennsylvania, give additional protection by imposing on the buyer an obligation to ensure that the money that he pays to his indebted seller is in fact applied to pay the seller's debts. This article requires notice to creditors (Section 6-105) and if bracketed Section 6-106 is enacted it imposes the other obligation also.

5. These are the affirmative reasons for a law such as this article. The objections are chiefly delay and red tape on legitimate transactions, and the possibility of a trap for the unwary buyer. It is hard to avoid the latter danger. But to minimize both it and the former the transactions subject to the article are identified as clearly as possible and are limited to those which carry the dangers to be guarded against (Sections 6-102 and 6-103), and the sanctions are such as to permit honest and solvent buyers and sellers to put through transactions promptly without undue risk. Sections 6-104 to 6-108.

Cross references.Point 3: Sections 6-105 and 6-108.

Point 4: Sections 6-105 and 6-106.

Point 5: Sections 6-102, 6-103 and 6-104 to 6-108.

ANNOTATION

Law reviews. - For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 C.J.S. Fraudulent Conveyances § 471 et seq.

§ 55-6-102. "Bulk transfer"; transfers of equipment; enterprises subject to this article; bulk transfers subject to this article.

(1) A "bulk transfer" is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (Section 9-109 [55-9-109 NMSA 1978]) of an enterprise subject to this article.

(2) A transfer of a substantial part of the equipment (Section 9-109 [55-9-109 NMSA 1978]) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.

(3) The enterprises subject to this article are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.

(4) Except as limited by the following section all bulk transfers of goods located within this state are subject to this article.

History: 1953 Comp., § 50A-6-102, enacted by Laws 1961, ch. 96, § 6-102.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Much of the litigation under the existing laws has dealt with the kinds of businesses and the kinds of transfers covered. This section defines these matters.

2. The businesses covered are defined in Subsection (3). Notice that they do not include farming nor contracting nor professional services, nor such things as cleaning shops, barber shops, pool halls, hotels, restaurants and the like whose principal business is the sale not of merchandise but of services. While some bulk sales risk exists in the excluded businesses, they have in common the fact that unsecured credit is not commonly extended on the faith of a stock of merchandise.

3. The transfers included are of "materials, supplies, merchandise or other inventory" that is, of goods. Transfers of investment securities are not covered by the article, nor are transfers of money, accounts receivable, chattel paper, contract rights, negotiable instruments nor things in action generally. Such transfers are dealt with in other articles, and are not believed to carry any major bulk sales risk.

4. The kinds of transfers covered are identified in Paragraph (1). They are believed to be those that carry the major bulk sales risks. They are further limited by the section following.

Cross references.Point 3: Articles 3, 4, 8 and 9.

Point 4: Section 6-103.

ANNOTATION

Sale of equipment in connection with bulk transfer. - Under subsection (2) of this section, the sale of equipment occurs in connection with a bulk transfer of inventory, and notice to creditors is required, if and only if the purchaser of the equipment has reason to know that a substantial part of the seller's inventory has been or will be sold in a reasonably contemporaneous transaction. Republic Steel Corp. v. Canyon Culvert Co., 104 N.M. 396, 722 P.2d 647 (1986).

The determination whether equipment is transferred "in connection with" a bulk transfer of inventory should logically be made from the buyer's point of view as of the date that negotiations are completed. If, at that time, the buyer has not purchased or agreed to purchase a major part of the seller's inventory and has not been alerted to the likelihood of such a concurrent sale, the buyer has no reason to know or to believe that the transfer of the seller's equipment is being made "in connection with" a bulk transfer of inventory. Republic Steel Corp. v. Canyon Culvert Co., 104 N.M. 396, 722 P.2d 647 (1986).

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances § 238 et seq.; 67 Am. Jur. 2d Sales §§ 94, 452.
Rights between parties to sale in violation of Bulk Sales Law, 5 A.L.R. 1517.
Branch or department of business, sale of entire stock of as within Bulk Sales Law, 33 A.L.R. 62.
Claim of public for taxes as within protection of Bulk Sales Law, 41 A.L.R. 973.
Right of creditor to judgment for value of goods against transferee in violation of Bulk Sales Law, 41 A.L.R. 1478; 61 A.L.R. 364.
Sale to one already having interest in property as within Bulk Sales Law, 51 A.L.R. 403.
Presumption of fraud under Bulk Sales Law as prima facie or conclusive, 75 A.L.R. 674.
Subrogation of purchaser at sale contrary to Bulk Sales Law to rights of creditors, 80 A.L.R. 712.
Omission of name of creditor from list of creditors which seller is required by Bulk Sales Law to furnish to purchaser, as affecting rights and remedies under that law, 83 A.L.R. 1140.
Character or class of creditors within contemplation of Bulk Sales Law, 84 A.L.R. 1406; 102 A.L.R. 565; 85 A.L.R.2d 1211.
Applicability of Bulk Sales Law to transfer to corporation or partnership organized to take over a business, 96 A.L.R. 1213.
Status of transferee or person whom he represents, as a creditor, or his right to preference as such, as affected by transfer of property contrary to Bulk Sales Law, 102

A.L.R. 686.
Fixtures as within contemplation of Bulk Sales or Bulk Mortgage Law, 118 A.L.R. 847.
Business or sellers subject to bulk sales statute, 168 A.L.R. 735.
Type of property subject to bulk sales statutes, 168 A.L.R. 762.
Defense to attack on sale in bulk on ground of violation of Bulk Sales Law, 15 A.L.R.2d 937.
Stockholders of corporation which transfers its assets as creditors within Bulk Sales Law, 16 A.L.R.2d 1350.
Right of purchaser to decline performance of contract for sale of business or goods because of seller's failure to comply with Bulk Sales Law, 24 A.L.R.2d 1030.
Sales of "off season" or "obsolete" merchandise as within scope of Bulk Sales Law, 36 A.L.R.2d 1141.
Return of merchandise to original seller in satisfaction of purchase price as transfer violating Bulk Sales Law, 59 A.L.R.2d 1115.
Construction and effect of U.C.C. Article 6, dealing with transfers in bulk, 47 A.L.R.3d 1114.
37 C.J.S. Fraudulent Conveyances § 479 et seq.

§ 55-6-103. Transfers excepted from this article.

The following transfers are not subject to this article:

(1) those made to give security for the performance of an obligation;

(2) general assignments for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;

(3) transfers in settlement or realization of a lien or other security interests;

(4) sales by executors, administrators, receivers, trustees in bankruptcy or any public officer under judicial process;

(5) sales made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation and of which notice is sent to the creditors of the corporation pursuant to order of the court or administrative agency;

(6) transfers to a person maintaining a known place of business in this state who becomes bound to pay the debts of the transferor in full and gives public notice of the fact, and who is solvent after becoming so bound;

(7) a transfer to a new business enterprise organized to take over and continue the business, if public notice of the transaction is given and the new enterprise assumes the debts of the transferor and he receives nothing from the transaction except an interest in the new enterprise junior to the claims of creditors; and

(8) transfers of property which is exempt from execution.

Public notice under Subsection (6) or Subsection (7) may be given by publishing once a week for two consecutive weeks in a newspaper of general circulation where the transferor had its principal place of business in this state an advertisement including the names and addresses of the transferor and transferee and the effective date of the transfer.

History: 1953 Comp., § 50A-6-103, enacted by Laws 1961, ch. 96, § 6-103; 1967, ch. 186, § 14.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The section defines the transfers which although within the general definition of the previous section ought not to be subjected to the requirements of this article.

2. Some of the existing bulk sales laws cover "bulk mortgages" as well as outright sales. In this code security interests of all kinds in personal property are regulated by Article 9, Secured Transactions. Subsection (1) of this section therefore excludes all transfers for security from the operation of this article. See also Sec. 9-111.

3. The exclusions described in Subsections (2), (3), (4), (5) and (8) are believed to explain themselves.

4. Subsection (6) will exclude a great many transactions from the requirements of this article. It is believed the exclusion is justified, and that it removes many of the objections to a law of this character. The transactions excluded are outright sales, since that is the only kind of a transaction in which the transferee is likely to bind himself to pay the transferor's debts. The purpose of this article on outright sales is to give the seller's creditors a reasonable chance to collect their debts. (See Sections 6-104 to 6-108). If the buyer is willing to assume personal liability for those debts, and is himself solvent after such assumption, there is no reason to subject the transaction to the delay and red tape which this article imposes.

5. Subsection (7) deals with certain changes in the ownership of a business, as by incorporation, change of membership of a firm or transfer from a sole proprietor to a firm. The exclusion is believed to be justified within the limits stated in the subsection. Notice that in all the transactions to which the subsection applies (a) both the original debtor and the new enterprise are personally bound to pay the debts, (b) the property subject to the debts before the transfer is still subject to them and (c) the original debtor has taken nothing out of the transaction except an interest (shares in a corporation, an interest in a firm or a subordinated obligation) which is junior to the debts.

Cross references.Point 1: Section 6-102.

Point 2: Section 9-111 and Article 9 generally.

Point 4: Sections 6-104 to 6-108.

Definitional cross references."Creditor". Sections 1-201 and 6-109.

"Person". Section 1-201.

ANNOTATION

Law reviews. - For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances § 246.
37 C.J.S. Fraudulent Conveyances § 481.

§ 55-6-104. Schedule of property; list of creditors.

(1) Except as provided with respect to auction sales (Section 6-107 [55-6-107 NMSA 1978]), a bulk transfer subject to this article is ineffective against any creditor of the transferor unless:

(a) the transferee requires the transferor to furnish a list of his existing creditors prepared as stated in this section; and

(b) the parties prepare a schedule of the property transferred sufficient to identify it; and

(c) the transferee preserves the list and schedule for six months next following the transfer and permits inspection of either or both and copying therefrom at all reasonable hours by any creditor of the transferor, or files the list and schedule in the office of the secretary of state and, in addition, if the debtor has a place of business in only one county of this state, also in the office of the county clerk of such county, or, if the debtor has no place of business in this state, but resides in the state, also in the office of the county clerk of the county in which he resides.

(2) The list of creditors must be signed and sworn to or affirmed by the transferor or his agent. It must contain the names and business addresses of all creditors of the transferor, with the amounts when known, and also the names of all persons who are known to the transferor to assert claims against him even though such claims are disputed. If the transferor is the obligor of an outstanding issue of bonds, debentures or the like as to which there is an indenture trustee, the list of creditors need include only the name and address of the indenture trustee and the aggregate outstanding principal

amount of the issue.

(3) Responsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the transferee is shown to have had knowledge.

History: 1953 Comp., § 50A-6-104, enacted by Laws 1961, ch. 96, § 6-104; 1967, ch. 186, § 15.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The section describes the information that must be compiled and kept available to creditors on all bulk transfers subject to this article except those made by sale at auction. Additional requirements for particular kinds of transfers are stated in the succeeding sections (6-105 to 6-107). The section on auction sales (Section 6-108) imposes similar requirements, but on different people and with a different sanction.

2. Except for the accuracy of the list of creditors, the sanction for non-compliance with the present section is that the transfer is ineffective against creditors of the transferor. The creditors referred to are those holding claims based on transactions or events occurring before the transfer (Section 6-109). Any such creditor or creditors may therefore disregard the transfer and levy on the goods as still belonging to the transferor, or a receiver representing them can take them by whatever procedure the local law provides. But it follows also that if the debts of the transferor are paid as they mature disregard of the requirements of the section creates no liability. And a defect can always be cured by paying off the unpaid creditors.

3. The sanction for the accuracy of the list of creditors is the criminal law of the state relative to false swearing, made applicable by Subsection (2).

Cross references.Point 1: Sections 6-105 to 6-108.

Point 2: Section 6-109.

Definitional cross references."Bulk transfer". Section 6-102.

"Creditor". Sections 1-201 and 6-109.

"Party". Section 1-201.

"Person". Section 1-201.

"Signed". Section 1-201.

ANNOTATION

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances §§ 251, 270, 271, 277.
Extent of duty of transferee of bulk sale to investigate regarding seller's creditors under U.C.C. Article 6, 67 A.L.R.3d 1056.
37 C.J.S. Fraudulent Conveyances § 471 et seq.

§ 55-6-105. Notice to creditors.

In addition to the requirements of the preceding section [55-6-104 NMSA 1978], any bulk transfer subject to this article except one made by auction sale (Section 6-107 [55-6-107 NSMA 1978]) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in the manner and to the persons hereafter provided (Section 6-106 [55-6-106 NMSA 1978]).

History: 1953 Comp., § 50A-6-105, enacted by Laws 1961, ch. 96, § 6-105.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is the heart of the article. It requires notice to creditors of all bulk transfers subject to the article, except those made by auction sale. The contents of the notice, the persons to whom it must be given, and the manner of giving it are stated in Section 6-107. The section on auction sales (6-108) also calls for notice, but by a different person and with a different sanction.

2. The notice in all cases must be given ten days in advance. See Points 3 and 4 to Section 6-101.

3. The sanction for noncompliance with the section is that the transfer is ineffective against creditors. Comment 2 to Section 6-104 applies.

Cross references.Point 1: Sections 6-107 and 6-108.

Point 2: Points 3 and 4 to Section 6-101.

Point 3: Comment 2 to Section 6-104.

Definitional cross references."Bulk transfer". Section 6-102.

"Creditor". Sections 1-201 and 6-109.

ANNOTATION

Compiler's notes. - New Mexico did not adopt 6-106 of the uniform act, relating to application of the proceeds of a bulk transfer.

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances §§ 251, 270, 277.
37 C.J.S. Fraudulent Conveyances § 471 et seq.

§ 55-6-106. The notice.

(1) The notice to creditors (Section 6-105 [55-6-105 NMSA 1978]) shall state:

(a) that a bulk transfer is about to be made; and

(b) the names and business addresses of the transferor and transferee, and all other business names and addresses used by the transferor within three years last past so far as known to the transferee; and

(c) whether or not all the debts of the transferor are to be paid in full as they fall due as a result of the transaction, and if so, the address to which creditors should send their bills.

(2) If the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point then the notice shall state further:

(a) the location and general description of the property to be transferred and the

estimated total of the transferor's debts;

(b) the address where the schedule of property and list of creditors (Section 6-104 [55-6-104 NMSA 1978]) may be inspected;

(c) whether the transfer is to pay existing debts and if so the amount of such debts and to whom owing; and

(d) whether the transfer is for new consideration and if so the amount of such consideration and the time and place of payment.

(3) The notice in any case shall be delivered personally or sent by registered or certified mail to all the persons shown on the list of creditors furnished by the transferor (Section 6-104 [55-6-104 NMSA 1978]) and to all other persons who are known to the transferee to hold or assert claims against the transferor.

History: 1953 Comp., § 50A-6-106, enacted by Laws 1961, ch. 96, § 6-106; 1967, ch. 186, § 16.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section specifies the contents of the notice to be given on all the transfers covered by Section 6-105 (that is, all transfers subject to the article except those made by auction sale) and the manner in which it is to be given.

2. Under the section, if the debts of the transferor are to be paid in full as they fall due, a short form of notice is provided. This facilitates honest and solvent transactions.

3. If the transfer is by auction sale Section 6-108 applies.

4. Subsection (2) (e) is a corollary of Section 6-106 and should be omitted if that section is. See note to Section 6-106.

Cross references.Point 1: Section 6-105.

Point 3: Section 6-108.

Point 4: Note to Section 6-106.

Definitional cross references."Bulk transfer". Section 6-102.

"Creditor". Sections 1-201 and 6-109.

"Person". Section 1-201.

ANNOTATION

Law reviews. - For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances §§ 251, 270, 271.
37 C.J.S. Fraudulent Conveyances § 471 et seq.

§ 55-6-107. Auction sales; "auctioneer."

(1) A bulk transfer is subject to this article even though it is by sale at auction, but only in the manner and with the results stated in this section.

(2) The transferor shall furnish a list of his creditors and assist in the preparation of a schedule of the property to be sold, both prepared as before stated (Section 6-104 [55-6-104 NMSA 1978]).

(3) The person or persons other than the transferor who direct, control or are responsible for the auction are collectively called the "auctioneer." The auctioneer shall:

(a) receive and retain the list of creditors and prepare and retain the schedule of property for the period stated in this article (Section 6-104 [55-6-104 NMSA 1978]); and

(b) give notice of the auction personally or by registered or certified mail at least ten days before it occurs to all persons shown on the list of creditors and to all other persons who are known to him to hold or assert claims against the transferor.

(4) Failure of the auctioneer to perform any of these duties does not affect the validity of the sale or the title of the purchasers, but if the auctioneer knows that the auction constitutes a bulk transfer such failure renders the auctioneer liable to the creditors of the transferor as a class for the sums owing to them from the transferor up to but not exceeding the net proceeds of the auction. If the auctioneer consists of several persons their liability is joint and several.

History: 1953 Comp., § 50A-6-107, enacted by Laws 1961, ch. 96, § 6-107; 1967, ch. 186, § 17.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The section is intended to make appropriate application of the requirements of this article to auction sales. It is clear that the provisions of the four previous sections in their literal form cannot be applied directly to an auction, since neither the price nor the identity of the purchaser or purchasers can be known until the sale occurs. But it is equally clear that if auctions were excluded entirely from the transfers covered by this article the way would be open to a debtor to carry out a bulk transfer of his property without notice to his creditors and without any duty upon anyone to see to the application of the proceeds. The section attempts to meet this situation by imposing the obligations stated in the section upon the persons there described.

2. Since the obligation to give advance notice, etc., cannot rest upon bidders at an auction it is clear that the sale must be effective so far as they are concerned whether or not the section is complied with. Subsection (4) therefore states a sanction which does not affect the purchasers. Notice that the sanction applies only "if the auctioneer knows that the auction constitutes a bulk transfer." No doubt in some cases, as for instance when goods are simply received on consignment for sale, he may not know.

3. Subsection (3) (c) is a corollary of Section 6-106 and should be omitted if that section is. See note to that section.

Cross references.Point 1: Sections 6-104 to 6-107.

Point 2: Sections 6-104 to 6-107.

Point 3: Section 6-106 and note thereto.

Definitional cross references."Bulk transfer". Section 6-102.

"Creditor". Sections 1-201 and 6-109.

"Person". Section 1-201.

"Purchaser". Section 1-201.

ANNOTATION

Law reviews. - For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances §§ 251, 271.
37 C.J.S. Fraudulent Conveyances §§ 471 et seq., 481.

§ 55-6-108. What creditors protected.

The creditors of the transferor mentioned in this article are those holding claims based on transactions or events occurring before the bulk transfer, but creditors who become such after notice to creditors is given (Sections 6-105 and 6-106 [55-6-105 and 55-6-106 NMSA 1978]) are not entitled to notice.

History: 1953 Comp., § 50A-6-108, enacted by Laws 1961, ch. 96, § 6-108.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) identifies the creditors who may have rights under the various provisions of this article. The claims referred to of course include unliquidated claims.

2. Subsection (2) gives the transferee or auctioneer appropriate credit for honest payments to particular creditors. If Section 6-106 is omitted this subsection should be also. See note to that section.

Cross references.Point 1: Sections 6-104 to 6-108.

Point 2: Section 6-106 and note thereto.

Definitional cross references."Auctioneer". Section 6-108.

"Bulk transfer". Section 6-102.

"Creditor". Section 1-201.

"Good faith". Section 1-201.

ANNOTATION

Law reviews. - For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances §§ 270, 271.
37 C.J.S. Fraudulent Conveyances § 483 et seq.

§ 55-6-109. Subsequent transfers.

When the title of a transferee to property is subject to a defect by reason of his noncompliance with the requirements of this article, then:

(1) a purchaser of any of such property from such transferee who pays no value or who takes with notice of such noncompliance takes subject to such defect; but

(2) a purchaser for value in good faith and without such notice takes free of such defect.

History: 1953 Comp., § 50A-6-109, enacted by Laws 1961, ch. 96, § 6-109.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The section deals with subsequent transfers by the transferee.

2. The second transfer may of course itself be a "bulk transfer" subject to this article. Whether it is or not will depend on its own character under Sections 6-102 and 6-103.

Cross references.Point 2: Sections 6-102 and 6-103.

Definitional cross references."Good faith". Section 1-201.

"Notice". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances § 275.
37 C.J.S. Fraudulent Conveyances § 486.

§ 55-6-110. Limitation of actions and levies.

No action under this article shall be brought nor levy made more than six months after the date on which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brought or levies made within six months after its discovery.

History: 1953 Comp., § 50A-6-110, enacted by Laws 1961, ch. 96, § 6-110.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This article imposes unusual obligations on buyers of property. A short statute of limitations is therefore appropriate.

2. The main sanction for noncompliance with the article is that the transfer "is ineffective against any creditor of the transferor." Sections 6-104 and 6-105. This means, e.g., that a judgment creditor of the transferor may levy execution on the property. See Comment 2 to Section 6-104.

In such a case, which may be expected to be frequent, no "action under this article" will be necessary. The action will have been brought and prosecuted to judgment on whatever the claim was. The only thing done "under this article" will be the levy and resulting sale.

The short statute of limitations is therefore made applicable to levies as well as actions. "Levy," which is not a defined term in the code, should be read broadly as including not only levies of execution proper but also attachment, garnishment, trustee process, receivership or whatever proceeding, under the state's practice, is used to apply a debtor's property to payment of his debts.

Definitional cross reference."Action". Section 1-201.

ANNOTATION

Failure to provide bulk sales notice as "concealment". - See Republic Steel Corp. v. Canyon Culvert Co., 104 N.M. 396, 722 P.2d 647 (1986).

Law reviews. - For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances § 277.
What statute of limitations governs creditor's action against purchaser under Bulk Sales Law, 61 A.L.R.2d 935.
37 C.J.S. Fraudulent Conveyances § 496; 54 C.J.S. Limitation of Actions § 87 et seq.

Article 7

Warehouse Receipts, Bills of Lading and Other Documents of Title

Part 1

GENERAL

Sec.
55-7-101. Short title.

Part 2

WAREHOUSE RECEIPTS; SPECIAL PROVISIONS

Part 3

BILLS OF LADING; SPECIAL PROVISIONS

Part 4

WAREHOUSE RECEIPTS AND BILLS OF LADING; GENERAL OBLIGATIONS

Part 5

WAREHOUSE RECEIPTS AND BILLS OF LADING; NEGOTIATION AND TRANSFER

Part 6

WAREHOUSE RECEIPTS AND BILLS OF LADING; MISCELLANEOUS PROVISIONS

Part 7

WAREHOUSE RECEIPTS; SPECIAL PENALTY PROVISIONS

Part 8

BILLS OF LADING; SPECIAL PENALTY PROVISIONS

Part 1

GENERAL

§ 55-7-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code - Documents of Title.

History: 1953 Comp., § 50A-7-101, enacted by Laws 1961, ch. 96, § 7-101.

OFFICIAL COMMENT

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 1 et seq.; 78 Am. Jur. 2d Warehouses § 1 et seq.
Construction and effect of U.C.C., art. 7, dealing with warehouse receipts, bills of lading and other documents of title, 21 A.L.R.3d 1339.
13 C.J.S. Carriers § 128; 80 C.J.S. Shipping §§ 111 to 114; 93 C.J.S. Warehousemen and Safe Depositaries § 1 et seq.

§ 55-7-102. Definitions and index of definitions.

(1) In this article, unless the context otherwise requires:

(a) "bailee" means the person who by a warehouse receipt, bill of lading or other document of title acknowledges possession of goods and contracts to deliver them;

(b) "consignee" means the person named in a bill to whom or to whose order the bill promises delivery;

(c) "consignor" means the person named in a bill as the person from whom the goods have been received for shipment;

(d) "delivery order" means a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary course of business issues warehouse

receipts or bills of lading;

(e) "document" means document of title as defined in the general definitions in Article 1 (Section 1-201 [55-1-201 NMSA 1978]);

(f) "goods" means all things which are treated as movable for the purposes of a contract of storage or transportation;

(g) "issuer" means a bailee who issues a document except that in relation to an unaccepted delivery order it means the person who orders the possessor of goods to deliver. Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions;

(h) "warehouseman" is a person engaged in the business of storing goods for hire.

(2) Other definitions applying to this article or to specified parts thereof, and the sections in which they appear are:

"duly negotiate." Section 7-501 [55-7-501 NMSA 1978];

"person entitled under the document." Section 7-403(4) [55-7-403(4) NMSA 1978].

(3) Definitions in other articles applying to this article and the sections in which they appear are:

"contract for sale." Section 2-106 [55-2-106 NMSA 1978];

"overseas." Section 2-323 [55-2-323 NMSA 1978];

"receipt" of goods. Section 2-103 [55-2-103 NMSA 1978].

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

History: 1953 Comp., § 50A-7-102, enacted by Laws 1961, ch. 96, § 7-102.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Sections 1 and 53, Uniform Bills of Lading Act.

Changes. Applicable definitions from the uniform acts have been consolidated and revised and definition of delivery order is new.

Purposes of changes and new matter.1. "Bailee" was not defined in the old uniform acts. It is used in this article as a blanket term to designate carriers, warehousemen and others who normally issue documents of title on the basis of goods which they have received. The definition does not, however, require actual possession of the goods. If a bailee acknowledges possession when he does not have it he is bound by sections of this article which declare the "bailee's" obligations. (See definition of "Issuer" in this section and Sections 7-203 and 7-301 on liability in case of non-receipt.)

2. The definition of warehouse receipt contained in the general definitions section of this act (Section 1-201) eliminates the requirement of the Uniform Warehouse Receipts Act that the issuing warehouseman be "lawfully engaged" in business. The warehouseman's compliance with applicable state regulations such as the filing of a bond has no bearing on the substantive issues dealt with in this article. Certainly the issuer's violations of law should not diminish his responsibility on documents he has put in commercial circulation. The Uniform Warehouse Receipts Act requirement that the warehouseman be engaged "for profit" has also been eliminated in view of the existence of state operated and co-operative warehouses. But it is still essential that the business be storing goods "for hire" (Section 1-201 and this section). A person does not become a warehouseman by storing his own goods.

3. Delivery orders, which were included without qualification in the Uniform Sales Act definition of document of title, must be treated differently in this consolidation of provisions from the three uniform acts. When a delivery order has been accepted by the bailee it is for practical purposes indistinguishable from a warehouse receipt. Prior to such acceptance there is no basis for imposing obligations on the bailee other than the ordinary obligation of contract which the bailee may have assumed to the depositor of the goods.

Cross references.Point 1: Section 7-203 and 7-301.

Point 2: Sections 1-201 and 7-203.

See general comment to document of title in Section 1-201.

Definitional cross references."Bill of lading". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Receipt of goods". Section 2-103.

"Right". Section 1-201.

"Warehouse receipt". Section 1-201.

"Written". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 39, 49; 78 Am. Jur. 2d Warehouses §§ 2, 41, 52.
13 C.J.S. Carriers § 128; 80 C.J.S. Shipping §§ 111 to 114; 82 C.J.S. Statutes § 315; 93 C.J.S. Warehousemen and Safe Depositaries §§ 1, 16.

§ 55-7-103. Relation of article to treaty, statute, tariff, classification or regulation.

To the extent that any treaty or statute of the United States, regulatory statute of this state or tariff, classification or regulation filed or issued pursuant thereto is applicable, the provisions of this article are subject thereto.

History: 1953 Comp., § 50A-7-103, enacted by Laws 1961, ch. 96, § 7-103.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. To make clear what would of course be true without the section, that applicable federal law is paramount.

2. To make clear also that

regulatory state statutes (such as those fixing or authorizing a commission to fix rates and prescribe services, authorizing different charges for goods of different values and limiting liability for loss to the declared value on which the charge was based) are not affected by the article and are controlling on the matters which they cover. Notice that the reference is not only to such statutes, but to tariffs, classifications and regulations filed or issued pursuant to them.

Cross references.Sections 7-201, 7-202, 7-204, 7-206, 7-309, 7-401 and 7-403.

Definitional cross reference."Bill of lading". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 264; 15A Am. Jur. 2d Commercial Code §§ 38, 43; 78 Am. Jur. 2d Warehouses § 1.
Relation of treaty to state and federal law, 4 A.L.R. 1377; 134 A.L.R. 882.
Jurisdiction of state courts in relation to interstate shipments, 64 A.L.R. 333.
82 C.J.S. Statutes § 7; 87 C.J.S. Treaties § 19.

§ 55-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading or other document of title.

(1) A warehouse receipt, bill of lading or other document of title is negotiable:

(a) if by its terms the goods are to be delivered to bearer or to the order of a named person; or

(b) where recognized in overseas trade, if it runs to a named person or assigns.

(2) Any other document is nonnegotiable. A bill of lading in which it is stated that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person.

History: 1953 Comp., § 50A-7-104, enacted by Laws 1961, ch. 96, § 7-104.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 27 and 76, Uniform Sales Act; Sections 2, 3, 4 and 5, Uniform Warehouse Receipts Act; Sections 2, 3, 4, 5 and 53, Uniform Bills of Lading Act.

Changes. Consolidated and rewritten.

Purposes of changes.This article deals with a class of commercial paper representing commodities in storage or transportation. This "commodity paper" is to be distinguished from what might be called "money paper" dealt with in the article of this act on commercial paper (Article 3) and "investment paper" dealt with in the article of this act on investment securities (Article 8). The class of "commodity paper" is designated "document of title" following the terminology of the Uniform Sales Act Section 76. Section 1-201. The distinctions between negotiable and nonnegotiable documents in this section make the most important subclassification employed in the article, in that the holder of negotiable documents may acquire more rights than his transferor had (See Section 7-502).

A document of title is negotiable only if it satisfies this section. "Deliverable on proper

indorsement and surrender of this receipt" will not render a document negotiable. Bailees often include such provisions as a means of insuring return of nonnegotiable receipts for record purposes. Such language may be regarded as insistence by the bailee upon a particular kind of receipt in connection with delivery of the goods. Subsections (1) (a) and (2) make it clear that a document is not negotiable which provides for delivery to order or bearer only if written instructions to that effect are given by a named person.

Cross reference.Section 7-502.

Definitional cross references."Bearer". Section 1-201.

"Bill of lading". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Overseas". Section 2-323.

"Person". Section 1-201.

"Warehouse receipt". Section 1-201.

ANNOTATION

Law reviews. - For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 8, 11, 47; 13 Am. Jur. 2d Carriers § 265; 15A Am. Jur. 2d Commercial Code §§ 56, 57, 65; 68 Am. Jur. 2d Secured Transactions § 167; 78 Am. Jur. 2d Warehouses § 59.
Character of bill of lading contemplated by a guaranty of payment of a draft with bill of lading attached, 13 A.L.R. 166.
Provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped, 25 A.L.R. 770.
Jurisdiction of state courts in relation to interstate shipments, 64 A.L.R. 333.
Applicability of provision in receipt limiting liability, to conversion of property by warehouseman, 99 A.L.R. 266.
Stipulation in warehouseman's receipt fixing valuation of property as basis of responsibility, validity and applicability, 142 A.L.R. 776.
Necessity of bringing to bailor's attention provision in warehouse receipt limiting liability of warehouseman, 160 A.L.R. 1112.
Warehouseman's liability for loss occasioned by failure to issue proper receipt to depositor, 168 A.L.R. 945.
Construction and effect of U.C.C., art. 7, dealing with warehouse receipts, bills of lading

and other documents of title, 21 A.L.R.3d 1339.
13 C.J.S. Carriers § 128; 80 C.J.S. Shipping §§ 111 to 114; 93 C.J.S. Warehousemen and Safe Depositaries § 25.

§ 55-7-105. Construction against negative implication.

The omission from either Part 2 or Part 3 of this article of a provision corresponding to a provision made in the other part does not imply that a corresponding rule of law is not applicable.

History: 1953 Comp., § 50A-7-105, enacted by Laws 1961, ch. 96, § 7-105.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To avoid any impairment, for example, of any common law right of indemnity a warehouseman may have corresponding to Section 7-301(5), or of any contractual security interest a carrier might have corresponding to Section 7-209(2).

Cross references.Parts 2 and 3 of Article 7.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 C.J.S. Statutes §§ 366, 385.

Part 2

WAREHOUSE RECEIPTS; SPECIAL PROVISIONS

§ 55-7-201. Who may issue a warehouse receipt; storage under government bond.

(1) A warehouse receipt may be issued by any warehouseman.

(2) Where goods including distilled spirits and agricultural commodities are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods has like effect as a warehouse receipt even though issued by a person who is the owner of the goods and is not a warehouseman.

History: 1953 Comp., § 50A-7-201, enacted by Laws 1961, ch. 96, § 7-201.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 1, Uniform Warehouse Receipts Act.

Changes. Provision added to cover storage under government bond or under licensing statute.

Purposes.It is not intended by reenactment of Subsection (1) to repeal any provisions of special licensing or other statutes regulating who may become a warehouseman. Subsection (2) covers receipts issued by the owner for whiskey or other goods stored in bonded warehouses under such statutes as 26 U.S.C. Chapter 26. Limitations on the transfer of the receipts and criminal sanctions for violation of such limitations are not impaired. Section 7-103. Compare Section 7-401(d) on the liability of the issuer in such cases.

Cross references.Sections 7-103 and 7-401.

Definitional cross references."Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 51; 68 Am. Jur. 2d Secured Transactions § 80; 78 Am. Jur. 2d Warehouses §§ 42, 44.
Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 A.L.R. 949.
Relationship of bailor and bailee as between owner of goods in bonded warehouse and proprietor of warehouse, 77 A.L.R. 1502.
Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied with statutory conditions necessary to become public warehouseman, 108 A.L.R. 928.
Statutory warehousing as determined by character of property stored, 132 A.L.R. 532.
Validity of field warehousing, 133 A.L.R. 209.
Estoppel of owner who permits another to have possession of certificates or other evidences of title, of personal property endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to deal with, the property, 151 A.L.R. 690.
Warehouseman's liability for loss occasioned by failure to issue a proper receipt to depositor, 168 A.L.R. 945.
93 C.J.S. Warehousemen and Safe Depositaries § 17.

§ 55-7-202. Form of warehouse receipt; essential terms; optional terms.

(1) A warehouse receipt need not be in any particular form.

(2) Unless a warehouse receipt embodies within its written or printed terms each of the following, the warehouseman is liable for damages caused by the omission to a person injured thereby:

(a) the location of the warehouse where the goods are stored;

(b) the date of issue of the receipt;

(c) the consecutive number of the receipt;

(d) a statement whether the goods received will be delivered to the bearer, to a specified person or to a specified person or his order;

(e) the rate of storage and handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a nonnegotiable receipt;

(f) a description of the goods or of the packages containing them;

(g) the signature of the warehouseman, which may be made by his authorized agent;

(h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and

(i) a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien or security interest (Section 7-209 [55-7-209 NMSA 1978]). If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

(3) A warehouseman may insert in his receipt any other terms which are not contrary to the provisions of this act and do not impair his obligation of delivery (Section 7-403 [55-7-403 NMSA 1978]) or his duty of care (Section 7-204 [55-7-204 NMSA 1978]). Any contrary provisions shall be ineffective.

History: 1953 Comp., § 50A-7-202, enacted by Laws 1961, ch. 96, § 7-202.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 2, Uniform Warehouse Receipts Act.

Changes. Exemption for field warehouse receipts added in Subsection (2) (e).

Purposes.To make clear that the formal requirements of the Uniform Warehouse Receipts Act are continued but not to displace particular legislation requiring other or

different specifications of form, see Section 7-103. This section does not require that a receipt be issued but states formal requirements for those which are issued.

Cross references.Section 7-103.

Definitional cross references."Bearer". Section 1-201.

"Delivery". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Security interest". Section 1-201.

"Term". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

"Written". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 78 Am. Jur. 2d Warehouses § 44.
Provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped, 25 A.L.R. 770.
Right of purchaser of receipt against warehouseman, 38 A.L.R. 1205.
"Warehouse purchase receipt" as bailment or contract of sale, 91 A.L.R. 907.
Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 A.L.R. 266.
Validity as against third persons of sale or pledge of goods, or receipts issued for goods, retained in warehouse on premises of seller or pledgor, 133 A.L.R. 209.
Storage contract as a bailment of chattels or lease of place where chattels are stored, 138 A.L.R. 1137.
Necessity of bringing to bailor's attention provision in warehouse receipt limiting liability of warehouseman, 160 A.L.R. 1112.
Warehouseman's liability for loss occasioned by failure to issue proper receipt to depositor, 168 A.L.R. 945.
93 C.J.S. Warehousemen and Safe Depositaries § 20.

§ 55-7-203. Liability for nonreceipt or misdescription.

A party to or purchaser for value in good faith of a document of title other than a bill of

lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that the document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity or condition, or the receipt or description is qualified by "contents, condition and quality unknown," "said to contain" or the like, if such indication be true or the party or purchaser otherwise has notice.

History: 1953 Comp., § 50A-7-203, enacted by Laws 1961, ch. 96, § 7-203.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 20, Uniform Warehouse Receipts Act.

Changes. New section confined to problem of non-receipt and misdescription.

Purposes of changes and new matter.This section is a simplified restatement of existing law as to the method by which a bailee may avoid responsibility for the accuracy of descriptions which are made by or in reliance upon information furnished by the depositor. The issuer is liable on documents issued by an agent, contrary to instructions of his principal, without receiving goods. No disclaimer of the latter liability is permitted.

Cross references.Sections 7-301 and 7-203.

Definitional cross references."Conspicuous". Section 1-201.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Goods". Section 7-102.

"Issuer". Section 7-102.

"Notice". Section 1-201.

"Party". Section 1-201.

"Purchaser". Section 1-201.

"Receipt of goods". Section 2-103.

"Value". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 50, 55; 78 Am. Jur. 2d Warehouses § 48.
Right of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.
Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 A.L.R. 266.

§ 55-7-204. Duty of care; contractual limitation of warehouseman's liability.

(1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

(2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any. No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff.

History: 1953 Comp., § 50A-7-204, enacted by Laws 1961, ch. 96, § 7-204.

Compiler's notes. - New Mexico did not enact a Subsection (4) to this section which would have placed a higher standard of care upon the warehouseman or invalidated limitations upon that duty allowed under Article 7.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 3 and 21, Uniform Warehouse Receipts Act.

Changes. Consolidated and rewritten and material on limitation of remedy is new.

Purposes of changes.The old uniform acts provided that receipts could not contain terms impairing the obligation of reasonable care. Whether this is violated by a stipulation that in case of loss the bailee's liability is limited to stated amounts has been much controverted. The section is intended to eliminate that controversy by setting forth

the conditions under which liability is so limited. However, as Subsection (4) makes clear, the states as well as the federal government may supplement this section with more rigid standards of responsibility for some or all bailees.

Cross reference.Section 7-103.

Definitional cross references."Action". Section 1-201.

"Agreed". Section 1-201.

"Goods". Section 7-102.

"Reasonable time". Section 1-204.

"Sign". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

"Written". Section 1-201.

ANNOTATION

Burden of proving ordinary care upon warehouseman. - Plain and unambiguous language of the law has changed common-law rule so as to place the burden upon the warehouseman to show that in the exercise of ordinary care, he is unable to redeliver the goods bailed to him. Denning Whse. Co. v. Widener, 172 F.2d 910, 13 A.L.R.2d 669 (10th Cir. 1949) (decided under prior law).

Not enough to show fire of unknown origin. - Establishment of fact that broomcorn in warehouseman's custody was destroyed by fire of unknown origin does not, without more, sustain the burden of showing due care with respect to it. Denning Whse. Co. v. Widener, 172 F.2d 910, 13 A.L.R.2d 669 (10th Cir. 1949) (decided under prior law).

And evidence allowable in damage suit. - In damage suit to recover for broomcorn in custody of warehouseman, evidence to effect that debris had been allowed to collect beneath platform or floor on which broomcorn was stored, and concerning smoking in and around the place were properly submitted to the jury and its findings were held binding on review. Denning Whse. Co. v. Widener, 172 F.2d 910, 13 A.L.R.2d 669 (10th Cir. 1949) (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 51; 78 Am. Jur. 2d Warehouses §§ 44, 139, 140, 188, 234, 248, 251.
Liability of bailee for loss of or injury to goods kept at a place other than that originally intended, 12 A.L.R. 1322; 17 A.L.R. 979.
Liability of warehouseman for damage to or destruction of property by fire, 16 A.L.R. 280.
Liability of warehouseman for theft of property in his care, 26 A.L.R. 223; 48 A.L.R. 378.
Warehouseman's bond as covering warehouse receipts issued by warehouse to itself or for its own property, 61 A.L.R. 331.
Right of owner to sue on insurance policy taken out by warehouseman, 61 A.L.R. 720.
Interest on damages for warehouseman's refusal to deliver property, or for injury to, or loss of, property, 96 A.L.R. 18; 36 A.L.R.2d 337.
Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 A.L.R. 266.
Validity and applicability of stipulation in warehouseman's receipt fixing valuation of property as basis of responsibility, 142 A.L.R. 776.
Storage charges collectible by warehousemen guilty of negligence causing injury to, or destruction of, goods of a perishable nature, 32 A.L.R.2d 918.
Liability of warehouseman for injury to, or destruction of, stored goods from floods, heavy rains or the like, 60 A.L.R.2d 1097.
Liability of warehouseman for deterioration of goods due to improper temperature, 92 A.L.R.2d 1298.
8 C.J.S. Bailments § 40; 93 C.J.S. Warehousemen and Safe Depositaries § 27.

§ 55-7-205. Title under warehouse receipt defeated in certain cases.

A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated.

History: 1953 Comp., § 50A-7-205, enacted by Laws 1961, ch. 96, § 7-205.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The typical case covered by this section is that of the warehouseman-dealer in grain, and the substantive question at issue is whether in case the warehouseman becomes insolvent the receipt holders shall be able to trace and recover grain shipped to farmers and other purchasers from the elevator. This was possible under the old acts, although courts were eager to find estoppels to prevent it. The practical difficulty of tracing fungible grain means that the preservation of this theoretical right adds little to the commercial acceptability of negotiable grain receipts, which really circulate on the credit of the warehouseman. Moreover, on default of the warehouseman, the receipt holders at least share in what grain remains, whereas retaking the grain from a good

faith cash purchaser reduces him completely to the status of general creditor in a situation where there was very little he could do to guard against the loss. Compare 15 U.S.C. Section 714p, enacted in 1955.

Cross references.Sections 2-403 and 9-307.

Definitional cross references."Buyer in ordinary course of business". Section 1-201.

"Delivery". Section 1-201.

"Duly negotiate". Section 7-501.

"Fungible" goods. Section 1-201.

"Goods". Section 7-102.

"Value". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 67; 67 Am. Jur. 2d Sales §§ 387 et seq., 448 et seq.; 78 Am. Jur. 2d Warehouses § 76.
Replevin for an undivided share in or undivided quantity of a larger mass, 26 A.L.R. 1015.
15A C.J.S. Confusion of Goods § 1; 93 C.J.S. Warehousemen and Safe Depositaries §§ 14, 39.

§ 55-7-206. Termination of storage at warehouseman's option.

(1) A warehouseman may on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than thirty days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of the section on enforcement of a warehouseman's lien (Section 7-210 [55-7-210 NMSA 1978]).

(2) If a warehouseman in good faith believes that the goods are about to deteriorate or decline in value to less than the amount of his lien within the time prescribed in Subsection (1) for notification, advertisement and sale, the warehouseman may specify

in the notification any reasonable shorter time for removal of the goods and in case the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting.

(3) If as a result of a quality or condition of the goods of which the warehouseman had no notice at the time of deposit the goods are a hazard to other property or to the warehouse or to persons, the warehouseman may sell the goods at public or private sale without advertisement on reasonable notification to all persons known to claim an interest in the goods. If the warehouseman after a reasonable effort is unable to sell the goods he may dispose of them in any lawful manner and shall incur no liability by reason of such disposition.

(4) The warehouseman must deliver the goods to any person entitled to them under this article upon due demand made at any time prior to sale or other disposition under this section.

(5) The warehouseman may satisfy his lien from the proceeds of any sale or disposition under this section but must hold the balance for delivery on the demand of any person to whom he would have been bound to deliver the goods.

History: 1953 Comp., § 50A-7-206, enacted by Laws 1961, ch. 96, § 7-206.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 34, Uniform Warehouse Receipts Act.

Changes. Rewritten and expanded to define the warehouseman's right to terminate the storage not only where the goods are perishable or hazardous as in Uniform Warehouse Receipts Act, Section 34, but also for any other reason including decline in value of the goods imperilling the warehouseman's security for charges.

Purposes of changes.1. Most warehousing is for an indefinite term, the bailor being entitled to delivery on reasonable demand. It is necessary to define the warehouseman's power to terminate the bailment, since it would be commercially intolerable to allow warehousemen to order removal of the goods on short notice. The thirty day period provided where the document does not carry its own period of termination corresponds to commercial practice of computing rates on a monthly basis. The right to terminate under Subsection (1) includes a right to require payment of "any charges", but does not depend on the existence of unpaid charges.

2. In permitting expeditious disposition of perishable and hazardous goods Uniform Warehouse Receipts Act, Section 34, made no distinction between cases where the warehouseman knowingly undertook to store such goods and cases where the goods were discovered to be of that character subsequent to storage. The former situation presents no such emergency as justifies the summary power of removal and sale. Subsections (2) and (3) distinguish between the two situations.

3. Protection of his lien is the only interest which the warehouseman has to justify summary sale of perishable goods which are not hazardous. This same interest must be recognized when the stored goods, although not perishable, decline in market value to a point which threatens the warehouseman's security.

4. The right to order removal of stored goods is subject to provisions of the public warehousing laws of some states forbidding warehousemen from discriminating among customers. Nor does the section relieve the warehouseman of any obligation under the state laws to secure the approval of a public official before disposing of deteriorating goods. Such

regulatory statutes and the regulations under them remain in force and operative. Section 7-103.

Cross references.Sections 7-103 and 7-403.

Definitional cross references."Delivery". Section 1-201.

"Document". Section 7-102.

"Good faith". Section 1-201.

"Goods". Section 7-102.

"Notice". Section 1-201.

"Notification". Section 1-201.

"Person". Section 1-201.

"Reasonable time". Section 1-204.

"Value". Section 1-201.

"Warehouseman". Section 7-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 78 Am. Jur. 2d Warehouses §§ 213, 226, 227.
Liability of warehouseman and of surety on bond in respect of collection and remittance of proceeds of sale of merchandise, 121 A.L.R. 1155.
Liability of warehouseman for deterioration of goods due to improper temperature, 92 A.L.R.2d 1298.
93 C.J.S. Warehousemen and Safe Depositaries §§ 12, 47.

§ 55-7-207. Goods must be kept separate; fungible goods.

(1) Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be commingled.

(2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehouseman is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated.

History: 1953 Comp., § 50A-7-207, enacted by Laws 1961, ch. 96, § 7-207.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 22, 23 and 24, Uniform Warehouse Receipts Act.

Changes. Consolidated and revised and holders of overissued receipts permitted to share in mass of fungible goods.

Purposes of changes.No change of substance is made other than the explicit statement that holders to whom overissued receipts have been duly negotiated shall share in a mass of fungible goods. Where individual ownership interests are merged into claims on a common fund, as is necessarily the case with fungible goods, there is no policy reason for discriminating between successive purchasers of similar claims.

Definitional cross references."Delivery". Section 1-201.

"Duly negotiate". Section 7-501.

"Fungible" goods. Section 1-201.

"Goods". Section 7-102.

"Holder". Section 1-201.

"Person". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 47; 78 Am. Jur. 2d Warehouses §§ 39, 45, 179, 181, 228.
Deposit of grain without obligation to return identical grain as a bailment or a sale, 54 A.L.R. 1166.
"Warehouse purchase receipt" as bailment or contract of sale, 91 A.L.R. 906.
Statutory warehousing as determined by character of property stored, 132 A.L.R. 532.
93 C.J.S. Warehousemen and Safe Depositaries §§ 13, 14.

§ 55-7-208. Altered warehouse receipts.

Where a blank in a negotiable warehouse receipt has been filled in without authority, a purchaser for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any receipt enforceable against the issuer according to its original tenor.

History: 1953 Comp., § 50A-7-208, enacted by Laws 1961, ch. 96, § 7-208.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 13, Uniform Warehouse Receipts Act.

Changes. Generally revised and simplified and explicit treatment of the situation where a blank in an executed document is filled without authority.

Purposes of changes.1. The execution of warehouse receipts in blank is a dangerous practice. As between the issuer and an innocent purchaser the risks should clearly fall on the former.

2. An unauthorized alteration whether made with or without fraudulent intent does not relieve the issuer of his liability on the warehouse receipt as originally executed. The unauthorized alteration itself is of course ineffective against the warehouseman.

Definitional cross references."Issuer". Section 7-102.

"Notice". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 1-201.

"Warehouse receipt". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 48, 66; 78 Am. Jur. 2d Warehouses § 50.
Rights of purchaser of forged or altered receipt as against warehouseman, 38 A.L.R. 1206.
3A C.J.S. Alteration of Instruments § 1; 93 C.J.S. Warehousemen and Safe Depositaries § 27.

§ 55-7-209. Lien of warehouseman.

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in Subsection (1), such as for money advanced and interest. Such a security interest is governed by the article on secured transactions (Article 9).

(3)(a) A warehouseman's lien for charges and expenses under Subsection (1) or a security interest under Subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under Section 7-503 [55-7-503 NMSA 1978].

(b) A warehouseman's lien on household goods for charges and expenses in relation to the goods under Subsection (1) is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" means furniture, furnishings and personal effects used by the depositor in a dwelling.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

History: 1953 Comp., § 50A-7-209, enacted by Laws 1961, ch. 96, § 7-209; 1969, ch. 106, § 1.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 27 to 32, Uniform Warehouse Receipts Act.

Changes. Rewritten.

Purposes of changes.1. Subsection (1) defines the warehouseman's statutory lien. A specific lien attaches automatically, without express notation on the receipt, to goods stored under a non-negotiable receipt. That lien is limited to the usual charges arising out of a storage transaction; by notation on the receipt it can be made a general lien extending to like charges in relation to other goods. The same rules apply where the receipt is negotiable, except that as against a holder by due negotiation the lien is limited to the amount or rate specified on the receipt, or, if none is specified, to a reasonable charge for storage of the specific goods after the date of the receipt.

2. Subsection (2) provides for a security interest based upon agreement. Such a security interest arises out of relations between the parties other than bailment for storage or transportation, as where the bailee assumes the role of financer or performs a manufacturing operation, extending credit in reliance upon the goods covered by the receipt. Such a security interest is not a statutory lien. Compare Sections 9-102(2) and 9-310. It is governed in all respects by Article 9, except that Subsection (2) requires that the receipt specify a maximum amount and limits the security interest to the amount specified.

3. Subsections (1) and (2) validate the lien and security interest "against the bailor." As against third parties, Subsection (3) (a) continues the rule under the prior uniform statutory provision that to validate the lien the owner must have entrusted the goods to the depositor, and that the circumstances must be such that a pledge by the depositor to a good faith purchaser for value would have been valid. Thus the owner's interest will not be subjected to a lien or security interest arising out of a deposit of his goods by a thief. The warehouseman may be protected because of the actual, implied or apparent authority of the depositor, because of a factor's act, or because of other circumstances which would protect a bona fide pledgee, unless those circumstances are denied effect under Section 7-503. Where the third party is the holder of a security interest, the rights of the warehouseman depend on the priority given to a hypothetical bona fide pledgee by Article 9, particularly Section 9-312. Thus the special priority granted to statutory liens by Section 9-310 does not apply to liens under Subsection (1) of this section, since Subsection (3) "expressly provides otherwise" within the meaning of Section 9-310. As to household goods, however, Subsection (3) (b) makes the warehouseman's lien "for charges and expenses in relation to the goods" effective against all persons if the depositor was the legal possessor. The purpose of the exception is to permit the warehouseman to accept household goods for storage in sole reliance on the value of the goods themselves, especially in situations of family emergency.

4. It is unnecessary to state here, as in Uniform Warehouse Receipts Act 31, that a bailee with a valid lien need not deliver until the lien is satisfied. Section 7-403 provides that a person demanding delivery under a document must be prepared to satisfy the bailee's lien.

5. Where goods have been stored under a non-negotiable warehouse receipt and are sold by the person to whom the receipt has been issued, frequently the goods are not withdrawn by the new owner. The obligations of the seller of the goods in this situation are set forth in Section 2-503(4) on tender of delivery and include procurement of an acknowledgment by the bailee of the buyer's right to possession of the goods. If a new receipt is requested, such an acknowledgment can be withheld until storage charges have been paid or provided for. The statutory lien for charges on the goods sold, granted by the first sentence of Subsection (1), continues valid unless the bailee gives it up. But once a new receipt is issued to the buyer, the buyer becomes "the person on whose account the goods are held" under the second sentence of Subsection (1); unless he undertakes liability for charges in relation to other goods stored by the seller, there is no general lien against the buyer for such charges. Of course, the bailee may preserve the general lien in such a case either by an arrangement by which the buyer "is liable for" such charges, or by reserving a security interest under Subsection (2).

Cross references.Point 2: Sections 9-102(2) and 9-310.

Point 3: Sections 7-503, 9-310 and 9-312.

Point 4: Section 7-403.

Point 5: Section 2-503.

Definitional cross references."Deliver". Section 1-201.

"Document". Section 7-102.

"Goods". Section 7-102.

"Money". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Right". Section 1-201.

"Security interest". Section 1-201.

"Value". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

ANNOTATION

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 13, 29, 131; 69 Am. Jur. 2d Secured Transactions §§ 509, 511; 78 Am. Jur. 2d Warehouses §§ 116 to 121, 188.
Waiver of warehouseman's lien by filing claim against decedent's estate as an unsecured one, 2 A.L.R. 1132.
Right of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.
Warehouseman's lien on property stored by officer who had seized it under attachment or execution, 95 A.L.R. 1529.
Storage charges collectible by warehousemen guilty of negligence causing injury to, or destruction of, goods of a perishable nature, 32 A.L.R.2d 918.
93 C.J.S. Warehousemen and Safe Depositaries §§ 63, 67, 69.

§ 55-7-210. Enforcement of warehouseman's lien.

(1) Except as provided in Subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) all persons known to claim an interest in the goods must be notified;

(b) the notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified;

(c) the notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place;

(d) the sale must conform to the terms of the notification;

(e) the sale must be held at the nearest suitable place to that where the goods are held or stored;

(f) after the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either Subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the

requirements for sale under this section and in case of willful violation is liable for conversion.

History: 1953 Comp., § 50A-7-210, enacted by Laws 1961, ch. 96, § 7-210; 1967, ch. 186, § 18.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 33, Uniform Warehouse Receipts Act.

Changes. Rewritten and simplified foreclosure proceeding provided for all liens other than warehousemen's lien in non-commercial storage.

Purposes of changes.1. Subsection (1) makes "commercial reasonableness" the standard for foreclosure proceedings in all cases except non-commercial storage with a warehouseman. The latter category embraces principally storage of household goods by private owners; and for such cases the detailed provisions as to notification, publication and public sale, found in Section 33 of the Uniform Warehouse Receipts Act are retained in Subsection (2). The swifter, more flexible procedure of Subsection (1) is appropriate to commercial storage. Compare seller's power of resale on breach by buyer under the provisions of the article on sales (Section 2-706).

2. The provisions of Subsections (4) and (5) permitting the bailee to bid at public sales and confirming the title of purchasers at foreclosure sales are designed to secure more bidding and better prices.

Cross reference.Section 7-403.

Definitional cross references."Bill of lading". Section 1-201.

"Conspicuous". Section 1-201.

"Creditor". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Good faith". Section 1-201.

"Goods". Section 7-102.

"Notification". Section 1-201.

"Notifies". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Rights". Section 1-201.

"Term". Section 1-201.

"Warehouseman". Section 7-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 506; 78 Am. Jur. 2d Warehouse §§ 123 to 126, 211, 244.
Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise, 121 A.L.R. 1155.
93 C.J.S. Warehousemen and Safe Depositaries § 69.

Part 3

BILLS OF LADING; SPECIAL PROVISIONS

§ 55-7-301. Liability for nonreceipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.

(1) A consignee of a nonnegotiable bill who has given value in good faith or a holder to whom a negotiable bill has been duly negotiated relying in either case upon the description therein of the goods, or upon the date therein shown, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the document indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load and count" or the like, if such indication be true.

(2) When goods are loaded by an issuer who is a common carrier, the issuer must count the packages of goods if package freight and ascertain the kind and quantity if bulk freight. In such cases "shipper's weight, load and count" or other words indicating that the description was made by the shipper are ineffective except as to freight concealed by packages.

(3) When bulk freight is loaded by a shipper who makes available to the issuer adequate facilities for weighing such freight, an issuer who is a common carrier must ascertain the kind and quantity within a reasonable time after receiving the written

request of the shipper to do so. In such cases "shipper's weight" or other words of like purport are ineffective.

(4) The issuer may by inserting in the bill the words "shipper's weight, load and count" or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.

(5) The shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition and weight, as furnished by him; and the shipper shall indemnify the issuer against damage caused by inaccuracies in such particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

History: 1953 Comp., § 50A-7-301, enacted by Laws 1961, ch. 96, § 7-301.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 23, Uniform Bills of Lading Act.

Changes. Rewritten in part.

Purposes of changes.1. The provision as to misdating in Subsection (1) conforms to the policy of the amendment to the Federal Bills of Lading Act by 44 Stat. 1450 (1927), as amended 49 U.S.C. Section 102, after the holding in Browne v. Union Pac. R. Co., 113 Kan. 726, 216 P. 299 (1923), affirmed on other grounds 267 U.S. 255, 45 S.Ct. 315, 69 L.Ed. 601 (1925). Subsections (2) and (3) conform to the policy of the Federal Bills of Lading Act, 49 U.S.C. Sections 100, 101, and the laws of several states. See, e.g., N.Y.Pers.Prop. Law Section 209; Report of N. Y. Law Revision Commission, N.Y.Leg.Doc. (1941) No. 65(F).

2. The language of the old uniform act suggested that a carrier is ordinarily liable for damage caused by improper loading, but may relieve himself of liability by disclosing on the bill that shipper actually loaded. A more accurate statement of the law is that the carrier is not liable for losses caused by act or default of the shipper, which would include improper loading. There is some question whether under present law a carrier is liable even to a good faith purchaser of a negotiable bill for such losses, if the shipper's faulty loading in fact caused the loss. It is this doubtful liability which Subsection (4) permits the carrier to bar by disclosure of shipper's loading. There is no implication that decisions such as Modern Tool Corp. v. Pennsylvania R. Co., 100 F.Supp. 595 (D.N.J. 1951), are disapproved.

3. This section is a simplified restatement of existing law as to the method by which a bailee may avoid responsibility for the accuracy of descriptions which are made by or in reliance upon information furnished by the depositor or shipper. The issuer is liable on

documents issued by an agent, contrary to instructions of his principal, without receiving goods. No disclaimer of this liability is permitted since it is not a matter either of the care of the goods or their description.

4. The shipper's erroneous report to the carrier concerning the goods may cause damage to the carrier. Subsection (5) therefore provides appropriate indemnity.

Cross references.Sections 7-203 and 7-309.

Definitional cross references."Bill of lading". Section 1-201.

"Consignee". Section 7-102.

"Document". Section 7-102.

"Duly negotiate". Section 7-501.

"Good faith". Section 1-201.

"Goods". Section 7-102.

"Holder". Section 1-201.

"Issuer". Section 7-102.

"Notice". Section 1-201.

"Party". Section 1-201.

"Purchaser". Section 1-201.

"Receipt of goods". Section 2-103.

"Value". Section 1-201.

ANNOTATION

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers §§ 291, 292; 15A Am. Jur. 2d Commercial Code §§ 50, 51.
Provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped, 25 A.L.R.2d 770.
Rail or motor carrier of freight, liability for loss through weight deficiency of goods shipped, 39 A.L.R.2d 325.

Conclusiveness of receipt clause in bill of lading, 67 A.L.R.2d 1028.
Shipper's misdescription of goods as affecting carrier's liability for loss or damage, 1 A.L.R.3d 736.
13 C.J.S. Carriers § 128; 80 C.J.S. Shipping § 113.

§ 55-7-302. Through bills of lading and similar documents.

(1) The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by persons acting as its agents or by connecting carriers is liable to anyone entitled to recover on the document for any breach by such other persons or by a connecting carrier of its obligation under the document but to the extent that the bill covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation this liability may be varied by agreement of the parties.

(2) Where goods covered by a through bill of lading or other document embodying an undertaking to be performed in part by persons other than the issuer are received by any such person, he is subject with respect to his own performance while the goods are in his possession to the obligation of the issuer. His obligation is discharged by delivery of the goods to another such person pursuant to the document, and does not include liability for breach by any other such persons or by the issuer.

(3) The issuer of such through bill of lading or other document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document therefor, as may be evidenced by any receipt, judgment or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action brought by anyone entitled to recover on the document therefor.

History: 1953 Comp., § 50A-7-302, enacted by Laws 1961, ch. 96, § 7-302.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The purpose of this section is to subject the initial carrier under a through bill to suit for breach of the contract of carriage by any connecting carrier and to make it clear that any such connecting carrier holds the goods on terms which are defined by the document of title even though such connecting carrier did not issue the document. Since the connecting carrier does hold on the terms of the document, it must honor a proper demand for delivery or a diversion order just as the original bailee would have to. Similarly it has the benefits of the excuses for nondelivery and limitations of liability provided for the original bailee. Unlike the original bailee-issuer, the connecting carrier's responsibility is limited to the period while the goods are in its possession. The section

is patterned generally after the Interstate Commerce Act, but does not impose any obligation to issue through bills.

2. The reference to documents other than through bills looks to the possibility that multi-purpose documents may come into use, e.g., combination warehouse receipts and bills of lading.

3. Where the obligations or standards applicable to different parties bound by a document of title are different, the initial carrier's responsibility for portions of the journey not on its own lines will be determined by the standards appropriate to the connecting carrier. Thus a land carrier issuing a through bill of lading involving water carriage at a later stage will have the benefit of the water carrier's immunity from liability for negligence of its servants in navigating the vessel, where the law provides such an immunity for water carriers and the loss occurred while the goods were in the water carrier's possession.

4. Under Subsection (1) the issuer of a through bill of lading may become liable for the fault of another person. Subsection (3) gives it appropriate rights of recourse.

Definitional cross references."Agreement". Section 1-201.

"Bailee". Section 7-102.

"Bill of lading". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Goods". Section 7-102.

"Issuer". Section 7-102.

"Overseas". Section 2-323.

"Party". Section 1-201.

"Person". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 14 Am. Jur. 2d Carriers § 710.
Strike on connecting line as defense, 28 A.L.R. 503; 45 A.L.R. 919.
Initial carrier's liability for diverting shipment by connecting carrier, 61 A.L.R. 1309.
Initial carrier's liability as that of carrier or of warehouseman in respect of goods while in

its warehouse awaiting delivery to connecting carrier, 172 A.L.R. 802.
13 C.J.S. Carriers §§ 128, 401; 80 C.J.S. Shipping § 113.

§ 55-7-303. Diversion; reconsignment; change of instructions.

(1) Unless the bill of lading otherwise provides, the carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from:

(a) the holder of a negotiable bill; or

(b) the consignor on a nonnegotiable bill notwithstanding contrary instructions from the consignee; or

(c) the consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill; or

(d) the consignee on a nonnegotiable bill if he is entitled as against the consignor to dispose of them.

(2) Unless such instructions are noted on a negotiable bill of lading, a person to whom the bill is duly negotiated can hold the bailee according to the original terms.

History: 1953 Comp., § 50A-7-303, enacted by Laws 1961, ch. 96, § 7-303.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The old acts contained no reference to diversion, a very common commercial practice which defeats delivery to the consignee originally named in a bill of lading. The carrier was protected under the heading of "justified delivery" if the substituted consignee who received delivery was "a person lawfully entitled to possession of the goods." Cf. Subsection (1) (d). This in turn depended on whether the person ordering the diversion was the owner of the goods or empowered to dispose of them, which again might depend upon whether under sales law title had passed from the consignor-seller to the consignee-buyer. The carrier is plainly not in a position to decide such questions when directed by the person with whom it has contracted for transportation to change the destination of the goods in transit. Carriers may as a business matter be willing to accept instructions from consignees in which case, as under the old uniform acts, the carrier will be liable for misdelivery if the consignee was not the owner or otherwise empowered to dispose of the goods. The section imposes no duty on carriers to undertake diversion; it is of course subject to the provisions of filed tariffs. Section 7-103.

2. It should be noted that the section provides only an immunity for carriers against liability for "misdelivery." It does not, for example, defeat the title to the goods which the consignee-buyer may have acquired from the consignor-seller upon delivery of the goods to the carrier under a non-negotiable bill of lading. Thus if the carrier, upon instructions from the consignor, returns the goods to him, the consignee may recover the goods from the consignor or his insolvent estate. However, under certain circumstances, the consignee's title may be defeated by diversion of the goods in transit to a different consignee.

Cross references.Point 2: Sections 7-403 and 7-504(3).

Definitional cross references."Bailee". Section 7-102.

"Bill of lading". Section 1-201.

"Consignee". Section 7-102.

"Consignor". Section 7-102.

"Delivery". Section 1-201.

"Goods". Section 7-102.

"Holder". Section 1-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 394.
Right of shipper or consignee to divert shipment, 61 A.L.R. 1309.
Liability for damages from loss of shipper's opportunity to sell or divert goods at intermediate point because of carrier's deviation from route, 33 A.L.R.2d 145.
13 C.J.S. Carriers § 163; 80 C.J.S. Shipping § 119.

§ 55-7-304. Bills of lading in a set.

(1) Except where customary in overseas transportation, a bill of lading must not be

issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(2) Where a bill of lading is lawfully drawn in a set of parts, each of which is numbered and expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitute [constitutes] one bill.

(3) Where a bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to whom the first due negotiation is made prevails as to both the document and the goods even though any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrender of his part.

(4) Any person who negotiates or transfers a single part of a bill of lading drawn in a set is liable to holders of that part as if it were the whole set.

(5) The bailee is obliged to deliver in accordance with Part 4 of this article against the first presented part of a bill of lading lawfully drawn in a set. Such delivery discharges the bailee's obligation on the whole bill.

History: 1953 Comp., § 50A-7-304, enacted by Laws 1961, ch. 96, § 7-304.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 6, Uniform Bills of Lading Act.

Changes. This section adds to existing legislation, which merely prohibits bills in a set in ordinary domestic trade, a statement of the legal effect of a lawfully issued set.

Purposes of changes.The statement of the legal effect of a lawfully issued set is in accord with existing commercial law relating to maritime and other overseas bills. This law has been codified in the Hague and Warsaw Conventions and in the Carriage of Goods by Sea Act, the provisions of which would ordinarily govern in situations where bills in a set are recognized by this article.

Definitional cross references."Bailee". Section 7-102.

"Bill of lading". Section 7-102.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Duly negotiate". Section 7-501.

"Good faith". Section 1-201.

"Goods". Section 7-102.

"Holder". Section 1-201.

"Issuer". Section 7-102.

"Overseas". Section 2-323.

"Person". Section 1-201.

"Receipt of goods". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers §§ 268, 272; 15A Am. Jur. 2d Commercial Code § 47.
Estoppel of owner who permits another to have possession of certificates or other evidences to title to personal property, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to deal with property, 151 A.L.R. 690.
13 C.J.S. Carriers § 124; 80 C.J.S. Shipping § 113.

§ 55-7-305. Destination bills.

(1) Instead of issuing a bill of lading to the consignor at the place of shipment a carrier may at the request of the consignor procure the bill to be issued at destination or at any other place designated in the request.

(2) Upon request of anyone entitled as against the carrier to control the goods while in transit and on surrender of any outstanding bill of lading or other receipt covering such goods, the issuer may procure a substitute bill to be issued at any place designated in the request.

History: 1953 Comp., § 50A-7-305, enacted by Laws 1961, ch. 96, § 7-305.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This proposal is designed to facilitate the use of order bills in connection with fast shipments. Use of order bills on high speed shipments is impeded by the fact that the goods may arrive at destination before the documents, so that no one is ready to take delivery from the carrier. This is especially inconvenient for carriers by truck and air, who do not have terminal facilities where shipments can be held to await consignee's appearance. Order bills would be useful to take advantage of bank

collection. This may be preferable to C.O.D. shipment in which the carrier, e.g. a truck driver, is the collecting and remitting agent. Financing of shipments under this plan would be handled as follows: seller at San Francisco delivers the goods to an airline with instructions to issue a bill in New York to a named bank. Seller receives a receipt embodying this undertaking to issue a destination bill. Airline wires its New York freight agent to issue the bill as instructed by the seller. Seller wires the New York bank a draft on buyer. New York bank indorses the bill to buyer when he honors the draft. Normally seller would act through his own bank in San Francisco, which would extend him credit in reliance on the airline's contract to deliver a bill to the order of its New York correspondent. This section is entirely permissive; it imposes no duty to issue such bills. Whether a connecting carrier will act as issuing agent is left to agreement between carriers.

Definitional cross references."Bill of lading". Section 1-201.

"Consignor". Section 7-102.

"Goods". Section 7-102.

"Issuer". Section 7-102.

"Receipt of goods". Section 2-103.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 272.
13 C.J.S. Carriers § 124; 80 C.J.S. Shipping § 113.

§ 55-7-306. Altered bills of lading.

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor.

History: 1953 Comp., § 50A-7-306, enacted by Laws 1961, ch. 96, § 7-306.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 16, Uniform Bills of Lading Act.

Changes. Generally revised and simplified and explicit treatment of the situation where a blank in an executed document is filled without authority.

Purposes of changes.An unauthorized alteration whether made with or without fraudulent intent does not relieve the issuer of his liability on the document as originally executed. Uniform Warehouse Receipts Act 13 excused the issuer from any liability to a

fraudulent alterer, other than the liability to deliver the goods according to the terms of the original document. It is difficult to conceive what liability the draftsman intended to excuse. Uniform Bills of Lading Act 16 contains no such excuse provision, and is followed in this respect in the present section. Uniform Bills of Lading Act 16 characterizes an unauthorized alteration as "void" but apparently nothing more was intended than that the alteration did not change the obligation of the issuer. This is sufficiently covered by the terms of this section. Moreover cases are conceivable in which an alteration would not be "void"; for example, an alteration made by common consent of a transferor and transferee of a document might evidence an enforceable contract between them. The same rule is made applicable to the filling in of blanks, a matter on which the prior acts were silent.

Definitional cross references."Bill of lading". Section 1-201.

"Issuer". Section 7-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 270; 15A Am. Jur. 2d Commercial Code §§ 48, 66.
3A C.J.S. Alteration of Instruments § 6.

§ 55-7-307. Lien of carrier.

(1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charge.

(2) A lien for charges and expenses under Subsection (1) on goods which the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to such charges and expenses. Any other lien under Subsection (1) is effective against the consignor and any person who permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked such authority.

(3) A carrier loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

History: 1953 Comp., § 50A-7-307, enacted by Laws 1961, ch. 96, § 7-307.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 27 and 32, Uniform Warehouse Receipts Act.

Changes. Rewritten and lien extended to carrier. Lien of common carrier validated unless carrier had notice that consignor lacked authority to subject the goods to charges and expenses. Where the carrier is not required by law to receive the goods for transportation, lien validated against anyone who permitted the bailor to have possession even if he had no real or apparent authority.

Purposes of changes.The section is intended to give carriers a specific statutory lien for charges and expenses similar to that given to warehousemen by the first sentence of Section 7-209. But since carriers do not commonly claim a lien for charges in relation to other goods or lend money on the security of goods in their hands, provisions for a general lien or a security interest similar to those in Section 7-209(1) and (2) are omitted. See comment to Section 7-105. Since the lien given by this section is specific, and the storage or transportation often preserves or increases the value of the goods, Subsection (2) validates the lien against anyone who permitted the bailor to have possession of the goods. Where the carrier is required to receive the goods for transportation, the owner's interest may be subjected to charges and expenses arising out of deposit of his goods by a thief. Cf. Section 9-310. The crucial mental element is the carrier's knowledge or reason to know of the bailor's lack of authority.

Cross references.Sections 7-209, 9-102(2) and 9-310.

Definitional cross references."Bill of lading". Section 1-201.

"Consignor". Section 7-102.

"Delivery". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers §§ 497, 499, 501, 503; 68 Am. Jur. 2d Secured Transactions §§ 13, 29, 131; 69 Am. Jur. 2d Secured Transactions § 509.
Marking freight bill "paid" or "prepaid" as estopping carrier to deny that freight has been paid, 10 A.L.R. 736.
Duty to collect freight charges from party to be notified under "order" bill of lading, 26 A.L.R. 1315.
Right of carrier to lien on goods shipped without owner's authority, 39 A.L.R. 168.
Status, rights and obligations of freight forwarders, 141 A.L.R. 919.
13 C.J.S. Carriers § 324; 80 C.J.S. Shipping § 170.

§ 55-7-308. Enforcement of carrier's lien.

(1) A carrier's lien may be enforced by public or private sale of the goods, in bloc [block] or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the carrier either sells the goods in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the carrier subject to the terms of the bill and this article.

(3) The carrier may buy at any public sale pursuant to this section.

(4) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the carrier with the requirements of this section.

(5) The carrier may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(6) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(7) A carrier's lien may be enforced in accordance with either Subsection (1) or the procedure set forth in Subsection (2) of Section 7-210 [55-7-210 NMSA 1978].

(8) The carrier is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

History: 1953 Comp., § 50A-7-308, enacted by Laws 1961, ch. 96, § 7-308.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 33, Uniform Warehouse Receipts Act.

Changes. Rewritten; provisions extended to carriers' liens and simplified foreclosure proceeding provided.

Purposes of changes.This section is intended to give the carrier an enforcement procedure of his lien coextensive with that given the warehousemen in cases other than those covering noncommercial storage by him. See comment to Section 7-210.

Cross reference.Section 7-210.

Definitional cross references."Bill of lading". Section 1-201.

"Creditor". Section 1-201.

"Delivery". Section 1-201.

"Good faith". Section 1-201.

"Goods". Section 7-102.

"Notification". Section 1-201.

"Notifies". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Rights". Section 1-201.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 506.
Liability for freight charge as affected by delivery without collecting charge as stipulated or directed, 24 A.L.R. 1163; 78 A.L.R. 926; 129 A.L.R. 213.
13 C.J.S. Carriers § 324; 80 C.J.S. Shipping § 170.

§ 55-7-309. Duty of care; contractual limitation of carrier's liability.

(1) A carrier who issues a bill of lading whether negotiable or nonnegotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.

(2) Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the shipment may be included in a bill of lading or tariff.

History: 1953 Comp., § 50A-7-309, enacted by Laws 1961, ch. 96, § 7-309.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 3, Uniform Bills of Lading Act.

Changes. Consolidated and rewritten.

Purposes of changes.The old uniform act provided that bills of lading could not contain terms impairing the obligation of reasonable care. Whether this is violated by a stipulation that in case of loss the bailee's liability is limited to stated amounts has been much controverted. For interstate rail transportation the matter is settled by the Carmack Amendment to the Interstate Commerce Act (see 49 U.S.C.A. § 20(11)). The present section is a generalized version of the Interstate Commerce Act provisions. The obligation of due care is radically qualified, in the case of maritime bills and international airbills, by federal legislation and treaty. All this special legislation would remain in effect even if congress enacts this code, including the present article. See Section 7-103.

Subsection (1) does not impair any rule of law imposing the liability of an insurer on a common carrier in intrastate commerce. Subsection (2), however, applies to such liability as well as to liability based on negligence. The entire section is subject under Section 7-103 to applicable provisions in filed tariffs, such as the common disclaimer of

responsibility for undeclared articles of extraordinary value, hidden from view. Tariffs which lawfully provide a maximum unit value beyond which goods are not taken fall within the same principle, and are expressly covered by the words "value as lawfully provided in the tariff."

Cross reference.Section 7-103.

Definitional cross references."Action". Section 1-201.

"Bill of lading". Section 1-201.

"Consignor". Section 7-102.

"Document". Section 7-102.

"Goods". Section 7-102.

"Value". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 14 Am. Jur. 2d Carriers §§ 517, 555, 560, 566, 578; 15A Am. Jur. 2d Commercial Code § 51.
Application of state statute as to carrier's limitation of common-law liability to federal government operating railroads, 4 A.L.R. 1680; 8 A.L.R. 969; 10 A.L.R. 956; 11 A.L.R. 1450; 14 A.L.R. 234; 19 A.L.R. 678; 52 A.L.R. 296.
Stipulation limiting amount of carrier's liability as applicable where goods are stolen by its employee, 5 A.L.R. 986; 52 A.L.R. 1073.
Liability for loss of or injury to goods kept at place other than that originally intended, 12 A.L.R. 1322; 17 A.L.R. 979.
Validity and construction of stipulation exempting carrier from liability for loss or damage to property at nonagency station, 16 A.L.R.3d 1111.
Carrier's right to stipulate against liability for loss resulting from strike causing delay in transportation, 45 A.L.R. 921.
Refusal on grounds of public policy of forum to enforce stipulation in carrier's contract limiting its liability, valid according to the proper law of the contract, 57 A.L.R. 175.
Effect of value limitation clause in bill of lading or shipping receipt for goods misdescribed therein or not received by carrier, 74 A.L.R. 1382.
Validity as affected by rule against unjust discrimination, of agreement in bill of lading to insurance, 76 A.L.R. 1265.
Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 A.L.R. 226.
Provision in carrier's contract regarding amount of recovery for damages as provision of liquidating damages or limitation of liability, 128 A.L.R. 632.
Presumption and burden of proof as to consignee's title to or interest in respect of goods comprising shipment, in consignee's action against carrier for loss, damage, delay,

nondelivery or conversion, 135 A.L.R. 456.
Expiration of period prescribed by bill of lading or statute or shipper's claim or action against carrier as affecting his rights to avail himself of claim by recoupment in carrier's action against him, 140 A.L.R. 816.
Initial carrier's liability as that of carrier or of warehouseman in respect to goods while in its warehouse awaiting delivery to connecting carrier, 172 A.L.R. 802.
Presumption and burden of proof or of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water, 13 A.L.R.2d 681.
Provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped, 25 A.L.R.2d 770.
Validity of contractual provision limiting place or court in which action may be brought, 31 A.L.R.4th 404.
Conclusiveness of receipt clauses in bill of lading, 67 A.L.R.2d 1028.
Railroad carrier's liability where goods were allegedly damaged by failure to properly refrigerate, 4 A.L.R.3d 994.
Liability of carrier by land for damage to goods resulting from improper packing by carrier, 7 A.L.R.3d 723.
13 C.J.S. Carriers § 71; 80 C.J.S. Shipping § 25.

Part 4

WAREHOUSE RECEIPTS AND BILLS OF LADING; GENERAL OBLIGATIONS

§ 55-7-401. Irregularities in issue of receipt or bill or conduct of issuer.

The obligations imposed by this article on an issuer apply to a document of title regardless of the fact that:

(a) the document may not comply with the requirements of this article or of any other law or regulation regarding its issue, form or content; or

(b) the issuer may have violated laws regulating the conduct of his business; or

(c) the goods covered by the document were owned by the bailee at the time the document was issued; or

(d) the person issuing the document does not come within the definition of warehouseman if it purports to be a warehouse receipt.

History: 1953 Comp., § 50A-7-401, enacted by Laws 1961, ch. 96, § 7-401.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 20, Uniform Warehouse Receipts Act; Section 23, Uniform Bills of Lading Act.

Changes. Most of the material is new and the uniform act sections cited deal only with non-receipt and misdescription.

Purposes of changes and new matter.The bailee's liability on his document despite non-receipt or misdescription of the goods is affirmed in Sections 7-203 and 7-301. The purpose of this section is to make it clear that regardless of irregularities a document which falls within the definition of document of title imposes on the issuer the obligations stated in this article. For example, a bailee will not be permitted to avoid his obligation to deliver the goods (Section 7-403) or his obligation of due care with respect to them (Sections 7-204 and 7-309) by taking the position that no valid "document" was issued because he failed to file a statutory bond or did not pay stamp taxes or did not disclose the place of storage in the document. Sanctions against violations of statutory or administrative duties with respect to documents should be limited to revocation of license or other measures prescribed by the regulation imposing the duty. As to the continuing vitality of regulations, in addition to those found in this article, of documents of title, see Section 7-103.

Cross references.Sections 7-103, 7-203, 7-204, 7-301 and 7-309.

Definitional cross references."Bailee". Section 7-102.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Goods". Section 7-102.

"Issuer". Section 7-102.

"Person". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 280; 15A Am. Jur. 2d Commercial Code § 50; 78 Am. Jur. 2d Warehouses §§ 40, 42.
Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 A.L.R. 266.
Legal effect of transaction by which commodity is received for storage by one who has not complied with statutory conditions necessary to become a public warehouseman,

108 A.L.R. 928.
13 C.J.S. Carriers § 126; 80 C.J.S. Shipping § 111; 93 C.J.S. Warehousemen and Safe Depositaries § 20.

§ 55-7-402. Duplicate receipt or bill; overissue.

Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents. But the issuer is liable for damages caused by his overissue or failure to identify a duplicate document as such by conspicuous notation on its face.

History: 1953 Comp., § 50A-7-402, enacted by Laws 1961, ch. 96, § 7-402.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 6, Uniform Warehouse Receipts Act; Section 7, Uniform Bills of Lading Act.

Changes. Consolidated and rewritten.

Purposes of changes.1. This section treats a duplicate which is not properly identified as such like any other overissue of documents: a purchaser of such a document acquires no title but only a cause of action for damages against the person who made his deception possible, except in the cases noted in the section. But parts of a bill lawfully issued in a set of parts are not "overissue" (Section 7-304). Of course, if the issuer has clearly indicated that a document is a duplicate so that no one can be deceived by it, and in fact the duplicate is a correct copy of the original, the warehouseman is not liable for preparing and delivering such a duplicate copy.

2. The section applies to nonnegotiable documents to the extent of providing an action for damages for one who acquires an unmarked duplicate from a transferor who knew the facts and would therefore himself have had no cause of action against the issuer of the duplicate. Ordinarily the transferee of a nonnegotiable document acquires only the rights of his transferor.

3. Overissue is defined so as to exclude the common situation where two valid documents of different issuers are outstanding for the same goods at the same time. Thus freight forwarders commonly issue bills of lading to their customers for small shipments to be combined into carload shipments for which the railroad will issue a bill of lading to the forwarder. So also a warehouse receipt may be outstanding against goods, and the holder of the receipt may issue delivery orders against the same goods. In these cases dealings with the subsequently issued documents may be effective to transfer title; e. g. negotiation of a delivery order will effectively transfer title in the

ordinary case where no dishonesty has occurred and the goods are available to satisfy the orders. Section 7-503 provides for cases of conflict between documents of different issuers.

Cross references.Point 1: Sections 7-207, 7-304 and 7-601.

Point 3: Section 7-503.

Definitional cross references."Bill of lading". Section 1-201.

"Conspicuous". Section 1-201.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Fungible" goods. Section 1-201.

"Goods". Section 7-102.

"Issuer". Section 7-102.

"Right". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 268; 15A Am. Jur. 2d Commercial Code § 47; 78 Am. Jur. 2d Warehouse § 45.
Assignment of duplicate bill of lading as terminating vendor's right of stoppage in transitu, 7 A.L.R. 1422.
13 C.J.S. Carriers § 129; 80 C.J.S. Shipping § 111; 93 C.J.S. Warehousemen and Safe Depositaries § 23.

§ 55-7-403. Obligation of warehouseman or carrier to deliver; excuse.

(1) The bailee must deliver the goods to a person entitled under the document who complies with Subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:

(a) delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) damage to or delay, loss or destruction of the goods for which the bailee is not liable;

(c) previous sale or other disposition of the goods in lawful enforcement of a lien or on

warehouseman's lawful termination of storage;

(d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the article on sales (Section 2-705 [55-2-705 NMSA 1978]);

(e) a diversion, reconsignment or other disposition pursuant to the provisions of this article (Section 7-303 [55-7-303 NMSA 1978]) or tariff regulating such right;

(f) release, satisfaction or any other fact affording a personal defense against the claimant;

(g) any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.

(3) Unless the person claiming is one against whom the document confers no right under Section 7-503(1) [55-7-503(1) NMSA 1978], he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated.

(4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a nonnegotiable document.

History: 1953 Comp., § 50A-7-403, enacted by Laws 1961, ch. 96, § 7-403.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 8 to 12, 16 and 19, Uniform Warehouse Receipts Act; Sections 11 to 15, 19 and 22, Uniform Bills of Lading Act.

Changes. Consolidated and rewritten.

Purposes of changes.1. The general and primary purpose of this revision is to simplify the statement of the bailee's obligation on the document. The interrelations of the separate sections of the old uniform acts dealing with "obligation to deliver," "justification in delivering" and "liability for misdelivery" are obscure. The present section is constructed on the basis of stating what previous deliveries or other circumstances operate to excuse the bailee's normal obligation on the document. Accordingly, "justified" deliveries under the old uniform acts now find their place as "excuse" under Subsection (1). Unjustified deliveries, i. e., "misdeliveries" under the old acts, are simply omitted from the list of excuses, thus permitting the normal obligation on the document to be asserted.

2. The principal case covered by Subsection (1) (a) is delivery to a person whose title is paramount to the rights represented by the document. For example, if a thief deposits stolen goods in a warehouse and takes a negotiable receipt, the warehouseman is not liable on the receipt if he has surrendered the goods to the true owner, even though the receipt is held by a good faith purchaser. See Section 7-503(1). However, if the owner entrusted the goods to a person with power of disposition, and that person deposited the goods and took a negotiable document, the owner's receipt would not be rightful as against a holder to whom the negotiable document was duly negotiated, and delivery to the owner would not give the bailee a defense against such a holder. See Sections 7-502(1)(b) and 7-503(1)(a).

3. Subsection (1) (b) amounts to a cross reference to all the tort law that determines the varying responsibilities and standards of care applicable to commercial bailees. A restatement of this tort law would be beyond the scope of this act. Much of the applicable law as to responsibility of bailees for the preservation of the goods and limitation of liability in case of loss has been codified for particular classes of bailees in interstate and foreign commerce by federal legislation and treaty and for intrastate carriers and other bailees by the regulatory state laws preserved by Section 7-103. In the absence of governing legislation the common law will prevail subject to the minimum standard of reasonable care prescribed by Sections 7-204 and 7-309 of this article. The optional language in Subsection (1)(b) states the rule laid down for interstate carriers in many federal cases. State decisions are in conflict as to both carriers and warehousemen. Particular states may prefer to adopt the federal rule.

4. Subsection (2) eliminates the implication of the old uniform acts that a request for delivery must be accompanied by a formal tender of the amount of the charges due. Rather, the bailee must request payment of the amount of his lien when asked to deliver, and only in case this request is refused is he justified in declining to deliver because of nonpayment of charges. Where delivery without payment is forbidden by law, the request is treated as implicit. Such a prohibition reflects a policy of uniformity to prevent discrimination by failure to request payment in particular cases.

5. Subsection (3) states the obvious duty of a bailee to take up a negotiable document or note partial deliveries conspicuously thereon, and the result of failure in that duty. It is subject to only one exception, that stated in Subsection 1(a) of this section and in Section 7-503(1). It is limited to cases of delivery to a claimant; it has no application, for example, where goods held under a negotiable document are lawfully sold to enforce the bailee's lien.

Cross references.Point 2: Sections 7-502 and 7-503.

Point 3: Sections 7-103, 7-204 and 7-309.

Point 5: Section 7-503(1).

Definitional cross references."Bailee". Section 7-102.

"Conspicuous". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Duly negotiate". Section 7-501.

"Goods". Section 7-102.

"Person". Section 1-201.

"Receipt of goods". Section 2-103.

"Right". Section 1-201.

"Terms". Section 1-201.

"Warehouseman". Section 7-102.

"Written". Section 1-201.

ANNOTATION

Compiler's notes. - New Mexico did not adopt the optional language of the uniform act in Subsection (1)(b) which would have placed the burden of establishing negligence in cases relevant to that subsection on persons entitled under the document.

Burden of proving ordinary care upon warehouseman. - Plain and unambiguous language of the law has changed common-law rule so as to place the burden upon the warehouseman to show that in the exercise of ordinary care, he is unable to redeliver the goods bailed to him. Denning Whse. Co. v. Widener, 172 F.2d 910, 13 A.L.R.2d 669 (10th Cir. 1949) (decided under prior law).

Not enough to show fire of unknown origin. - Establishment of fact that broomcorn in warehouseman's custody was destroyed by fire of unknown origin does not, without more, sustain the burden of showing due care with respect to it. Denning Whse. Co. v. Widener, 172 F.2d 910, 13 A.L.R.2d 669 (10th Cir. 1949) (decided under prior law).

And evidence allowable in damage suit. - In damage suit to recover for broomcorn in custody of warehouseman, evidence to effect that debris had been allowed to collect beneath platform or floor on which broomcorn was stored, and concerning smoking in

and around the place were properly submitted to the jury and its findings were held binding on review. Denning Whse. Co. v. Widener, 172 F.2d 910, 13 A.L.R.2d 669 (10th Cir. 1949) (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 8 Am. Jur. 2d Bailments § 332; 13 Am. Jur. 2d Carriers §§ 417, 419, 423, 436, 439, 442; 15A Am. Jur. 2d Commercial Code §§ 39, 67; 78 Am. Jur. 2d Warehouses §§ 38, 75, 78, 201, 203, 205, 208 to 210, 212, 214, 215, 217 to 219, 255, 293.
Duty of carrier to deliver goods on siding or private track of consignee, 1 A.L.R. 1425.
Delivery of goods to one whose authority to act for consignee has ceased, 2 A.L.R. 279.
Duty to notify consignor when consignee, or person to be notified, refuses to accept goods, 4 A.L.R. 1285.
Lost or mislaid property, respective rights of carrier or one in similar relation to owner and finder, 9 A.L.R. 1388; 170 A.L.R. 706.
What constitutes delivery to carriers of goods in warehouse, 22 A.L.R. 985; 113 A.L.R. 1459.
Delivery without collecting charge as stipulated or directed as affecting liability, 24 A.L.R. 1163; 78 A.L.R. 926; 129 A.L.R. 213.
Delay, or damages incident to delay, in transportation, due to strike, liability of carrier, 28 A.L.R. 503; 45 A.L.R. 919.
Rights of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.
Delay in transportation or delivery as affecting carrier's liability for loss of or damages to goods by act of God, 46 A.L.R. 302.
Delivery by carrier or warehouseman of property to impostor, 54 A.L.R. 1335.
Warehouseman's bond as covering warehouse receipts issued by warehouse to itself or for its own property, 61 A.L.R. 331.
Diverting shipment, right of shipper or consignee, 61 A.L.R. 1309.
Carrier's employees as agents of shipper or consignee in unloading or caring for livestock at destination, 62 A.L.R. 525.
Interest on damages for warehouseman's refusal to deliver property, or for injury to, or loss of property, 96 A.L.R. 18; 36 A.L.R.2d 337.
Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 A.L.R. 266.
Presumption and burden of proof as to carrier's responsibility for goods received in good condition and delivered to consignee in bad condition, 106 A.L.R. 1156.
Duty of warehouseman to take up and cancel negotiable receipt upon delivering goods as delegable or nondelegable, 139 A.L.R. 1488.
Consignee's refusal to accept delivery at place specified in the contract, or carrier's inability to make delivery at that place, as terminating its liability as carrier, 149 A.L.R. 1118.
When carrier put upon notice that delay in transportation or delivery will cause special damages, 166 A.L.R. 1034.
Presumptions and burden of proof or of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water, 13 A.L.R.2d 681.
Shipper's ratification of carrier's unauthorized delivery or misdelivery, 15 A.L.R.2d 807.

Carrier's liability for conversion by delivery in violation of provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped, 25 A.L.R.2d 770.
Liability of carrier for delivering goods sent C.O.D. without receiving cash payment, 27 A.L.R.3d 1320.
13 C.J.S. Carriers §§ 126, 329; 80 C.J.S. Shipping §§ 113, 170; 93 C.J.S. Warehousemen and Safe Depositaries §§ 27, 64.

§ 55-7-404. No liability for good faith delivery pursuant to receipt or bill.

A bailee who in good faith including observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document of title or pursuant to this article is not liable therefor. This rule applies even though the person from whom he received the goods had no authority to procure the document or to dispose of the goods and even though the person to whom he delivered the goods had no authority to receive them.

History: 1953 Comp., § 50A-7-404, enacted by Laws 1961, ch. 96, § 7-404.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 10, Uniform Warehouse Receipts Act; Section 13, Uniform Bills of Lading Act.

Changes. Consolidated and rewritten.

Purposes of changes.The generalized test of good faith and observance of reasonable commercial standards is substituted for the attempts to particularize what constitutes good faith in the cited sections of the old uniform acts. The section states explicitly what is perhaps an implication from the old acts that the common law rule of "innocent conversion" by unauthorized "intermeddling" with another's property is inapplicable to the operations of commercial carriers and warehousemen, who in good faith and with reasonable observance of commercial standards perform obligations which they have assumed and which generally they are under a legal compulsion to assume. The section applies to delivery to a fraudulent holder of a valid document as well as to delivery to the holder of an invalid document.

Definitional cross references."Bailee". Section 7-102.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Good faith". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Receipt of goods". Section 2-103.

"Term". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 437; 78 Am. Jur. 2d Warehouses §§ 201, 204.
Lack of endorsement or irregular endorsement of warehouse receipt or bill of lading as affecting privilege of goods, 18 A.L.R. 588.
Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligations, 53 A.L.R.2d 1396.
13 C.J.S. Carriers § 126; 80 C.J.S. Shipping § 113; 93 C.J.S. Warehousemen and Safe Depositaries § 27.

Part 5

WAREHOUSE RECEIPTS AND BILLS OF LADING; NEGOTIATION AND TRANSFER

§ 55-7-501. Form of negotiation and requirements of "due negotiation."

(1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone.

(2)(a) A negotiable document of title is also negotiated by delivery alone when by its original terms it runs to bearer.

(b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.

(3) Negotiation of a negotiable document of title after it has been indorsed to a specified person requires indorsement by the special indorsee as well as delivery.

(4) A negotiable document of title is "duly negotiated" when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.

(5) Indorsement of a nonnegotiable document neither makes it negotiable nor adds to the transferee's rights.

(6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods.

History: 1953 Comp., § 50A-7-501, enacted by Laws 1961, ch. 96, § 7-501.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 28, 29, 31, 32 and 38, Uniform Sales Act; Sections 37, 38, 39, 40 and 47, Uniform Warehouse Receipts Act; Sections 9, 28, 29, 30, 31 and 38, Uniform Bills of Lading Act.

Changes. Consolidated and rewritten.

Purposes of changes.1. In general this section is intended to clarify the language of the old acts and to restate the effect of the better decisions thereunder. An important new concept is added, however, in the requirement of "regular course of business or financing" to effect the "due negotiation" which will transfer greater rights than those held by the person negotiating. The foundation of the mercantile doctrine of good faith purchase for value has always been, as shown by the case situations, the furtherance and protection of the regular course of trade. The reason for allowing a person, in bad faith or in error, to convey away rights which are not his own has from the beginning been to make possible the speedy handling of that great run of commercial transactions which are patently usual and normal.

There are two aspects to the usual and normal course of mercantile dealings, namely, the person making the transfer and the nature of the transaction itself. The first question which arises is: Is the transferor a person with whom it is reasonable to deal as having full powers? In regard to documents of title the only holder whose possession appears, commercially, to be in order is almost invariably a person in the trade. No commercial purpose is served by allowing a tramp or a professor to "duly negotiate" an order bill of lading for hides or cotton not his own, and since such a transfer is obviously not in the regular course of business, it is excluded from the scope of the protection of Subsection (4).

The second question posed by the "regular course" qualification is: Is the transaction one which is normally proper to pass full rights without inquiry, even though the transferor himself may not have such rights to pass, and even though he may be acting in breach of duty? In raising this question the "regular course" criterion has the further advantage of limiting the effective wrongful disposition to transactions whose protection will really further trade. Obviously, the snapping up of goods for quick resale at a price suspiciously below the market deserves no protection as a matter of policy: it is also clearly outside the range of regular course.

Any notice from the face of the document sufficient to put a merchant on inquiry as to the "regular course" quality of the transaction will frustrate a "due negotiation". Thus irregularity of the document on its face or unexplained staleness of a bill of lading may appropriately be recognized as negating a negotiation in "regular" course.

A preexisting claim constitutes value, and "due negotiation" does not require "new value." A usual and ordinary transaction in which documents are received as security for credit previously extended may be in "regular" course, even though there is a demand for additional collateral because the creditor "deems himself insecure." But the matter has moved out of the regular course of financing if the debtor is thought to be insolvent, the credit previously extended is in effect cancelled, and the creditor snatches a plank in the shipwreck under the guise of a demand for additional collateral. Where a money debt is "paid" in commodity paper, any question of "regular" course disappears, as the case is explicitly excepted from "due negotiation."

2. Negotiation under this section may be made by any holder no matter how he acquired possession of the document. The present section follows in this respect the Uniform Bills of Lading Act and amendments of the original Uniform Sales Act and Uniform Warehouse Receipts Act proposed by the commissioners on uniform state laws in 1922.

3. Subsection (2) (b) makes explicit a matter upon which the intent of the old acts was clear but the language somewhat obscure: a negotiation results from a delivery to a banker or buyer to whose order the document has been taken by the person making the bailment. There is no presumption of irregularity in such a negotiation; it may very well be in "regular course."

4. This article does not contain any provision creating a presumption of due negotiation to, and full rights in, a holder of a document of title akin to that created by Sections 16, 24 and 59 of the Negotiable Instruments Law. But the reason of the provisions of this act (Section 1-202) on the prima facie authenticity and accuracy of third party documents, joins with the reason of the present section to work such a presumption in favor of any person who has power to make a due negotiation. It would not make sense for this act to authorize a purchaser to indulge the presumption of regularity if the courts were not also called upon to do so.

Cross references.Point 1: Sections 7-502 and 7-503.

Point 2: Section 7-502.

Definitional cross references."Bearer". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 305; 15A Am. Jur. 2d Commercial Code §§ 39, 51, 57 to 65; 68 Am. Jur. 2d Secured Transactions §§ 13, 61, 75; 69 Am. Jur. 2d Secured Transactions §§ 369, 383, 474; 78 Am. Jur. 2d Warehouses §§ 63 to 66, 69, 72.
Pledge by factor of receipts for principal's property, 14 A.L.R. 435.
Lack of endorsement or irregular endorsement of warehouse receipt as affecting pledge of goods, 18 A.L.R. 588.
Rights of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.
Acceptance of draft for purchase price with warehouse receipt attached or by transfer of draft with receipt as passing title to goods, 55 A.L.R. 116; 76 A.L.R. 885; 109 A.L.R. 1381.
Duty of warehouseman to take up and cancel negotiable receipt upon delivering goods as delegable or nondelegable, 139 A.L.R. 1488.
Effectiveness, as pledge, of transfer of warehouse receipt, 53 A.L.R.2d 1406.
13 C.J.S. Carriers § 128; 80 C.J.S. Shipping § 114; 93 C.J.S. Warehousemen and Safe Depositaries § 25.

§ 55-7-502. Rights acquired by due negotiation.

(1) Subject to the following section [55-7-503 NMSA 1978] and to the provisions of Section 7-205 [55-7-205 NMSA 1978] on fungible goods, a holder to whom a negotiable document of title has been duly negotiated acquires thereby:

(a) title to the document;

(b) title to the goods;

(c) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(d) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by him except those arising under the terms of the document or under this article. In the case of a delivery order the bailee's obligation accrues only upon acceptance and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(2) Subject to the following section, title and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of such goods by the bailee, and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person.

History: 1953 Comp., § 50A-7-502, enacted by Laws 1961, ch. 96, § 7-502.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 20(4), 25, 33, 38 and 62, Uniform Sales Act; Sections 41, 47, 48 and 49, Uniform Warehouse Receipts Act; Sections 32, 38, 39, 40 and 42, Uniform Bills of Lading Act.

Changes. Rewritten.

Purposes of changes.1. The several necessary qualifications of the broad principle that the holder of a document acquired in a due negotiation is the owner of the document and the goods have been brought together in the next section.

2. Subsection (1) (c) covers the case of "feeding" of a duly negotiated document by subsequent delivery to the bailee of such goods as the document falsely purported to cover; the bailee in such case is estopped as against the holder of the document.

3. The explicit statement in Subsection (1) (d) of the bailee's direct obligation to the holder precludes the defense, sometimes successfully asserted under the old acts, that the document in question was "spent" after the carrier had delivered the goods to a previous holder. But the holder is subject to such defenses as non-negligent destruction even though not apparent on the face of the document, and the bailee's obligation is of course subject to lawful provisions in filed classifications and tariffs. See Sections 7-103 and 7-403. The sentence on delivery orders applies only to delivery orders in negotiable form which have been duly negotiated. On delivery orders, see also Section 7-503 (2)

and comment.

4. Subsection (2) condenses and continues the law of a number of sections of the prior acts which gave full effect to the issuance or due negotiation of a negotiable document. The subsection adds nothing to the effect of the rules stated in Subsection (1), but it has been included since such explicit references were relied upon under the prior acts to preserve the rights of a purchaser by due negotiation unimpaired. The listing is not exhaustive. Only those matters have been repeated in this subsection which were explicitly reserved in the prior acts except in the case of stoppage in transit. Here, the language has been broadened to include "any stoppage" lest an inference be drawn that a stoppage of the goods before or after transit might cut off or otherwise impair the purchaser's rights.

Cross references.Sections 7-103, 7-205, 7-403 and 7-503.

Definitional cross references."Bailee". Section 7-102.

"Delivery". Section 1-201.

"Delivery order". Section 7-102.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Duly negotiate". Section 7-501.

"Fungible". Section 1-201.

"Goods". Section 7-102.

"Holder". Section 1-201.

"Issuer". Section 7-102.

"Person". Section 1-201.

"Rights". Section 1-201.

"Term". Section 1-201.

"Warehouse receipt". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers §§ 307, 313; 15A Am. Jur. 2d Commercial Code §§ 62, 65, 66; 68 Am. Jur. 2d Secured Transactions §§ 13, 75; 69 Am. Jur. 2d Secured Transactions §§ 241, 369; 78 Am. Jur. 2d Warehouses §§ 68 to 75, 80, 93.
Receipt of partial payment or commercial paper for purchase price for goods as terminating vendor's right of stoppage in transitu, 7 A.L.R. 1412.
Assignment of duplicate bill of lading as terminating vendor's right of stoppage in transitu, 7 A.L.R. 1422.
Failure to ship by carrier designated by buyer as affecting passing of title, 31 A.L.R. 955.
Right of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.
Measure of seller's damages under executory contract as affected by his resale of the property, 44 A.L.R. 296; 119 A.L.R. 1141.
Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached or by transfer of draft with receipt, 55 A.L.R. 1116.
Issuance or nonissuance of bill of lading as affecting delivery of freight to carrier, 113 A.L.R. 1469.
Right of carrier as against transferee of bill to deny receipt of goods, 130 A.L.R. 1315.
Validity as against third persons of sale or pledge of goods retained in warehouse on premises of seller or pledgor (field warehousing), 133 A.L.R. 209.
Bailors of goods covered by policy of insurance issued to warehousemen as subject to defenses that would be available to insurer as against warehousemen, 153 A.L.R. 190.
Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation, 53 A.L.R.2d 1396.
13 C.J.S. Carriers § 128; 80 C.J.S. Shipping § 114; 93 C.J.S. Warehousemen and Safe Depositaries § 25.

§ 55-7-503. Document of title to goods defeated in certain cases.

(1) A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither:

(a) delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery under this article (Section 7-403 [55-7-403 NMSA 1978]) or with power of disposition under this act (Sections 2-403 [55-2-403 NMSA 1978] and 9-307 [55-9-307 NMSA 1978]) or other statute or rule of law; nor

(b) acquiesced in the procurement by the bailor or his nominee of any document of title.

(2) Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such a title may be defeated under the next section [55-7-504 NMSA 1978] to the same extent as the rights of the issuer or a transferee from the

issuer.

(3) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier in accordance with Part 4 of this article pursuant to its own bill of lading discharges the carrier's obligation to deliver.

History: 1953 Comp., § 50A-7-503, enacted by Laws 1961, ch. 96, § 7-503.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 33, Uniform Sales Act; Section 41, Uniform Warehouse Receipts Act; Section 32, Uniform Bills of Lading Act.

Changes. Subsection (1) narrows, as compared to the cited sections, the occasions for defeating the document holder's title.

Purposes of changes.1. In general it may be said that the title of a purchaser by due negotiation prevails over almost any interest in the goods which existed prior to the procurement of the document of title if the possession of the goods by the person obtaining the document derived from any action by the prior claimant which introduced the goods into the stream of commerce or carried them along that stream. A thief of the goods cannot indeed by shipping or storing them to his own order acquire power to transfer them to a good faith purchaser. Nor can a tenant or mortgagor defeat any rights of a landlord or mortgagee which have been perfected under the local law merely by wrongfully shipping or storing a portion of the crop or other goods. However, "acquiescence" by the landlord or tenant does not require active consent under Subsection (1) (b) and knowledge of the likelihood of storage or shipment with no objection or effort to control it is sufficient to defeat his rights as against one who takes by "due" negotiation of a negotiable document.

On the other hand, where goods are delivered to a factor for sale, even though the factor has made no advances and is limited in his duty to sell for cash, the goods are "entrusted" to him "with actual . . . authority . . . to sell" under Subsection (1) (a), and if he procures a negotiable document of title he can transfer the owner's interest to a purchaser by due negotiation. Further, where the factor is in the business of selling, goods entrusted to him simply for safekeeping or storage may be entrusted under circumstances which give him "apparent authority to ship, store or sell" under Subsection (1) (a), or power of disposition under Sections 2-403, 7-205 or 9-307, or under a statute such as the earlier factors acts, or under a rule of law giving effect to apparent ownership. See Section 1-103.

Persons having an interest in goods also frequently deliver or entrust them to agents or servants other than factors for the purpose of shipping or warehousing or under circumstances reasonably contemplating such action. Rounding out the case law development under the prior acts, this act is clear that such persons assume full risk

that the agent to whom the goods are so delivered may ship or store in breach of duty, take a document to his own order and then proceed to misappropriate it. This act makes no distinction between possession or mere custody in such situations and finds no exception in the case of larceny by a bailee or the like. The safeguard in such situations lies in the requirement that a due negotiation can occur only "in the regular course of business or financing" and that the purchase be in good faith and without notice. See Section 7-501. Documents of title have no market among the commercially inexperienced and the commercially experienced do not take them without inquiry from persons known to be truck drivers or petty clerks even though such persons purport to be operating in their own names.

Again, where the seller allows a buyer to receive goods under a contract for sale, though as a "conditional delivery" or under "cash sale" terms and on explicit agreement for immediate payment, the buyer thereby acquires power to defeat the seller's interest by transfer of the goods to certain good faith purchasers. See Section 2-403. Both in policy and under the language of Subsection (1) (a) that same power must be extended to accomplish the same result if the buyer procures a negotiable document of title to the goods and duly negotiates it.

2. Under Subsection (1) a delivery order issued by a person having no right in or power over the goods is ineffective unless the owner acts as provided in Subsection (1) (a) or (b). Thus the rights of a transferee of a nonnegotiable warehouse receipt can be defeated by a delivery order subsequently issued by the transferor only if the transferee "delivers or entrusts" to the "person procuring" the delivery order or "acquiesces" in his procurement. Similarly, a second delivery order issued by the same issuer for the same goods will ordinarily be subject to the first, both under this section and under Section 7-402. After a delivery order is validly issued but before it is accepted, it may nevertheless be defeated under Subsection (2) in much the same way that the rights of a transferee may be defeated under Section 7-504. For example, a buyer in ordinary course from the issuer may defeat the rights of the holder of a prior delivery order if the bailee receives notification of the buyer's rights before notification of the holder's rights. Section 7-504(2) (b). But an accepted delivery order has the same effect as a document issued by the bailee.

3. Under Subsection (3) a bill of lading issued to a freight forwarder is subordinated to the freight forwarder's certificate, since the bill on its face gives notice of the fact that a freight forwarder is in the picture and has in all probability issued a certificate. But the carrier is protected in following the terms of its own bill of lading.

Cross references.Point 1: Sections 2-403, 7-205, 7-501, 9-307 and 9-309.

Point 2: Sections 7-402 and 7-504.

Point 3: Sections 7-402, 7-403 and 7-404.

Definitional cross references."Bill of lading". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Delivery order". Section 7-102.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Duly negotiate". Section 7-501.

"Goods". Section 7-102.

"Person". Section 1-201.

"Right". Section 1-201.

"Warehouse receipt". Section 1-201.

ANNOTATION

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 419; 15A Am. Jur. 2d Commercial Code §§ 47, 64, 66, 67; 68 Am. Jur. 2d Secured Transactions § 13; 69 Am. Jur. 2d Secured Transactions § 511; 78 Am. Jur. 2d Warehouses §§ 68, 74, 75, 77, 78, 217, 218.
Uniform Warehouse Receipts Act as affecting liens on property represented by principal, 61 A.L.R. 949.
Status, rights and obligations of freight forwarders, 141 A.L.R. 919.
Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of warehouse receipts, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge or otherwise deal with, the property, 151 A.L.R. 696.
Title of goods, as between purchaser from, and one who entrusted them to, auctioneer, 36 A.L.R.2d 1362.
13 C.J.S. Carriers § 126; 80 C.J.S. Shipping §§ 113, 114; 93 C.J.S. Warehousemen and Safe Depositaries § 24.

§ 55-7-504. Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.

(1) A transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey.

(2) In the case of a nonnegotiable document, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated:

(a) by those creditors of the transferor who could treat the sale as void under Section 2-402 [55-2-402 NMSA 1978]; or

(b) by a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights; or

(c) as against the bailee by good faith dealings of the bailee with the transferor.

(3) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in ordinary course of business and in any event defeats the consignee's rights against the bailee.

(4) Delivery pursuant to a nonnegotiable document may be stopped by a seller under Section 2-705 [55-2-705 NMSA 1978], and subject to the requirement of due notification there provided. A bailee honoring the seller's instructions is entitled to be indemnified by the seller against any resulting loss or expense.

History: 1953 Comp., § 50A-7-504, enacted by Laws 1961, ch. 96, § 7-504.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 34, Uniform Sales Act; Sections 41(b) and 42, Uniform Warehouse Receipts Act; Sections 32(b) and 33, Uniform Bills of Lading Act.

Changes. Generally rewritten and Subsection (3) is new.

Purposes of changes and new matter.1. Under the general principles controlling negotiable documents, it is clear that in the absence of due negotiation a transferor cannot convey greater rights than he himself has, even when the negotiation is formally perfect. This section recognizes the transferor's power to transfer rights which he himself has or has "actual authority to convey." Thus, where a negotiable document of title is being transferred the operation of the principle of estoppel is not recognized, as contrasted with situations involving the transfer of the goods themselves. (Compare Section 2-403 on good faith purchase of goods.)

A necessary part of the price for the protection of regular dealings with negotiable

documents of title is an insistence that no dealing which is in any way irregular shall be recognized as a good faith purchase of the document or of any rights pertaining to it. So, where the transfer of a negotiable document fails as a negotiation because a requisite indorsement is forged or otherwise missing, the purchaser in good faith and for value may be in the anomalous position of having less rights, in part, than if he had purchased the goods themselves. True, his rights are not subject to defeat by attachment of the goods or surrender of them to his transferor [Contrast Subsection (2)]; but on the other hand, he cannot acquire enforceable rights to control or receive the goods over the bailee's objection merely by giving notice to the bailee. Similarly, a consignee who makes payment to his consignor against a straight bill of lading can thereby acquire the position of a good faith purchaser of goods under provisions of the article of this act on sales (Section 2-403), whereas the same payment made in good faith against an unindorsed order bill would not have such effect. The appropriate remedy of a purchaser in such a situation is to regularize his status by compelling indorsement of the document (see Section 7-506).

2. As in the case of transfer - as opposed to "due negotiation" - of negotiable documents, Subsection (1) empowers the transferor of a nonnegotiable document to transfer only such rights as he himself has or has "actual authority" to convey. In contrast to situations involving the goods themselves the operation of estoppel or agency principles is not here recognized to enable the transferor to convey greater rights than he actually has. Subsection (2) makes it clear, however, that the transferee of a nonnegotiable document may acquire rights greater in some respects than those of his transferor by giving notice of the transfer to the bailee.

3. Subsection (3) is in part a reiteration of the carrier's immunity from liability if it honors instructions of the consignor to divert, but there is added a provision protecting the title of the substituted consignee if the latter is a buyer in ordinary course of business. A typical situation would be where a manufacturer, having shipped a lot of standardized goods to A on nonnegotiable bill of lading, diverts the goods to customer B who pays for them. Under orthodox passage-of-title-by-appropriation doctrine A might reclaim the goods from B. However, no consideration of commercial policy supports this involvement of an innocent third party in the default of the manufacturer on his contract to A; and the common commercial practice of diverting goods in transit suggests a trade understanding in accordance with this subsection.

4. Subsection (4) gives the carrier an express right to indemnity where he honors a seller's request to stop delivery.

5. Section 1-201(27) gives the bailee protection, if due diligence is exercised, similar to that found in the third paragraph of Section 33, Uniform Bills of Lading Act, where the bailee's organization has not had time to act on a notification.

Cross references.Point 1: Sections 2-403 and 7-506.

Point 2: Section 2-403.

Point 3: Sections 7-303 and 7-403(1) (e).

Point 4: Sections 2-705 and 7-403(1) (d).

Definitional cross references."Bailee". Section 7-102.

"Bill of lading". Section 1-201.

"Buyer in ordinary course of business". Section 1-201.

"Consignee". Section 7-102.

"Consignor". Section 7-102.

"Creditor". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Duly negotiate". Section 7-501.

"Good faith". Section 1-201.

"Goods". Section 7-102.

"Honor". Section 1-201.

"Notification". Section 1-201.

"Purchaser". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment § 90; 13 Am. Jur. 2d Carriers §§ 307, 394; 15A Am. Jur. 2d Commercial Code §§ 60, 61, 63, 68, 69; 67A Am. Jur. 2d Sales §§ 807, 1055; 78 Am. Jur. 2d Warehouses §§ 65, 69, 74, 81, 108.
Lack of endorsement or irregular endorsement of warehouse receipt or bill of lading as affecting pledge of goods, 18 A.L.R. 588.

Rights of purchaser of warehouse receipt as against warehouseman, 38 A.L.R. 1205.
Attachment or garnishment of goods covered by negotiable warehouse receipt, 40 A.L.R. 969.
Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 A.L.R. 949.
Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of warehouse receipts, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge or otherwise deal with the property, 151 A.L.R. 696.
What amounts to acknowledgment by third person that he holds goods on buyer's behalf within statutory provision respecting delivery when goods are in possession of third person, 4 A.L.R.2d 213.
Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation, 53 A.L.R.2d 1396.
13 C.J.S. Carriers § 126; 80 C.J.S. Shipping §§ 113, 114; 93 C.J.S. Warehousemen and Safe Depositaries § 24.

§ 55-7-505. Indorser not a guarantor for other parties.

The indorsement of a document of title issued by a bailee does not make the indorser liable for any default by the bailee or by previous indorsers.

History: 1953 Comp., § 50A-7-505, enacted by Laws 1961, ch. 96, § 7-505.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 37, Uniform Sales Act; Section 45, Uniform Warehouse Receipts Act; Section 36, Uniform Bills of Lading Act.

Changes. No substantial change.

Purposes of changes.The indorsement of a document of title is generally understood to be directed towards perfecting the transferee's rights rather than towards assuming additional obligations. The language of the present section, however, does not preclude the one case in which an indorsement given for value guarantees future action, namely, that in which the bailee has not yet become liable upon the document at the time of the indorsement. Under such circumstances the indorser, of course, engages that appropriate honor of the document by the bailee will occur. See Section 7-502(1) (d) as to negotiable delivery orders. However, even in such a case, once the bailee attorns to the transferee, the indorser's obligation has been fulfilled and the policy of this section excludes any continuing obligation on the part of the indorser for the bailee's ultimate actual performance.

Cross reference.Section 7-502.

Definitional cross references."Bailee". Section 7-102.

"Document of title". Section 1-201.

"Party". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 70; 78 Am. Jur. 2d Warehouses § 71.
Lack of endorsement or irregular endorsement of warehouse receipt or bill of lading as affecting pledge of goods, 18 A.L.R. 588.
13 C.J.S. Carriers § 128; 80 C.J.S. Shipping § 113; 93 C.J.S. Warehousemen and Safe Depositaries § 26.

§ 55-7-506. Delivery without indorsement; right to compel indorsement.

The transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary indorsement but the transfer becomes a negotiation only as of the time the indorsement is supplied.

History: 1953 Comp., § 50A-7-506, enacted by Laws 1961, ch. 96, § 7-506.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 35, Uniform Sales Act; Section 43, Uniform Warehouse Receipts Act; Section 34, Uniform Bills of Lading Act.

Changes. Consolidated and rewritten and former requirement that transfer be "for value" eliminated.

Purposes of changes.1. From a commercial point of view the intention to transfer a negotiable document of title which requires an indorsement for its transfer, is incompatible with an intention to withhold such indorsement and so defeat the effective use of the document. This position is sustained by the absence of any reported case applying the prior provisions in almost forty years of decisions. Further, the preceding section and the comment thereto make it clear that an indorsement generally imposes no responsibility on the indorser.

2. Although this section provides that delivery of a document of title without the necessary indorsement is effective as a transfer, the transferee, of course, has not regularized his position until such indorsement is supplied. Until this is done he cannot claim rights under due negotiation within the requirements of this article (Subsection (4) of Section 7-501) on "due negotiation." Similarly, despite the transfer to him of his

transferor's title, he cannot demand the goods from the bailee until the negotiation has been completed and the document is in proper form for surrender. See Section 7-403(2).

Cross references.Point 1: Section 7-505.

Point 2: Sections 7-501(4) and 7-403(2).

Definitional cross references."Document of title". Section 1-201.

"Rights". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 305; 15A Am. Jur. 2d Commercial Code § 61; 78 Am. Jur. 2d Warehouses § 65.
Lack of endorsement or irregular endorsement of warehouse receipt as affecting pledge of goods, 18 A.L.R. 588.
Rights of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.
6A C.J.S. Assignments § 53; 13 C.J.S. Carriers § 128; 80 C.J.S. Shipping § 114; 93 C.J.S. Warehousemen and Safe Depositaries § 27.

§ 55-7-507. Warranties on negotiation or transfer of receipt or bill.

Where a person negotiates or transfers a document of title for value otherwise than as a mere intermediary under the next following section [55-7-508 NMSA 1978], then unless otherwise agreed he warrants to his immediate purchaser only in addition to any warranty made in selling the goods:

(a) that the document is genuine; and

(b) that he has no knowledge of any fact which would impair its validity or worth; and

(c) that his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

History: 1953 Comp., § 50A-7-507, enacted by Laws 1961, ch. 96, § 7-507.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 36, Uniform Sales Act; Section 44, Uniform Warehouse Receipts Act; Section 35, Uniform Bills of Lading Act.

Changes. Consolidated and rewritten without change in policy.

Purposes of changes.1. This section omits provisions of the prior acts on warranties as to the goods as unnecessary and incomplete. It is unnecessary because such warranties derive from the contract of sale and not from the transfer of the documents. The fact that transfer of control occurs by way of a document of title does not limit or displace the ordinary obligations of a seller. The former provision, moreover, was incomplete because it did not expressly include all of the warranties which might rest upon a seller under such circumstances. This act handles the problem by means of the precautionary reference to "any warranty made in selling the goods." If the transfer of documents attends or follows the making of a contract for the sale of goods, the general obligations on warranties as to the goods (Sections 2-312 to 2-318) are brought to bear as well as the special warranties under this section.

2. The limited warranties of a delivering or collecting intermediary are stated in Section 7-508.

Cross references.Point 1: Sections 2-312 to 2-318.

Point 2: Section 7-508.

Definitional cross references."Document". Section 7-102.

"Document of title". Section 1-201.

"Genuine". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 308; 15A Am. Jur. 2d Commercial Code §§ 71, 72; 68 Am. Jur. 2d Secured Transactions § 63; 78 Am. Jur. 2d Warehouses §§ 71, 90.
13 C.J.S. Carriers § 128; 80 C.J.S. Shipping § 114; 93 C.J.S. Warehousemen and Safe Depositaries § 27.

§ 55-7-508. Warranties of collecting bank as to documents.

A collecting bank or other intermediary known to be entrusted with documents on behalf of another or with collection of a draft or other claim against delivery of documents

warrants by such delivery of the documents only its own good faith and authority. This rule applies even though the intermediary has purchased or made advances against the claim or draft to be collected.

History: 1953 Comp., § 50A-7-508, enacted by Laws 1961, ch. 96, § 7-508.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. To state the limited warranties given with respect to the documents accompanying a documentary draft.

2. In warranting its authority a bank only warrants its authority from its transferor. See Section 4-203. It does not warrant the genuineness or effectiveness of the document. Compare Section 7-507.

3. Other duties and rights of banks handling documentary drafts for collection are stated in Article 4, Part 5.

Cross references.Sections 4-203 and 7-507 and 4-501 to 4-504.

Definitional cross references."Collecting bank". Section 4-105.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Draft". Section 5-103.

"Good faith". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 9 C.J.S. Banks and Banking § 241.

§ 55-7-509. Receipt or bill; when adequate compliance with commercial contract.

The question whether a document is adequate to fulfill the obligations of a contract for sale or the conditions of a credit is governed by the articles on sales (Article 2) and on letters of credit (Article 5).

History: 1953 Comp., § 50A-7-509, enacted by Laws 1961, ch. 96, § 7-509.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.To cross-refer to the articles of this act which deal with the substantive issues of the type of document of title required under the contract entered into by the parties.

Cross references.Articles 2 and 5.

Definitional cross references."Contract for sale". Section 2-106.

"Document". Section 7-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 9 C.J.S. Banks and Banking § 241.

Part 6

WAREHOUSE RECEIPTS AND BILLS OF LADING; MISCELLANEOUS PROVISIONS

§ 55-7-601. Lost and missing documents.

(1) If a document has been lost, stolen or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with such order. If the document was negotiable the claimant must post security approved by the court to indemnify any person who may suffer loss as a result of nonsurrender of the document. If the document was not negotiable, such security may be required at the discretion of the court. The court may also in its discretion order payment of the bailee's reasonable costs and counsel fees.

(2) A bailee who without court order delivers goods to a person claiming under a missing negotiable document is liable to any person injured thereby, and if the delivery is not in good faith becomes liable for conversion. Delivery in good faith is not conversion if made in accordance with a filed classification or tariff or, where no classification or tariff is filed, if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery who files a notice of claim within one year after the delivery.

History: 1953 Comp., § 50A-7-601, enacted by Laws 1961, ch. 96, § 7-601.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 14, Uniform Warehouse Receipts Act; Section 17, Uniform Bills of Lading Act.

Changes. General revision. Principal innovations include: affirmation of bailee's privilege to deliver to claimant without resort to judicial proceedings if the bailee acts in good faith and is willing to take the full risk of loss in case the lost document turns up in the hands of an innocent purchaser; explicit authorization to the court to order bailee to issue a substitute document rather than make physical delivery of the goods; inclusion of "stolen" as well as lost documents and extension of section to nonnegotiable documents.

Purposes of changes. The purposes of the changes insofar as they are not self-evident are as follows:

1. As to bailee's privilege to deliver without court order, doubt had arisen as to the propriety of such action under Section 54 of the Uniform Warehouse Receipts Act, which made it a crime to deliver goods covered by negotiable receipts without taking up the receipts "except in the cases provided for in Section 14" (the lost receipts section). This has been interpreted by one court as exempting from criminal liability only if the judicial procedure of Section 14 was followed. Dahl v. Winter-Truesdell-Diercks Co., 61 N. D. 84, 237 N.W. 202 (1931). Although the criminal provisions are not being reenacted in this act (and the Uniform Bills of Lading Act never did include such a criminal provision), it seems advisable to clarify the legality of the well established commercial practice of bailees to make delivery where they are satisfied that the claimant is the person entitled under a lost document. Since the bailee remains liable on the document in such cases, he will usually insist that the claimant provide an indemnity bond.

2. The old acts provide only for compulsory delivery of goods; this section provides also for compulsory issuance of a substitute document. If continuance of the bailment is desirable there is no reason to require the goods to be withdrawn and redeposited in order to secure a negotiable document. The present acts would probably be so interpreted. Section 20 of the Federal Warehouse Act and some state laws expressly require issuance of a new receipt on proof of loss and posting of bond.

3. Claimants on nonnegotiable instruments are permitted to avail themselves of this procedure because straight bills of lading sometimes contain provisions that the goods shall not be delivered except upon production of the bill. If the carrier should choose to insist upon production of the bill, the consignee should have some means of compelling delivery on satisfactory proof of entitlement.

Ordinarily no security would be necessary to indemnify a bailee in delivering to the person named in a nonnegotiable document. But disputes as to negotiability may arise, in which case if there is a reasonable doubt on the point the bailee should be protected against the possibility that the missing document would, in the hands of an innocent purchaser for value, be held negotiable.

4. It seems unnecessary to state, as do the present acts, that the court shall act "on satisfactory proof of such loss or destruction." The right of action created by the section is conditioned on a document being lost, stolen or destroyed. Plaintiff must of course bring himself within the section. There is nothing in the language of the old acts to suggest that they intended to impose anything but the normal burden of proof on the plaintiff in such proceedings.

5. Subsection (2) makes it clear that after delivery without court order the bailee remains liable for actual damages. Liability for conversion is provided where the delivery is dishonest, but excluded where a filed classification or tariff is followed in good faith, or where the described bond is posted in good faith and no classification or tariff is filed. Liability for conversion in other cases is left to judicial decision.

Definitional cross references."Bailee". Section 7-102.

"Bill of lading". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Good faith". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Carriers § 421; 15A Am. Jur. 2d Commercial Code §§ 42, 47, 121; 78 Am. Jur. 2d Warehouses §§ 45, 220.
Right of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.
Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 A.L.R. 266.
Degree or quantum of evidence necessary to establish a lost instrument, 148 A.L.R. 400.
54 C.J.S. Lost Instruments § 1 et seq.

§ 55-7-602. Attachment of goods covered by a negotiable document.

Except where the document was originally issued upon delivery of the goods by a person who had no power to dispose of them, no lien attaches by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court. One who purchases the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

History: 1953 Comp., § 50A-7-602, enacted by Laws 1961, ch. 96, § 7-602.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 25, Uniform Warehouse Receipts Act; Section 24, Uniform Bills of Lading Act.

Changes. Consolidated and rewritten.

Purposes of changes.1. The purpose of the section is to protect the bailee from conflicting claims of the document holder and the judgment creditors of the person who deposited the goods. The rights of the former prevail unless, in effect, the judgment creditors immobilize the negotiable document. However, if the document was issued upon deposit of the goods by a person who had no power to dispose of the goods so that the document is ineffective to pass title, judgment liens are valid to the extent of the debtor's interest in the goods.

2. The last sentence covers the possibility that the holder of a document who has been enjoined from negotiating it will violate the injunction by negotiating to an innocent purchaser for value. In such case the lien will be defeated.

Cross reference.Point 1: Section 7-503.

Definitional cross references."Bailee". Section 7-102.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Goods". Section 7-102.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment § 61; 8 Am. Jur. 2d Bailments § 99; 69 Am. Jur. 2d Secured Transactions § 560; 78 Am. Jur. 2d Warehouses §§ 107, 224.
Attachment or garnishment of goods covered by negotiable warehouse receipt, 40 A.L.R. 969.
Garnishment of carrier in respect of goods shipped, 46 A.L.R. 933.
Uniform warehouse receipts as affecting liens on the property represented by the receipts, 61 A.L.R. 949.
Allowance of attorneys' fees to party interpleading claimants to funds or property, 48 A.L.R.2d 190.
7 C.J.S. Attachment § 273; 33 C.J.S. Execution §§ 128, 129.

§ 55-7-603. Conflicting claims; interpleader.

If more than one person claims title or possession of the goods, the bailee is excused from delivery until he has had a reasonable time to ascertain the validity of the adverse claims or to bring an action to compel all claimants to interplead and may compel such interpleader, either in defending an action for nondelivery of the goods, or by original action, whichever is appropriate.

History: 1953 Comp., § 50A-7-603, enacted by Laws 1961, ch. 96, § 7-603.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 16 and 17, Uniform Warehouse Receipts Act; Sections 20 and 21, Uniform Bills of Lading Act.

Changes. Consolidation without substantial change.

Purposes of changes.The section enables a bailee faced with conflicting claims to the goods to compel the claimants to litigate their claims with each other rather than with him.

Definitional cross references."Action". Section 1-201.

"Bailee". Section 7-102.

"Delivery". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Reasonable time". Section 1-204.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 8 Am. Jur. 2d Bailments §§ 284, 285; 13 Am. Jur. 2d Carriers § 441; 78 Am. Jur. 2d Warehouses §§ 221, 264.
Jurisdiction of state courts of actions in relation to interstate shipments, 64 A.L.R. 333.
Interpleader where one claimant asserts adverse and paramount title, 97 A.L.R. 996.
Warehouseman's right to interplead rival claimants, 100 A.L.R. 425.
Allowance of attorneys' fees to party interpleading claimants to funds or property, 48 A.L.R.2d 190.
48 C.J.S. Interpleader § 12.

Part 7

WAREHOUSE RECEIPTS; SPECIAL PENALTY PROVISIONS

§ 55-7-701. Issue of receipt for goods not received.

A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars [($5,000)], or by both.

History: 1953 Comp., § 50A-7-701, enacted by Laws 1961, ch. 96, § 7-701.

ANNOTATION

Compiler's notes. - Part 7 of Article 7 of this chapter is not included in the uniform act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 78 Am. Jur. 2d Warehouses § 49.
93 C.J.S. Warehousemen and Safe Depositaries § 18.

§ 55-7-702. Issue of receipt containing false statement.

A warehouseman, or any officer, agent or servant of a warehouseman, who fraudulently

issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars [($1,000)] or by both.

History: 1953 Comp., § 50A-7-702, enacted by Laws 1961, ch. 96, § 7-702.

§ 55-7-703. Issue of duplicate receipts not so marked.

A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncancelled, without plainly placing upon the face thereof the word "duplicate" except in the case of a lost or destroyed receipt after proceedings as provided for in Section 7-601 (1) [55-7-601 (1) NMSA 1978], shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars [($5,000)] or by both.

History: 1953 Comp., § 50A-7-703, enacted by Laws 1961, ch. 96, § 7-703.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 78 Am. Jur. 2d Warehouses § 308.
93 C.J.S. Warehousemen and Safe Depositaries § 23.

§ 55-7-704. Issue for warehouseman's goods of receipts which do not state that fact.

Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars [($1,000)] or by both.

History: 1953 Comp., § 50A-7-704, enacted by Laws 1961, ch. 96, § 7-704.

§ 55-7-705. Delivery of goods without obtaining negotiable receipt.

A warehouseman, or any officer, agent or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt

the negotiation of which would transfer the right to the possession of such goods is outstanding and uncancelled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in Section 7-601 [55-7-601 NMSA 1978], be found guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars [($1,000)] or by both.

History: 1953 Comp., § 50A-7-705, enacted by Laws 1961, ch. 96, § 7-705.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 78 Am. Jur. 2d Warehouses §§ 216 to 220. 93 C.J.S. Warehousemen and Safe Depositaries § 49.

§ 55-7-706. Negotiation of receipt for goods subject to a security interest.

Any person who deposits goods to which he has not title, or in which there is a security interest, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the security interest shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars [($1,000)] or by both.

History: 1953 Comp., § 50A-7-706, enacted by Laws 1961, ch. 96, § 7-706.

Part 8

BILLS OF LADING; SPECIAL PENALTY PROVISIONS

§ 55-7-801. Issue of bill for goods not received.

Any officer, agent or servant of a carrier, who with intent to defraud issues or aids in issuing a bill knowing that all or any part of the goods for which such bill is issued have not been received by such carrier, or by an agent of such carrier, or by a connecting carrier or are not under the carrier's control at the time of issuing such bill, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars [($5,000)] or by both.

History: 1953 Comp., § 50A-7-801, enacted by Laws 1961, ch. 96, § 7-801.

ANNOTATION

Compiler's notes. - Part 8 of Article 7 of this chapter is not included in the uniform act.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 78 Am. Jur. 2d Warehouses § 49.
93 C.J.S. Warehousemen and Safe Depositaries § 18.

§ 55-7-802. Issue of bill containing false statement.

Any officer, agent or servant of a carrier, who with intent to defraud issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars [($1,000)] or by both.

History: 1953 Comp., § 50A-7-802, enacted by Laws 1961, ch. 96, § 7-802.

§ 55-7-803. Issue of duplicate bills not so marked.

Any officer, agent or servant of a carrier, who with intent to defraud issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of Section 7-402 [55-7-402 NMSA 1978], knowing that a former negotiable bill for the same goods or any part of them is outstanding and uncanceled, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars [($5,000)] or by both.

History: 1953 Comp., § 50A-7-803, enacted by Laws 1961, ch. 96, § 7-803.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 78 Am. Jur. 2d Warehouses § 308.
93 C.J.S. Warehousemen and Safe Depositaries § 23.

§ 55-7-804. Negotiation of bill for goods subject to a security interest.

Any person who ships goods to which he has not title, or in which there is a security interest, and who takes for such goods a negotiable bill which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the security interest, shall be guilty of a crime and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars [($1,000)] or by both.

History: 1953 Comp., § 50A-7-804, enacted by Laws 1961, ch. 96, § 7-804.

§ 55-7-805. Negotiation of bill when goods are not in carrier's possession.

Any person who with intent to deceive negotiates or transfers for value a bill knowing that any or all of the goods which by the terms of such bill appear to have been reecived [received] for transportation by the carrier which issued the bill, are not in the possession or control of such carrier, or of a connecting carrier, without disclosing this fact, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars [($5,000)], or by both.

History: 1953 Comp., § 50A-7-805, enacted by Laws 1961, ch. 96, § 7-805.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 78 Am. Jur. 2d Warehouses §§ 216 to 220. 93 C.J.S. Warehousemen and Safe Depositaries § 49.

§ 55-7-806. Inducing carrier to issue bill when goods have not been received.

Any person who with intent to defraud secures the issue by a carrier of a bill knowing that at the time of such issue, any or all of the goods described in such bill as received for transportation have not been received by such carrier, or an agent of such carrier or a connecting carrier, or are not under the carrier's control, by inducing an officer, agent or servant of such carrier falsely to believe that such goods have been received by such carrier, or are under its control, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars [($5,000)] or by both.

History: 1953 Comp., § 50A-7-806, enacted by Laws 1961, ch. 96, § 7-806.

§ 55-7-807. Issue of nonnegotiable bill not so marked.

Any person who with intent to defraud issues or aids in issuing a nonnegotiable bill without the words, "not negotiable" placed plainly upon the face thereof, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars [($5,000)], or by both.

History: 1953 Comp., § 50A-7-807, enacted by Laws 1961, ch. 96, § 7-807.

Article 8

Investment Securities

Part 1

SHORT TITLE AND GENERAL MATTERS

Part 2

ISSUE; ISSUER

Part 3

Purchase

Part 1

SHORT TITLE AND GENERAL MATTERS

§ 55-8-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code - Investment Securities.

History: 1953 Comp., § 50A-8-101, enacted by Laws 1961, ch. 96, § 8-101.

OFFICIAL COMMENT

Purposes.This Article sets forth certain rights and duties of the issuers of and the parties that deal with investment securities, both certificated and uncertificated. Unlike a corporation code, it does not set forth general rules defining property rights that accrue to holders of securities. And unlike a Blue Sky statute it does not set forth specific requirements for disclosing to the public the nature of the property interest that is the security. Rather it sets forth rules relative to the transfer of the rights that constitute securities and to the establishment of those rights against the issuer and other parties.

As is true with respect to all other Articles of the Code, parties may by agreement create rights and duties between themselves that vary from those set forth in this Article. Section 1-102(3). But prejudice to the rights of those not party to the agreement is limited by Code provisions (

e.g., Sections 8-313 and 8-321) as well as by general legal principles that supplement the Code. See Section 1-103 and Comment 2 to Section 1-102.

This Article does not purport to determine whether a particular issue of securities should be represented by certificates, in whole or in part. That determination is left to the parties involved, subject to federal and state law.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes §§ 8, 47; 15A Am. Jur. 2d Commercial Code § 73 et seq.
Conflict of laws as to transfer of corporate stock, 131 A.L.R. 192.
Construction and effect of U.C.C., art. 8, dealing with investment securities, 21 A.L.R.3d 964; 88 A.L.R.3d 949.
Awarding damages for delay, in addition to specific performance, of contract for sale of corporate stock, 28 A.L.R.3d 1401.
11 C.J.S. Bonds § 62; 18 C.J.S. Corporations § 388; 19 C.J.S. Corporations § 1146; 64 C.J.S. Municipal Corporations § 1950; 81A C.J.S. States § 186.

§ 55-8-102. Definitions and index of definitions.

(1) In this article unless the context otherwise requires:

(a) a "certificated security" is a share, participation or other interest in property of or an

enterprise of the issuer or an obligation of the issuer which is:

(i) represented by an instrument issued in bearer or registered form;

(ii) of a type commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

(iii) either one of a class or series or by its terms divisible into a class or series of shares, participations, interests or obligations;

(b) an "uncertificated security" is a share, participation or other interest in property or an enterprise of the issuer or an obligation of the issuer which is:

(i) not represented by an instrument and the transfer of which is registered upon books maintained for that purpose by or on behalf of the issuer;

(ii) of a type commonly dealt in on securities exchanges or markets; and

(iii) either one of a class or series or by its terms divisible into a class or series of shares, participations, interests or obligations;

(c) a "security" is either a certificated or an uncertificated security. If a security is certificated, the terms "security" and "certificated security" may mean either the intangible interest, the instrument representing that interest, or both, as the context requires. A writing that is a certificated security is governed by this article and not by Chapter 55, Article 3 NMSA 1978 even though it also meets the requirements of that article. This article does not apply to money. If a certificated security has been retained by or surrendered to the issuer or its transfer agent for reasons other than registration of transfer, other temporary purpose, payment, exchange or acquisition by the issuer, that security shall be treated as an uncertificated security for purposes of this article;

(d) a certificated security is in "registered form" if:

(i) it specifies a person entitled to the security or to the rights it represents; and

(ii) its transfer may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security so states; and

(e) a certificated security is in "bearer form" if it runs to bearer according to its terms and not by reason of any indorsement.

(2) A "subsequent purchaser" is a person who takes other than by original issue.

(3) A "clearing corporation" is a corporation registered as a "clearing agency" under the federal securities laws or a corporation:

(a) at least ninety percent of whose capital stock is held by or for one or more organizations, none of which, other than a national securities exchange or association, holds in excess of twenty percent of the capital stock of the corporation, and each of which is:

(i) subject to supervision or regulation pursuant to the provisions of federal or state banking laws or state insurance laws;

(ii) a broker or dealer or investment company registered under the federal securities laws; or

(iii) a national securities exchange or association registered under the federal securities laws; and

(b) any remaining capital stock of which is held by individuals who have purchased it at or prior to the time of their taking office as directors of the corporation and who have purchased only so much of the capital stock as is necessary to permit them to qualify as directors.

(4) A "custodian bank" is a bank or trust company that is supervised and examined by state or federal authority having supervision over banks and is acting as custodian for a clearing corporation.

(5) Other definitions applying to this article or to specified parts thereof and the sections in which they appear are:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

"Adverse claim"
.....Section 55-8-302 NMSA 1978;
"Bona fide purchaser"
.....Section 55-8-302 NMSA 1978;
"Broker"
.....Section 55-8-303 NMSA 1978;
"Debtor"
.....Section 55-9-105 NMSA 1978;
"Financial intermediary"
.....Section 55-8-313 NMSA 1978;
"Guarantee of the signature"
.....Section 55-8-402 NMSA 1978;
"Initial transaction statement"
.....Section 55-8-408 NMSA 1978;
"Instruction"
.....Section 55-8-308 NMSA 1978;
"Intermediary bank"

.....Section 55-4-105 NMSA 1978;
"Issuer"
.....Section 55-8-201 NMSA 1978;
"Overissue"
.....Section 55-8-104 NMSA 1978;
"Secured party"
.....Section 55-9-105 NMSA 1978; and
"Security agreement"
.....Section 55-9-105 NMSA 1978.

(6) In addition, Chapter 55, Article 1 NMSA 1978 contains general definitions and principles of construction and interpretation applicable throughout this article.

History: 1953 Comp., § 50A-8-102, enacted by Laws 1961, ch. 96, § 8-102; 1967, ch. 186, § 19; 1973, ch. 96, § 1; 1987, ch. 248, § 3.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This is Article 8's definitional Section. It is supplemented generally by the definitions in Article 1 and in particular matters is supplemented by definitions in other Articles. Subsection (5) enumerates several important supplementary definitions and their locations in the Code.

2. Subsection (1) defines "security," the basic term of this section. Paragraphs (a) and (b) respectively define "certificated security" and "uncertificated security," and paragraph (c) states that the term "security" comprises both. These definitions are functional rather than formal. At the core is the notion that a security is a share or participation in an enterprise or an obligation that is of a type commonly traded in organized markets for such interests or is commonly recognized as a medium for investment. The ambit of the definition will change as "securities" trading practices evolve to include or exclude new property interests. It is believed that the definition will cover anything which securities markets, including not only the organized exchanges but as well the "over-the-counter" markets, are likely to regard as suitable for trading. For example, transferable warrants evidencing rights to subscribe for shares in a corporation will normally be "certificated securities" within the definition, since they (a) are issued in bearer or registered form, (b) are of a type commonly dealt in on securities markets, (c) constitute a class or series of instruments, and (d) evidence an obligation of the issuer, namely the obligation to honor the warrant upon its due exercise and issue shares accordingly.

Notice that the definition of uncertificated security does not include the phrase "or commonly recognized in any area in which it is issued or dealt in as a medium for investment." Since there is no requirement of representation by an instrument, a great many interests that might be regarded as media for investment would be classified as securities under the umbrella of the omitted phrase. For example, interests such as

bank checking and savings accounts are intended to be excluded from the definition because they are not commonly traded; but since those accounts are commonly recognized as media for investment, the omitted language might bring them within the scope of the definition.

Interests such as the stock of closely-held corporations, although they are not actually traded upon securities exchanges, are intended to be included within the definitions of both certificated and uncertificated securities by the inclusion of interests "of a type" commonly traded in those markets. See paragraphs (1)(a)(ii) and (1)(b)(ii).

The second sentence of (1)(c) is intended to eliminate confusion arising from the fact that certificated securities are alternatively viewed as the actual pieces of paper and the interests they represent. The final sentence of (1)(c) is to recognize that an issuer that nominally issues certificated securities but does not normally send the certificates to the owners is functionally identical to the issuer of uncertificated securities and should be guided by the same rules.

3. The consequence of determining that an interest is a "security" is that this Article will provide the relative rights of issuers, owners, purchasers and creditors as to transfer of rights, notice of claims, registration of interests, etc. This definition has no bearing upon whether an interest is a "security" for purposes of federal securities laws. By the same token the definitions of "securities" for purposes of those laws has no bearing upon whether an interest is a security within the definition of this Article.

4. A certificated security is a negotiable instrument (Section 8-105) but is nonetheless governed by this Article rather than by Article 3. A critical distinction between certificated securities and other negotiable instruments is that one indorsing a security does not undertake the issuer's obligation or make any warranty that the issuer will honor the underlying obligation. One indorsing other negotiable instruments becomes secondarily liable on the underlying obligation.

5. The definition of "clearing corporation" in subsection (3) reflects the fact that a 1975 amendment to the Securities Exchange Act provides for registration of "clearing agencies" with the Securities and Exchange Commission.

Cross reference.Section 3-103.

Definitional cross references."Bearer". Section 1-201.

"Issuer". Section 8-201.

"Money". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

"Term". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Cross-references. - As to fiduciary or custodian depositing securities in clearing corporation, see 46-1-12 NMSA 1978.

The 1987 amendment, effective June 19, 1987, substituted NMSA citations for UCC citations, rewrote Subsections (1) and (3), made minor stylistic changes in Subsection (4), and added the definitions in Subsection (5) for "debtor", "financial intermediary", "initial transaction statement", "instruction", "secured party", and "security agreement".

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Alteration of Instruments § 30; 12 Am. Jur. 2d Bonds § 55; 13 Am. Jur. 2d Carriers § 47; 15A Am. Jur. 2d Commercial Code §§ 73, 74, 77, 86, 91, 107; 18A Am. Jur. 2d Corporations §§ 509, 681; 50 Am. Jur. 2d Letters of Credit and Credit Cards § 3; 68 Am. Jur. 2d Secured Transactions §§ 14, 59, 168.
What is a "security" under UCC Article 8, 11 A.L.R.4th 1036.
82 C.J.S. Statutes § 315.

§ 55-8-103. Issuer's lien.

A lien upon a security in favor of an issuer thereof is valid against a purchaser only if:

(a) the security is certificated and the right of the issuer to the lien is noted conspicuously thereon; or

(b) the security is uncertificated and a notation of the right of the issuer to the lien is contained in the initial transaction statement sent to the purchaser or, if his interest is transferred to him other than by registration of transfer, pledge or release, the initial transaction statement sent to the registered owner or the registered pledgee.

History: 1953 Comp., § 50A-8-103, enacted by Laws 1961, ch. 96, § 8-103; 1987, ch. 248, § 4.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 15, Uniform Stock Transfer Act.

Purposes.1. The rule of Section 15 of the Uniform Stock Transfer Act is made applicable to all securities covered by the Article. An analogous rule as to restrictions on transfer imposed by the issuer appears at Section 8-204. Compare also Section 8-202. This section differs from those two sections in that the purchaser's knowledge of the issuer's claim is irrelevant.

"Noted" makes clear that the text of the lien provisions need not be set forth in full. However, this would not override a provision of an applicable corporation code requiring statement

in haec verba .

2. The purchaser of an uncertified security is charged with notice of all provisions in the initial transaction statement, whether or not it is sent to him personally. Similarly, one who takes a certificated security is charged with notice of all provisions noted on the certificate whether or not he actually receives the certificate. When a purchaser takes a security under circumstances in which no initial transaction statement is sent to him by the issuer and no certificated security is delivered to him, he must look to the person to whom a transfer or pledge of the uncertificated security has been registered or the person in possession of the certificated security for the appropriate notice or absence thereof. If the purchaser is not notified of a lien he may have a right of action for breach of transfer warranties. See Section 8-306. Compare Section 8-202 and its Comment 1.

Cross references.Sections 8-202 and 8-204.

Definitional cross references."Certificated Security". Section 8-102.

"Conspicuous". Section 1-201.

"Initial Transaction Statement". Section 8-408.

"Issuer". Section 8-201.

"Purchaser". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, divided the existing language into an introductory paragraph and Paragraph (a) while adding "the security is certificated and" at the beginning of Paragraph (a), and added Paragraph (b).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 83, 87; 18A Am. Jur. 2d Corporations § 722; 68 Am. Jur. 2d Secured Transactions § 14.
Constructive notice to purchaser or pledgee of stock of corporation's lien thereon, 33 A.L.R. 1272.
Construction, application and effect of statutes giving corporation lien on shares of its stockholders for debts due from stockholders to corporation, 80 A.L.R. 1338.
Priority as between lien of corporation and rights of pledgee or bona fide purchaser of corporate stock, 81 A.L.R. 989.
Construction and application of provisions of articles, bylaws, statutes or agreements restricting alienation or transfer of corporate stock; payment of indebtedness to corporation, 2 A.L.R.2d 760.
Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations, 11 A.L.R.2d 1380.
Construction and effect of § 15 of Uniform Stock Transfer Act prohibiting restriction of transfer of shares unless such restriction is stated on the certificate, 29 A.L.R.2d 901.
Validity of restrictions on alienation of corporate stock, 61 A.L.R.2d 1318.
18 C.J.S. Corporations § 450.

§ 55-8-104. Effect of overissue; "overissue".

(1) The provisions of this article which validate a security or compel its issue or reissue do not apply to the extent that validation, issue or reissue would result in overissue; but if:

(a) an identical security which does not constitute an overissue is reasonably available for purchase, the person entitled to issue or validation may compel the issuer to purchase the security for him and either to deliver a certificated security or to register the transfer of an uncertificated security to him, against surrender of any certificated security he holds; or

(b) a security is not so available for purchase, the person entitled to issue or validation may recover from the issuer the price he or the last purchaser for value paid for it with interest from the date of his demand.

(2) "Overissue" means the issue of securities in excess of the amount the issuer has corporate power to issue.

History: 1953 Comp., § 50A-8-104, enacted by Laws 1961, ch. 96, § 8-104; 1987, ch. 248, § 5.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Deeply embedded in corporation law is the conception that "corporate power" to issue securities stems from the statute, either general or special, under which the corporation is organized. Corporation codes universally require that the charter or articles of incorporation state, at least as to capital shares, maximum limits in terms of number of shares or total dollar capital. Historically, special incorporation statutes are similarly drawn and sometimes similarly limit the face amount of authorized debt securities. The theory is that issue of securities in excess of the authorized amounts is prohibited. See, for example, McWilliams v. Geddes & Moss Undertaking Co., 169 So. 894 (1936, La.); Crawford v. Twin City Oil Co., 216 Ala. 216, 113 So. 61 (1927); New York and New Haven R.R. Co. v. Schuyler, 34 N.Y. 30 (1865). This conception persists despite modern corporation codes under which, by action of directors and stockholders, additional shares can be authorized by charter amendment and thereafter issued. This section does not give a person entitled to validation, issue or reissue of a security, the right to compel amendment of the charter to authorize additional shares. Therefore, in a case where issue of an additional security would require charter amendment, the plaintiff is limited to the two alternate remedies set forth in paragraphs (a) and (b) of subsection (1).

2. Where an identical security is reasonably available for purchase, whether because traded on an organized market, or because one or more security owners may be willing to sell at a not unreasonable price, the issuer, although unable to issue additional shares, will be able to purchase them and may be compelled to follow that procedure. West v. Tintic Standard Mining Co., 71 Utah 158, 263 P. 490, 56 A.L.R. 1190 (1928).

Paragraph (1)(a) gives the issuer the choice to transfer either a certificated or an uncertificated security. As a practical matter the issuer will have the choice only when the securities of the issue involved are partly certificated and partly uncertificated; and in those circumstances section 8-407 gives the owner (or registered pledgee) the right to choose the form of the security. Thus the issuer likely will transfer a security of the form requested by the person entitled to the security.

3. The right to recover damages from an issuer who has permitted an overissue to occur is well settled. New York and New Haven R.R. Co. v. Schuyler, 34 N.Y. 30 (1865). The measure of such damages, however, has been open to question, some courts basing them upon the value of stock at the time registration is refused; some upon the value at the time of trial; and some upon the highest value between the time of refusal and the time of trial. Allen v. South Boston Railroad, 150 Mass. 200, 22 N.E. 917, 5 L.R.A. 716, 15 Am. St. Rep. 185 (1889); Commercial Bank v. Kortright, 22 Wend. (N.Y.) 348 (1839). The purchase price of the security to the last purchaser who gave value for it is here adopted as being the fairest means of reducing the possibility of speculation by the purchaser. Interest may be recovered as the best available measure of compensation for delay.

4. This section modifies and controls the rules otherwise laid down in this Article as to the validation and issue of securities. The particular sections so modified are listed in the cross-references.

Cross references.Point 4: See Sections 8-202, 8-205, 8-206, 8-208, 8-311 and Part 4 of this Article.

Definitional cross references."Certificated Security". Section 8-102.

"Issuer". Section 8-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted all of the language following "to purchase" for "and deliver such a security to him against surrender of the security, if any, which he holds" in Subsection (1)(a), and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 73, 74, 82, 89, 102, 119, 121; 18A Am. Jur. 2d Corporations §§ 472 to 474.
11 C.J.S. Bonds § 62; 18 C.J.S. Corporations §§ 197, 209; 19 C.J.S. Corporations § 1147; 64 C.J.S. Municipal Corporations § 1950; 81A C.J.S. States § 186.

§ 55-8-105. Certificated securities negotiable; statements and instructions not negotiable; presumptions.

(1) Certificated securities governed by this article are negotiable instruments.

(2) Statements (Section 55-8-408 NMSA 1978), notices or the like, sent by the issuer of uncertificated securities and instructions (Section 55-8-308 NMSA 1978) are neither negotiable instruments nor certificated securities.

(3) In any action on a security:

(a) unless specifically denied in the pleadings, each signature on a certificated security, in a necessary indorsement on an initial transaction statement or on an instruction, is admitted;

(b) if the effectiveness of a signature is put in issue, the burden of establishing it is on the party claiming under the signature, but the signature is presumed to be genuine or authorized;

(c) if signatures on a certificated security are admitted or established, production of the

security entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security;

(d) if signatures on an initial transaction statement are admitted or established, the facts stated in the statement are presumed to be true as of the time of its issuance; and

(e) after it is shown that a defense or defect exists, the plaintiff has the burden of establishing that he or some person under whom he claims is a person against whom the defense or defect is ineffective (Section 55-8-202 NMSA 1978).

History: 1953 Comp., § 50A-8-105, enacted by Laws 1961, ch. 96, § 8-105; 1987, ch. 248, § 6.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Although certificated securities are negotiable instruments, this Article and not Article 3 provides the rights and duties relative to such instruments. See Sections 8-102(1)(c) and 3-103(1). But in subsection (3) of this section the particular rules stated in Section 3-307 for the negotiable instruments governed by Article 3 are adapted to certificated securities. Further, those rules are adopted with respect to signatures on initial transaction statements, although subsection (2) makes clear that such statements are not negotiable instruments.

2. Paragraph (3)(d) makes clear that the effect of establishing the validity of signatures on an initial transaction statement is to create a presumption that the facts stated therein were true as of the time it was issued. The issuer is free to show that later events - e.g., a subsequent transfer - changed the stated facts.

3. "Any action on a security" includes any action or proceeding brought against the issuer to enforce a right or interest that is part of the security - e.g., to collect principal or interest or a dividend, or to establish a right to vote or to receive a new security under an exchange offer or plan of reorganization.

Cross references.Section 3-103, 3-307, 8-202, 8-301.

Definitional cross references."Certificated Security". Section 8-102.

"Initial Transaction Statement". Section 8-408.

"Instruction". Section 8-308.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, inserted "Certificated" at the beginning of Subsection (1), redesignated former Subsection (2) as present Subsection (3) and added present Subsection (2), substituted all of the language beginning with "certificated" in Subsection (3)(a) for "the security or in a necessary endorsement is admitted", substituted "if" for "when" at the beginning of Subsection (3)(b), substituted all of the language preceding "entitles" in Subsection (3)(c) for "when signatures are admitted or established, production of the instrument", redesignated former Subsection (3)(d) as present Subsection (3)(e) and added present Subsection (3)(d), and substituted "Section 55-8-202 NMSA 1978" for "Section 8-202" in Subsection (3)(e).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Banks § 51; 12 Am. Jur. 2d Bonds §§ 51, 55, 63; 15A Am. Jur. 2d Commercial Code §§ 73, 75, 78, 108; 18A Am. Jur. 2d Corporations § 681.
11 C.J.S. Bonds § 62; 18 C.J.S. Corporations § 444; 19 C.J.S. Corporations § 1147; 64 C.J.S. Municipal Corporations § 1950; 81A C.J.S. States § 186.

§ 55-8-106. Applicability.

The law (including the conflict of laws rules) of the jurisdiction of organization of the issuer governs the validity of a security, the effectiveness of registration by the issuer and the rights and duties of the issuer with respect to:

(a) registration of transfer of a certificated security;

(b) registration of transfer, pledge or release of an uncertificated security; and

(c) sending of statements of uncertificated securities.

History: 1953 Comp., § 50A-8-106, enacted by Laws 1961, ch. 96, § 8-106; 1987, ch. 248, § 7.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section states a special rule for conflicts of laws relating to certain matters covered by this Article. Except as provided in this section, the generally applicable conflicts rules stated in Section 1-105 apply to Article 8.

2. Generally speaking, this section makes the law, including the conflict of laws rules, of the jurisdiction in which the issuer is organized applicable to determine the rights and obligations of the issuer with respect to security. Further, the

effectiveness of registration by the issuer is to be governed by the law of the jurisdiction in which the issuer is organized. Thus whenever an uncertificated security is transferred through registration on the issuer's records, Section 8-313(1)(b), this section provides the choice of law rule as to the effectiveness of the registration to effect the transfer. Similarly, the effectiveness of a registration on the issuer's records to create and perfect a security interest in uncertificated securities (see Section 8-321) is within the ambit of this section.

It is significant that this section makes applicable the conflict of laws rules as well as the substantive law of the jurisdiction in which the issuer is organized. Because of this provision many matters related to the registration of transfer - for example, the appointment of a guardian for an incompetent person and the existence of agency relations - may be governed by the substantive law of a jurisdiction other than that in which the issuer is organized.

Any transfer of securities that is not effected through registration on the issuer's records is subject to the law provided by general choice of law rules. Transfers (including pledges) of certificated securities are not effected by registration on the issuer's records, and thus are subject to general choice of law rules. Similarly, some transfers of uncertificated securities are not covered by this section. See Section 8-313(1)(d) and (f)-(j).

Cross references.Sections 1-105 and 8-202 and Part 4 of this Article.

Definitional cross references."Certificated Security". Section 8-102.

"Issuer". Section 8-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted the present language for "The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer".

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 11, 76; 16 Am. Jur. 2d Conflict of Laws § 2; 18 Am. Jur. 2d Corporations § 19.
Conflict of laws as to title and transfer of corporate stock, 131 A.L.R. 192.
Statutory requirements respecting issuance of corporate stock as applicable to foreign

corporations, 8 A.L.R.2d 1185.
Construction and effect of U.C.C. art. 8, dealing with investment securities, 21 A.L.R.3d 964; 88 A.L.R.3d 949.
18 C.J.S. Corporations §§ 196, 434.

§ 55-8-107. Securities transferable; action for price.

(1) Unless otherwise agreed and subject to any applicable law or regulation respecting short sales, a person obligated to transfer securities may transfer any certificated security of the specified issue in bearer form or registered in the name of the transferee or indorsed to him or in blank, or he may transfer an equivalent uncertificated security to the transferee or a person designated by the transferee.

(2) If the buyer fails to pay the price as it comes due under a contract of sale, the seller may recover the price of:

(a) certificated securities accepted by the buyer;

(b) uncertificated securities that have been transferred to the buyer or a person designated by the buyer; and

(c) other securities if efforts at their resale would be unduly burdensome or if there is no readily available market for their resale.

History: 1953 Comp., § 50A-8-107, enacted by Laws 1967, ch. 186, § 2; 1987, ch. 248, § 8.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The rights and interests that constitute securities of the same issue are "fungible". Section 1-201(17). This is true of both certificated and uncertificated securities. Subsection (1) states the generally accepted legal consequences of such fungibility. "Unless otherwise agreed", the seller, bailee, broker or other "person obligated to transfer securities" need not transfer any specific instrument, but may select (e.g., from "a fungible bulk" (Section 8-313(2)) any security of the proper issue, in bearer form or appropriately registered or indorsed or may transfer an uncertificated security of the same issue.

Rules of the organized markets limiting the forms in which securities are transferable in transactions on such markets are matters "otherwise agreed". Cases such as Parsons v. Martin, 77 Mass. (11 Gray) 111 (1858) and Rumery v. Brooks, 205 App.Div. 283, 199 N.Y.Supp. 517 (1st Dept.1923), holding a broker liable for conversion if he registers transfer of a customer's securities held in "cash account" out of the customer's name or

tenders on demand for delivery a different though equivalent security, are rejected. However, this Act does not enlarge the rights of a broker as to such securities so as to permit him without the customer's consent to pledge them for his own indebtedness, and he may properly do with securities held in a "margin account" to the extent he has acquired a lien for advances. The distinction is carefully preserved in statute (e.g., N.Y.Penal Law § 956) and case law. In re Mills, 125 App.Div. 730, 113 N.Y.Supp. 314 (1st Dept.1908).

2. Subsection (2) is designed to follow the dictum in Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1934) in this context. Paragraph (c) is applicable where for example (i) the securities are those of a "closely-held" corporation not dealt in on any organized market; or (ii) because of the necessity for compliance with the registration requirements of the Securities Act of 1933 or other regulatory provisions or procedures prior to offering the particular securities on the market substantial delay and expense would be involved. The approval of these particular remedies does not constitute disapproval of other remedies that may exist under other rules of law. Section 1-103.

Cross references.Sections 1-103; 2-708; 2-709; 8-313; 8-319.

Definitional cross references."Action". Section 1-201.

"Certificated Security". Section 8-102.

"Contract". Section 1-201.

"Person". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, in Subsection (1) twice substituted "transfer" for "deliver", substituted "certificated security" for "security", and added all of the language following "blank". The amendment also made stylistic changes in Subsection (2), inserted "certificated" in Subsection (2)(a), redesignated former Subsection (2)(b) as present Subsection (2)(c), and added present Subsection (2)(b).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 104, 106, 112.
18 C.J.S. Corporations § 194.

§ 55-8-108. Registration of pledge and release of uncertificated securities.

A security interest in an uncertificated security may be evidenced by the registration of pledge to the secured party or a person designated by him. There can be no more than one registered pledge of an uncertificated security at any time. The registered owner of an uncertificated security is the person in whose name the security is registered, even if the security is subject to a registered pledge. The rights of a registered pledgee of an uncertificated security under this article are terminated by the registration of release.

History: 1978 Comp., § 55-8-108, enacted by Laws 1987, ch. 248, § 9.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section introduces the concept of the registered pledge of uncertificated securities. The term "pledge" is used, notwithstanding the absence of physical delivery, because it reflects common terminology employed in connection with security interests in investment securities. Note that the same term has been used in Section 8-320 to describe the security interest created by book entry made by a securities depository. The rights of a registered pledgee, set forth in other sections (particularly Section 8-207), are intended to resemble, as closely as possible, the rights of the pledgee of a certificated security who retains possession of the pledged security without reregistration. Although the registration of pledge requires communication to the issuer, no details of the security agreement between the debtor and the secured party need be disclosed.

There is no provision for the registration of more than one pledge at a time. This limits the burden on issuers and insulates them from problems of conflicting priorities and the like. The registration of pledge is only one among several methods of creating security interests under Section 8-313(1), and other methods can be effectively employed to create security interests junior to that of the registered pledgee or even first security interests if, for some reason, the use of the registered pledge mechanism is inadvisable. See Section 8-321, which deals comprehensively with security interests and incorporates the transfer rules of Section 8-313(1) by reference.

The third sentence makes it clear that the registered owner, and not the registered pledgee, is the person in whose name an uncertificated security is registered as, for example, to determine how an unsecured creditor may reach his debtor's interest under Section 8-317(2). The registration of release, in effect, nullifies the registration of pledge, and is functionally equivalent to the redelivery of a pledged certificated security to the pledgor.

Cross references.Sections 8-207; 8-321; 8-401.

Definitional cross references."Secured Party". Section 9-105.

"Security". Section 8-102.

"Security Interest". Section 1-201.

"Uncertificated Security". Section 8-102.

ANNOTATION

Effective dates. - Laws 1987, ch. 248 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 19, 1987.

Part 2

ISSUE; ISSUER

§ 55-8-201. "Issuer".

(1) With respect to obligations on or defenses to a security "issuer" includes a person who:

(a) places or authorizes the placing of his name on a certificated security (otherwise than as authenticating trustee, registrar, transfer agent or the like) to evidence that it represents a share, participation or other interest in his property or in an enterprise, or to evidence his duty to perform an obligation represented by the certificated security;

(b) creates shares, participations or other interests in his property or in an enterprise or undertakes obligations, which shares, participations, interests or obligations are uncertificated securities;

(c) directly or indirectly creates fractional interests in his rights or property which fractional interests are represented by certificated securities; or

(d) becomes responsible for or in place of any other person described as an issuer in this section.

(2) With respect to obligations on or defenses to a security a guarantor is an issuer to the extent of his guaranty whether or not his obligation is noted on a certificated security or on statements of uncertificated securities sent pursuant to Section 55-8-408 NMSA 1978.

(3) With respect to registration of transfer, pledge or release (Sections 55-8-401 through 55-8-408 NMSA 1978), "issuer" means a person on whose behalf transfer books are maintained.

History: 1953 Comp., § 50A-8-201, enacted by Laws 1961, ch. 96, § 8-201; 1987, ch. 248, § 10.

OFFICIAL COMMENT

Prior uniform statutory provisions. Sections 29, 60, 61, and 62, Uniform Negotiable Instruments Law.

Purposes.1. Part 2 of Article 8 describes the rights and duties of an "issuer" of a security. It is generally understood that an "issuer" is the one who creates the property interest that is a "security" and who thereby incurs obligations to purchasers of that interest. This section provides the criteria for determining whether a person has incurred the obligations - and gained the rights - given to an issuer in this Article. Numerous rights and obligations arise from sources other than Article 8. This section does not determine whether a person is an "issuer" for purposes of those sources of law.

2. Paragraph (1)(a) makes a person an "issuer" for purposes of this Article if he authorizes the placing of his name on a certificate intending that it should be a certificated security (Section 8-102(1)(a)). This paragraph bears a close relationship to Section 8-102(1)(a), which describes the property interests that may constitute a "certificated security." The latter section describes those interests in terms of rights against "the issuer," while this section defines issuer in terms of authorizing the placing of a name on a "certificated security." The effect is to add to the definition of "certificated security" the requirement that it bear the authorized name of the person creating the property interests. Thus, if a certificate bears the

unauthorized name of the purported issuer, the purported issuer is not an "issuer" within this Article; and the certificate is not a "certificated security." See Section 8-202(3) and its Comment 4. Section 8-205 describes the circumstances in which the purported issuer will be treated as if he were a true "issuer" despite the absence of his authorized signature.

3. Read in conjunction with the definition of "uncertificated security" in Section 8-102(1)(b), paragraph (1)(b) makes a person an "issuer" if he creates and maintains books for the registration of ownership of property interests that fit within the definition of an uncertificated security.

4. Subsection (2) distinguishes the obligations of a guarantor as issuer from those of the principle obligor. However, it does not exempt the guarantor from the impact of subsection (4) of Section 8-202. Whether or not the obligation of the guarantor is noted on the security or initial transaction statement (Section 8-408(4)) is immaterial. Typically, guarantors are parent corporations, or stand in some similar relationship to the principal obligor. If that relationship existed at the time the security originally was issued, the guaranty probably would be noted on the security or initial transaction statement. However, if the relationship arose afterward - e.g., through a purchase of stock or properties, or through merger or consolidation - probably the notation would not

be made. Nonetheless, the owner of the security is entitled to the benefit of the obligation of the guarantor.

5. Subsection (3) narrows the definition of "issuer" for purposes of Part 4 of this Article (registration of transfer). It is supplemented by Section 8-406.

Cross references.Points 1, 2, and 3: Sections 8-102, 8-202 and 8-205.

Point 4: Section 8-202.

Point 5: Part 4 of this Article.

Definitional cross references."Certificated Security". Section 8-102.

"Person". Section 1-201.

"Rights". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated security" for "security" and "represented" for "evidenced" in several places throughout the section, added present Subsection (1)(b) while redesignating former Subsections (1)(b) and (1)(c) as present Subsections (1)(c) and (1)(d), added all of the language beginning with "or on statements" in Subsection (2), and inserted "pledge or release" in Subsection (3) while substituting therein the NMSA citations for "(Part 4 of this article)".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 74, 77, 86, 116.
Statutory requirements respecting issuance of corporate stock as applicable to foreign corporation, 8 A.L.R.2d 1185.
Construction and effect to UCC § 8-207(1) allowing issuer of investment security to treat registered owner as entitled to owner's rights until presentment for registration of transfer, 21 A.L.R.4th 879.
11 C.J.S. Bonds § 62; 18 C.J.S. Corporations § 388; 19 C.J.S. Corporations § 1146; 64 C.J.S. Municipal Corporations § 1950; 81A C.J.S. States § 186.

§ 55-8-202. Issuer's responsibility and defenses; notice of defect or defense.

(1) Even against a purchaser for value and without notice, the terms of a security

include:

(a) if the security is certificated, those stated on the security;

(b) if the security is uncertificated, those contained in the initial transaction statement sent to such purchaser, or if his interest is transferred to him other than by registration of transfer, pledge or release, the initial transaction statement sent to the registered owner or registered pledgee; and

(c) those made part of the security by reference, on the certificated security or in the initial transaction statement, to another instrument, indenture or document or to a constitution, statute, ordinance, rule, regulation, order or the like to the extent that the terms referred to do not conflict with the terms stated on the certificated security or contained in the statement. A reference under this paragraph does not of itself charge a purchaser for value with notice of a defect going to the validity of the security, even though the security expressly states that a person accepting it admits notice.

(2) A certificated security in the hands of a purchaser for value or an uncertificated security as to which an initial transaction statement has been sent to a purchaser for value, other than a security issued by a government or governmental agency or unit, even though issued with a defect going to its validity, is valid with respect to the purchaser if he is without notice of the particular defect unless the defect involves a violation of constitutional provisions, in which case the security is valid with respect to a subsequent purchaser for value and without notice of the defect.

This subsection applies to an issuer that is a government or governmental agency or unit only if either there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

(3) Except as provided in the case of certain unauthorized signatures (Section 55-8-205 NMSA 1978), lack of genuineness of a certificated security or an initial transaction statement is a complete defense, even against a purchaser for value and without notice.

(4) All other defenses of the issuer of a certificated or uncertificated security, including nondelivery and conditional delivery of a certificated security, are ineffective against a purchaser for value who has taken without notice of the particular defense.

(5) Nothing in this section shall be construed to affect the right of a party to a "when, as and if issued" or a "when distributed" contract to cancel the contract in the event of a material change in the character of the security that is the subject of the contract or in the plan or arrangement pursuant to which the security is to be issued or distributed.

History: 1953 Comp., § 50A-8-202, enacted by Laws 1961, ch. 96, § 8-202; 1987, ch. 248, § 11.

OFFICIAL COMMENT

Prior uniform statutory provisions. Sections 16, 23, 28, 56, 57, 60, 61, 62, Uniform Negotiable Instruments Law.

Purposes.1. A purchaser must have some method of learning the terms of the security he is purchasing. The printing on the certificate or on the initial transaction statement ("ITS") is designed to notify the purchaser of those terms. If he purchases without examining the certificate or ITS, he does so at his peril, since he is charged with notice of terms stated thereon.

Some methods of transferring a security do not involve the actual delivery of a certificate or the sending of an ITS to the actual purchaser. See Section 8-313(1)(c)-(j). The situations in which these methods of transfer will be used can be divided into two categories - those in which an intermediary takes a transfer for his principal and those in which a bailee "holding" a security effects a transfer by receiving notice of, or sending acknowledgement of, the purchase. In either type of situation the purchaser will be charged with notice of all terms stated on the certificate if the security is certificated or, if the security is uncertificated, with notice of all terms stated in the ITS sent to the registered owner or registered pledgee. For example, suppose that Customer purchases an uncertificated security that is already registered in the name of his broker. Customer is content to allow the security to remain in Broker's name, so that Customer never receives an ITS. Customer is charged with notice of the terms stated on the ITS sent to Broker when Broker became the registered owner. Or suppose that Purchaser buys a certificated security and the transfer is effected not by delivering the certificate but by having Bailee, who holds the security, acknowledge that he holds for Purchaser. Purchaser is charged with notice of the terms written on the certificate.

It is apparent that in these situations a purchaser must rely upon the intermediary or bailee who "holds" the security for him.

2. Subsection (1)(c) states, in accordance with the prevailing case law, the right of the issuer (who prepares the text of the security or statement) to include terms incorporated by adequate reference to an extrinsic source, so long as the terms so incorporated do not conflict with the stated terms. Thus the standard practice of referring in a bond or debenture to the trust indenture under which it is issued without spelling out its necessarily complex and lengthy provisions is approved. Every stock certificate or ITS will refer in some manner to the charter or articles of incorporation of the issuer. At least where there is more than one class of stock authorized, applicable corporation codes specifically require a statement or summary as to preferences, voting powers and the like. References to constitutions, statutes, ordinances, rules, regulations or orders are not so common except in the obligations of governments or governmental agencies or units; but where appropriate they fit into the rule here stated.

Following the basic principles of the Negotiable Instruments Law the cases have generally held that an issuer is estopped from denying representations made in the text

of a security. Delaware-New Jersey Ferry Co. v. Leeds, 21 Del.Ch. 279, 186 A. 913 (1936). Nor is a defect in form or the invalidity of a security normally available to the issuer as a defense. Bonini v. Family Theatre Corporation, 327 Pa. 273, 194 A. 498 (1937); First National Bank of Fairbanks v. Alaska Airmotive, 119 F.2d 267 (C.C.A.Alaska 1941).

This general rule of estoppel is here adopted in favor of purchasers, with the exception noted above.

3. The last sentence of subsection (1) and all of subsection (2) embody the concept that it is the duty of the issuer, not of the purchaser, to make sure that the security complies with the law governing its issue. The last sentence of subsection (1) makes clear that the issuer cannot, by incorporating a reference to a statute or other document, charge the purchaser with notice of the security's invalidity. Subsection (2) gives to a purchaser for value without notice of the defect the right to enforce the security against the issuer despite the presence of a defect that otherwise would render the security invalid. This right accrues to a purchaser regardless of whether the security has been transferred to him through physical delivery of a certificate (Section 8-313(1)(a)), through registration of transfer or pledge of an uncertificated security (Section 8-313(1)(b)), or through some other method in which he receives no certificate or initial transaction statement. (Section 8-313(1)(c)-(j)). There are three circumstances in which a purchaser does not gain such rights: first, if the defect involves a violation of constitutional provisions, these rights accrue only to a subsequent purchaser (Section 8-102(2)). This Article leaves to the law of each particular state the rights of a purchaser on original issue of a security with a constitutional defect. No negative implication is intended by the explicit grant of rights to a subsequent purchaser.

Second, governmental issuers are distinguished in subsection (2) from other issuers as a matter of public policy, and additional safeguards are imposed before governmental issues are validated. Governmental issuers are estopped from asserting defenses only if there has been substantial compliance with the legal requirements governing the issue or if substantial consideration has been received and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security. The purpose of the substantial compliance requirement is to make certain that a mere technicality as, e.g., in the manner of publishing election notices, shall not be a ground for depriving an innocent purchaser of his rights in the security. The policy is here adopted of such cases as Tommie v. City of Gadsden, 229 Ala. 521, 158 So. 763 (1935), in which minor discrepancies in the form of the election ballot used were overlooked and the bonds were declared valid since there had been substantial compliance with the statute.

A long and well established line of Federal cases recognizes the principle of estoppel in favor of bona fide purchasers where municipalities issue bonds containing recitals of compliance with governing constitutional and statutory provisions, made by the municipal authorities entrusted with determining such compliance. Chaffee County v. Potter, 142 U.S. 355, 12 S.Ct. 216, 35 L.Ed. 1040 (1892); Oregon v. Jennings, 119 U.S.

74, 7 S.Ct. 124, 30 L.Ed. 323 (1886); Gunnison County Commissioners v. Rollins, 173 U.S. 255, 19 S.Ct. 390, 43 L.Ed. 689 (1898). This rule has been qualified, however, by requiring that the municipality have power to issue the security. Anthony v. County of Jasper, 101 U.S. 693, 25 L.Ed. 1005 (1879); Town of South Ottawa v. Perkins, 94 U.S. 260, 24 L.Ed. 154 (1876). This section follows the case law trend, simplifying the rule by setting up two conditions for an estoppel against a governmental issuer: (1) substantial consideration given, and (2) power in the issuer to borrow money or issue the security for the stated purpose. As a practical matter the problem of policing governmental issuers has been alleviated by the present practice of requiring legal opinions as to the validity of the issue. The bulk of the case law on this point is more than 50 years old and it may be assumed that the question now seldom arises.

Section 8-104 regarding over-issue, provides the third exception to the rule that an innocent purchase for value takes a valid security despite the presence of a defect that would otherwise give rise to invalidity. See that section and its comment for further explanation.

4. Subsection (3) is in effect a definitional provision. The person purported to have issued a certificated security is not an "issuer", and the certificate is not a "certificated security", unless that person actually took the actions that constitute issue. See Sections 8-102(1)(a) and 8-201(1). Similarly, a statement purportedly sent by an issuer is not an "initial transaction statement" if it was not actually sent by the issuer (Section 8-408(4), (1), (2) and (3)). Section 8-205 is a caveat to both of these general rules.

5. Subsection (4) gives the general rule that defenses of the issuer are ineffective against a purchaser for value without notice of the defense. Notice to the purchaser may come from sources other than a notation on a certificate or an initial transaction statement. Compare Section 8-103 with respect to an issuer's lien.

6. Subsection (5) is included to make clear that this section does not affect the presently recognized right of either party to a "when, as and if" or "when distributed" contract to cancel the contract on substantial change.

Cross references.Point 1: Section 8-313.

Point 2: Sections 1-201, 8-103, 8-203, 8-204.

Point 3: Sections 1-201, 8-102 and 8-104.

Point 4: Sections 8-102, 8-201 and 8-205.

Point 5: Section 8-103.

See Sections 8-104, 8-203, 8-205, and 8-206.

Definitional cross references."Certificated Security". Section 8-102.

"Delivery". Section 1-201.

"Genuine". Section 1-201.

"Initial Transaction Statement". Section 8-408.

"Issuer". Section 8-201.

"Money". Section 1-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Security". Section 8-102.

"Subsequent Purchaser". Section 8-102.

"Term". Section 1-201.

"Unauthorized Signature". Section 1-201.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote Subsections (1), (2) and (3), inserted "of a certificated or uncertificated security" in Subsection (4) while substituting therein "a certificated security" for "the security", and made minor stylistic changes in Subsection (5).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bonds §§ 62, 73; 15A Am. Jur. 2d Commercial Code §§ 75, 77 to 80, 89; 18A Am. Jur. 2d Corporations §§ 488, 509, 512; 64 Am. Jur. 2d Public Securities and Obligations §§ 324, 325, 328.
Fraudulent representations in sale of corporate stock for which note is given as throwing upon subsequent holder of note burden of proving that he is a holder in due course, 18 A.L.R. 60; 34 A.L.R. 300; 57 A.L.R. 1083.
Issuance by corporation of new stock certificates without requiring surrender of old, 61 A.L.R. 436; 150 A.L.R. 148.
Right of pledgee of corporate stock to transfer of stock on books of company, 116

A.L.R. 571.
Rights, duties and liability of corporation in connection with transfer of stock of infant or incompetent, 3 A.L.R.2d 881.
Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations, 11 A.L.R.2d 1380.
Patent rights, copyrights, trademarks, secret processes and the like, as "property" within provisions of law or charter forbidding issuance of corporate stock except for money paid or property received, 37 A.L.R.2d 913.
Issuance of stock certificate to joint tenants as creating gift inter vivos, 5 A.L.R.4th 373.
11 C.J.S. Bonds § 81; 18 C.J.S. Corporations § 388; 19 C.J.S. Corporations § 1146; 64 C.J.S. Municipal Corporations §§ 1970, 1971; 81A C.J.S. States § 190.

§ 55-8-203. Staleness as notice of defects or defenses.

(1) After an act or event creating a right to immediate performance of the principal obligation represented by a certificated security or that sets a date on or after which the security is to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer if:

(a) the act or event is one requiring the payment of money, the delivery of certificated securities, the registration of transfer of uncertificated securities or any of these on presentation or surrender of the certificated security, the funds or securities are available on the date set for payment or exchange and he takes the security more than one year after that date; and

(b) the act or event is not covered by Paragraph (a) of this subsection and he takes the security more than two years after the date set for surrender or presentation or the date on which performance became due.

(2) A call that has been revoked is not within Subsection (1) of this section.

History: 1953 Comp., § 50A-8-203, enacted by Laws 1961, ch. 96, § 8-203; 1987, ch. 248, § 12.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 52(2), 53, Uniform Negotiable Instruments Law.

Purposes.1. The problem of matured or called securities is here dealt with in terms of the effect of such events in giving notice of the issuer's defenses and not in terms of "negotiability". The substance of this section applies only to certificated securities because such securities may be transferred to a purchaser by delivery after they have matured, been called or become redeemable or exchangeable. It is contemplated that uncertificated securities which have matured or been called will merely be cancelled on

the books of the issuer and the proceeds sent to the registered owner or registered pledgee, as the case may be. Uncertificated securities which have become redeemable or exchangeable, at the option of the owner, may be transferred to a purchaser, but the transfer is effectuated only by registration of transfer, thus necessitating communication with the issuer. If defects or defenses in such securities exist, the issuer will necessarily have the opportunity to bring them to the attention of the purchaser in the initial transaction statement sent to him.

2. The fact that a certificated security is in circulation long after it has been called for redemption or exchange must give rise to the question in a purchaser's mind as to why it has not been surrendered. After the lapse of a reasonable period of time he can no longer claim that he had "no reason to know" of any defects or irregularities in its issue. Where funds are available for the redemption of the security it is normally turned in more promptly and a shorter time is set as the "reasonable period", subsection (1)(a), than is set where funds are not available.

It is true that defaulted certificated securities are frequently traded on financial markets in the same manner as unmatured and undefaulted instruments and a purchaser might not be placed upon notice of irregularity by the mere fact of default. An issuer, however, should at some point be placed in a position to determine definitely its liability on an invalid or improper issue, and for this purpose a security under this section becomes "stale" two years after the default. But notice that a different rule applies when the question is notice not of issuer's defenses but of claims of ownership. Section 8-305 and comment.

3. Nothing in this section is designed to extend the life of preferred stocks called for redemption as "shares of stock" beyond the redemption date. After such a call, the security represents only a right to the funds set aside for redemption.

Cross references.Sections 8-104, 8-202 and 8-305.

Definitional cross references."Certificated Security". Section 8-102.

"Delivery". Section 1-201.

"Issuer". Section 8-201.

"Money". Section 1-201.

"Notice". Section 1-201.

"Purchaser". Section 1-201.

"Right". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "represented by a certificated security" for "evidenced by the security" in the introductory paragraph of Subsection (1), in Subsection (1)(a) substituted "certificated securities, the registration of transfer of uncertificated securities or any of these on presentation or surrender of the certificated security" for "securities or both on presentation or surrender of the security", and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bonds § 69; 15A Am. Jur. 2d Commercial Code §§ 81, 94; 18A Am. Jur. 2d Corporations §§ 509, 541.
Validity, construction and effect of provisions of articles of incorporation or certificates of stock relating to redemption or retirement of preferred stock, 88 A.L.R. 1131.
Validity, construction and effect of provisions of article of incorporation of stock certificates relating to call, redemption or retirement of common stock, 48 A.L.R.2d 392.
Change in stock or corporate structure, or split or substitution of stock of corporation, as affecting bequest of stock, 46 A.L.R.3d 7.
11 C.J.S. Bonds § 81; 18 C.J.S. Corporations §§ 253, 444; 19 C.J.S. Corporations § 1227; 64 C.J.S. Municipal Corporations § 1965; 81A C.J.S. States § 190.

§ 55-8-204. Effect of issuer's restrictions on transfer.

A restriction on transfer of a security imposed by the issuer, even though otherwise lawful, is ineffective against any person without actual knowledge of it unless:

(a) the security is certificated and the restriction is noted conspicuously thereon; or

(b) the security is uncertificated and a notation of the restriction is contained in the initial transaction statement sent to the person or, if his interest is transferred to him other than by registration of transfer, pledge or release, the initial transaction statement sent to the registered owner or the registered pledgee.

History: 1953 Comp., § 50A-8-204, enacted by Laws 1961, ch. 96, § 8-204; 1987, ch. 248, § 13.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 15, Uniform Stock Transfer Act.

Purposes.1. Use of the words "noted" and "notation" is intended to make clear that the restriction need not be set forth in full text. See Allen v. Biltmore Tissue Corporation, 2 N.Y.2d 534, 141 N.E.2d 812 (1957).

2. Securities traded on financial markets are generally assumed to be free of adverse claims (Section 8-302). That assumption should not be lightly negated. Therefore, a strict rule as to notice of a restriction on transfer is here imposed. The issuer can protect itself by noting the restriction on the certificate or initial transaction statement. Refusal by an issuer to register a transfer on the basis of an unnoted restriction constitutes a conversion and the issuer can be compelled to register the transfer under the policy of Part 4 of this Article. Hulse v. Consolidated Quicksilver Mining Corporation, 65 Idaho 768, 154 P.2d 149 (1944); Mancini v. Patrizi, 110 Cal.App. 42, 293 P. 828 (1930). Conversely, the issuer to whom a certificated security with proper notation of a restriction is presented thereby receives timely notification of an adverse claim and is under a duty to inquire (Section 8-403).

A purchaser with actual knowledge of an unnoted restriction certainly has notice of an adverse claim (Section 8-304 and Comment). In that situation this section adopts the reasoning of Baumohl v. Goldstein, 95 N.J.Eq. 597, 124 A. 118 (1924), and Tomoser v. Kamphausen, 307 N.Y. 797, 121 N.E.2d 622 (1954), rejecting the contrary holding of such cases as Costello v. Farrell, 234 Minn. 453, 48 N.W.2d 557, 29 A.L.R.2d 890 (1951).

3. A transferee who purchases securities in organized financial markets often may neither take physical delivery of a certificated security nor have an uncertificated security registered in his name. See Section 8-313(1)(c) through (j). Under those circumstances the transferee may have no occasion to examine the writing on the certificate or the initial transaction statement. Nonetheless the transferee is charged with notice of restrictions noted on the certificate or on the initial transaction statement sent to the registered owner or registered pledgee. See Section 8-202(1) and Comment 1 thereto.

4. Most jurisdictions recognize the right of issuers to impose restrictions giving either the issuer itself or other stockholders the option to purchase the security at an ascertained price before it is offered to third parties. Vannucci v. Peduni, 217 Cal. 138, 17 P.2d 706 (1932); People ex rel. Rudaitis v. Galskis, 233 Ill.App. 414 (1924); Bloomingdale v. Bloomingdale, 107 Misc. 646, 177 N.Y.S. 873 (1919). This is the type of restriction contemplated by the present section. Mere notation on the certificate or initial transaction statement cannot, of course, validate an otherwise unlawful restriction. The present section in no way alters the prevailing case law which recognizes free alienability as an inherent attribute of securities and holds invalid unreasonable restraints on alienation such as those requiring consents of directors without establishing criteria for the granting or withholding of such consents and those giving the directors an option of purchase at a price to be fixed in their sole discretion. Howe v. Roberts, 209 Ala. 80, 95 So. 344 (1923); People ex rel. Malcolm v. Lake Sand Corporation, 251 Ill.App. 499 (1929); Morris v. Hussong Dyeing Machine Co., 81 N.J.Eq. 256, 86 A. 1026 (1913); New England Trust Co. v. Abbott, 162 Mass. 148, 38 N.E. 432, 27 L.R.A. 271 (1894).

No interference is intended with the common practice of closing books for proper corporate purposes.

5. Cooperative associations and ventures, as well as private clubs are generally considered an exception to the rules against restrictions on transfer as unreasonable restraints on alienation and are permitted for example to require the consents of governing bodies such as a board of directors. Penthouse Properties, Inc. v. 1158 Fifth Avenue, Inc., 256 App.Div. 685, 11 N.Y.S.2d 417 (1939).

Historically, restrictions on transfer were most commonly imposed by so-called "closely-held" issuers (including cooperatives and the like) in an attempt to restrict control, if not total membership to a homogeneous security holder group. They have been increasingly resorted to by issuers with publicly held securities seeking to police enforcement of the registration requirements of the Securities Act of 1933 against persons purchasing their securities in a transaction exempt from those requirements (e.g., one "not involving any public offering" [Securities Act of 1933, Section 4(2)]) or against persons in a "control" relationship to the issuer. [See Securities Act of 1933, Section 2(11) and Rule 405 of the Rules and Regulations of the Securities and Exchange Commission under that Act.] Particularly in the latter context in which notation of the restriction on all affected certificates or initial transaction statements may not be practical, the issuer enforces it by notifying the holders of such certificates and refusing requests to register transfer out of the name of the "controlling person" either for purposes of sale or for delivery after sale, relying on the stated exceptions as to a person "with actual knowledge" of the restriction.

6. This section deals only with restrictions imposed by the issuer and restrictions imposed by statute are not affected. See Quiner v. Marblehead Social Co., 10 Mass. 476 (1813); Madison Bank v. Price, 79 Kan. 289, 100 P. 280 (1909); Healey v. Steele Center Creamery Ass'n, 115 Minn. 451, 133 N.W. 69 (1911). Nor does it deal with private agreements between stockholders containing restrictive covenants as to the sale of the security as in In re Consolidated Factors Corporation, 46 F.2d 561 (S.D.N.Y.1931).

7. An analogous provision concerning issuer's liens appears at Section 8-103.

Cross references.Point 7: Section 8-103.

See Part 4 of this Article.

Definitional cross references."Certificated Security". Section 8-102.

"Conspicuous". Section 1-201.

"Initial Transaction Statement". Section 8-408.

"Issuer". Section 8-201.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted the present language for "Unless noted conspicuously on the security a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective except against a person with actual knowledge of it".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 83, 87, 92; 18A Am. Jur. 2d Corporations § 683.
Provision for disposal of stock on death of stockholder as affecting validity of option or similar contract, 1 A.L.R.2d 1269.
Construction and application of provision restricting sale or transfer of corporate stock, 2 A.L.R.2d 745.
Construction and effect of restriction on transfer of stock unless such restriction is stated on the certificate, 29 A.L.R.2d 1146.
Dominant stockholders' accountability to minority for profit, bonus or the like received on sale of stock to outsiders, 38 A.L.R.3d 738.
Validity of restrictions on alienation of corporate stock, 61 A.L.R.2d 1318.
Validity and construction of provision restricting transfer of corporate stock, which conditions transfer upon consent of one other than shareholder, officer or director of corporation, 53 A.L.R.3d 1272.
11 C.J.S. Bonds § 66; 18 C.J.S. Corporations § 391; 19 C.J.S. Corporations § 1148; 64 C.J.S. Municipal Corporations §§ 1950, 1968; 81A C.J.S. States § 186.

§ 55-8-205. Effect of unauthorized signature on certificated security or initial transaction statement.

An unauthorized signature placed on a certificated security prior to or in the course of issue or placed on an initial transaction statement is ineffective, but the signature is effective in favor of a purchaser for value of the certificated security or a purchaser for value of an uncertificated security to whom such initial transaction statement has been sent, if the purchaser is without notice of the lack of authority and the signing has been done by:

(a) an authenticating trustee, registrar, transfer agent or other person entrusted by the issuer with the signing of the security, of similar securities or of initial transaction

statements or the immediate preparation for signing of any of them; or

(b) an employee of the issuer or of any of the foregoing entrusted with responsible handling of the security or initial transaction statement.

History: 1953 Comp., § 50A-8-205, enacted by Laws 1961, ch. 96, § 8-205; 1987, ch. 248, § 14.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 23, Uniform Negotiable Instruments Law.

Purposes.1. In current practice the problem of forged or unauthorized signatures arises most frequently where an employee of the issuer, transfer agent or registrar has access to securities which he is required to prepare for issue by affixing the corporate seal or by adding a signature necessary for issue. This section is based upon the issuer's duty to avoid the negligent entrusting of securities to such persons. Issuers have long been held responsible for signatures placed upon securities by parties whom they have held out to the public as authorized to prepare such securities. See Fifth Avenue Bank of New York v. The Forty-Second Street & Grand Street Ferry Railroad Co., 137 N.Y. 231, 33 N.E. 378, 19 L.R.A. 331, 33 Am.St.Rep. 712 (1893); Jarvis v. Manhattan Beach Co., 148 N.Y. 652, 43 N.E. 68, 31 L.R.A. 776, 51 Am.St.Rep. 727 (1896). The "apparent authority" concept of some of the caselaw, however, is here extended and this section expressly rejects the technical distinction, made by courts reluctant to recognize forged signatures, between cases where the forger signs a signature he is authorized to sign under proper circumstances and those in which he signs a signature he is never authorized to sign. Citizens' & Southern National Bank v. Trust Co. of Georgia, 50 Ga.App. 681, 179 S.E. 278 (1935). Normally the purchaser is not in a position to determine which signature a forger, entrusted with the preparation of securities, has "apparent authority" to sign and which he has not. The issuer, on the other hand, can protect itself against such fraud by the careful selection and bonding of agents and employees, or by action over against transfer agents and registrars who in turn may bond their personnel.

2. It is contemplated that purchasers of uncertificated securities will rely on initial transaction statements (ITS's) sent to them, much as purchasers of certificated securities rely on certificates. The issuer's signature is thus required to ensure genuineness of the ITS. Section 8-408(4). In this regard the principal difference between certificates and ITS's is that only the one to whom the ITS is sent can safely rely on it, whereas a certificated security is a negotiable instrument and may be relied upon by transferees other than the original purchaser. The issuer's responsibility for unauthorized signatures otherwise is the same in both instances.

A transferee of an uncertificated security may be protected indirectly by this section despite the fact that he has not received the ITS. If his transferor received an ITS and was protected by this section, Section 8-301(1) gives those rights to the transferee.

3. The issuer cannot be held liable for the honesty of employees not entrusted, directly or indirectly, with the signing, preparation, or responsible handling of similar securities or similar ITS's and whose possible commission of forgery it has no reason to anticipate. The result in such cases as Hudson Trust Co. v. American Linseed Co., 232 N.Y. 350, 134 N.E. 178 (1922), and Dollar Savings Fund & Trust Co. v. Pittsburgh Plate Glass Co., 213 Pa. 307, 62 A. 916, 5 Ann. Cas. 248 (1906) is here adopted.

4. This section is not concerned with forged or unauthorized indorsements (Section 8-311), but only with unauthorized signatures of issuers, transfer agents, etc., placed upon certificated securities, or initial transaction statements during the course of their issue. The protection here stated is available to all purchasers for value without notice and not merely to subsequent purchasers.

Cross references.Point 4: Section 8-311.

See Section 8-202(3).

Definitional cross references."Certificated Security". Section 8-102.

"Initial Transaction Statement". Section 8-408.

"Issuer". Section 8-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Security". Section 8-102.

"Sign". Section 1-201.

"Unauthorized Signature". Section 1-201.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote the introductory paragraph, substituted all of the language of Paragraph (a) following "security" for "or of similar securities or their immediate preparation for signing", and added "or initial transaction statement" at the end of Paragraph (b).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 79, 82, 89, 91, 102; 18A Am. Jur. 2d Corporations §§ 512, 514.
Issuance of stock certificate to joint tenants as creating gift inter vivos, 5 A.L.R.4th 373.
11 C.J.S. Bonds § 81; 18 C.J.S. Corporations § 253; 19 C.J.S. Corporations § 1150; 64 C.J.S. Municipal Corporations §§ 1970, 1971; 81A C.J.S. States § 190.

§ 55-8-206. Completion or alteration of certificated security or initial transaction statement.

(1) If a certificated security contains the signatures necessary to its issue or transfer but is incomplete in any other respect:

(a) any person may complete it by filling in the blanks as authorized; and

(b) even though the blanks are incorrectly filled in, the security as completed is enforceable by a purchaser who took it for value and without notice of such incorrectness.

(2) A complete certificated security that has been improperly altered, even though fraudulently, remains enforceable, but only according to its original terms.

(3) If an initial transaction statement contains the signatures necessary to its validity, but is incomplete in any other respect:

(a) any person may complete it by filling in the blanks as authorized; and

(b) even though the blanks are incorrectly filled in, the statement as completed is effective in favor of the person to whom it is sent if he purchased the security referred to therein for value and without notice of the incorrectness.

(4) A complete initial transaction statement that has been improperly altered, even though fraudulently, is effective in favor of a purchaser to whom it has been sent, but only according to its original terms.

History: 1953 Comp., § 50A-8-206, enacted by Laws 1961, ch. 96, § 8-206; 1987, ch. 248, § 15.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 14, 15 and 124, Uniform Negotiable Instruments Law; Section 16, Uniform Stock Transfer Act.

Purposes.1. The problem of forged or unauthorized signatures necessary for the issue or transfer of a security or for the authentication of an initial transaction statement is not involved here, and a person in possession of a blank certificate or of a writing that would

be an initial transaction statement if it were properly signed is not, by this section, given authority to fill in blanks with such signatures.

2. Completion of blanks left in a transfer instruction is dealt with elsewhere (Section 8-308(5)). Blanks left upon authentication of an initial transaction statement or upon issue of a certificated security are the only ones dealt with here, and a purchaser for value without notice is protected. A purchaser is not in a good position to determine whether blanks were completed by the issuer or by some person not authorized to complete them. On the other hand the issuer can protect itself by not placing its signature on the writing until the blanks are completed or, if it does sign before all blanks are completed, by carefully selecting the agents and employees to whom it entrusts the writing after authentication. With respect to a certificated security or an initial transaction statement that is completed by the issuer but later is altered, the issuer has done everything it can to protect the purchaser and thus is not charged with the terms as altered. However, it is charged according to the original terms, since it is not thereby prejudiced.

If the completion or alteration is obviously irregular, the purchaser may be charged with notice. See Section 1-201(25).

3. Only the purchaser who physically takes the certificate or receives the initial transaction statement is directly protected. However, a transferee may receive protection indirectly through Section 8-301(1).

4. The protection granted a purchaser for value without notice under this section is modified to the extent that an overissue may result where an incorrect amount is inserted into a blank (Section 8-104).

Cross references.Point 2: Sections 1-201, 8-302 and 8-308. Point 3: Section 8-301. Point 4: Section 8-104. See Sections 8-205 and 8-311.

Definitional cross references."Certificated Security". Section 8-102.

"Initial Transaction Statement". Section 8-408.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Security". Section 8-102.

"Term". Section 1-201.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated security" for "security", made minor stylistic changes in Subsections (1) and (2), and added Subsections (3) and (4).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Alteration of Instruments § 30; 12 Am. Jur. 2d Bonds § 73; 15A Am. Jur. 2d Commercial Code §§ 79, 84, 85; 18A Am. Jur. 2d Corporations § 512; 64 Am. Jur. 2d Public Securities and Obligations § 299. Effect of entrusting another with stock certificate endorsed or assigned in blank, to estop owner as against bona fide purchaser or pledgee for value, 73 A.L.R. 1405.
3A C.J.S. Alteration of Instruments § 1; 11 C.J.S. Bonds § 75; 18 C.J.S. Corporations § 208; 19 C.J.S. Corporations § 1138; 64 C.J.S. Municipal Corporations §§ 1970, 1971; 81A C.J.S. States § 190.

§ 55-8-207. Rights and duties of issuer with respect to registered owners and registered pledgees.

(1) Prior to due presentment for registration of transfer of a certificated security in registered form, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, to receive notifications and otherwise to exercise all the rights and powers of an owner.

(2) Subject to the provisions of Subsections (3), (4) and (6) of this section, the issuer or indenture trustee may treat the registered owner of an uncertificated security as the person exclusively entitled to vote, to receive notifications and otherwise to exercise all the rights and powers of an owner.

(3) The registered owner of an uncertificated security that is subject to a registered pledge is not entitled to registration of transfer prior to the due presentment to the issuer of a release instruction. The exercise of conversion rights with respect to a convertible uncertificated security is a transfer within the meaning of this section.

(4) Upon due presentment of a transfer instruction from the registered pledgee of an uncertificated security, the issuer shall:

(a) register the transfer of the security to the new owner free of pledge, if the instruction specifies a new owner (who may be the registered pledgee) and does not specify a pledgee;

(b) register the transfer of the security to the new owner subject to the interest of the existing pledgee, if the instruction specifies a new owner and the existing pledgee; or

(c) register the release of the security from the existing pledge and register the pledge of the security to the other pledgee, if the instruction specifies the existing owner and another pledgee.

(5) Continuity of perfection of a security interest is not broken by registration of transfer under Subsection (4)(b) or by registration of release and pledge under Subsection (4)(c) of this section, if the security interest is assigned.

(6) If an uncertificated security is subject to a registered pledge:

(a) any uncertificated securities issued in exchange for or distributed with respect to the pledged security shall be registered subject to the pledge;

(b) any certificated securities issued in exchange for or distributed with respect to the pledged security shall be delivered to the registered pledgee; and

(c) any money paid in exchange for or in redemption of part or all of the security shall be paid to the registered pledgee.

(7) Nothing in this article shall be construed to affect the liability of the registered owner of a security for calls, assessments or the like.

History: 1953 Comp., § 50A-8-207, enacted by Laws 1961, ch. 96, § 8-207; 1987, ch. 248, § 16.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 3, Uniform Stock Transfer Act.

Purposes.1. Subsection (1) states the issuer's right to treat the registered owner of a certificated security as the person entitled to exercise all the rights of an owner. This right of the issuer is limited by the provisions of Part 4 of this article - once there has been due presentation for registration of transfer, the issuer has a duty to register ownership in the name of the transferee. Section 8-401. Thus its right to treat the old registered owner as exclusively entitled to the rights of ownership must cease.

Subsection (2) states a parallel rule for uncertificated securities, with the important exception that the rights of the registered owner are curtailed when the uncertificated security is subject to a registered pledge. See Section 8-108. Thus, subsection (3) denies the registered owner the power to order transfer of an uncertificated security subject to a registered pledge until the pledge has been released by order of the pledgee. See Section 8-308(4) and (7)(b).

Subsection (4) establishes the right of the registered pledgee to control the transfer of an uncertificated security subject to his pledge. The three paragraphs of subsection (4)

illustrate the mechanics for three common transactions: (a) the outright transfer of the security, free of the pledge; (b) the transfer of registered ownership, subject to the pledge; and (c) the transfer of the pledgee's interest without disturbing the registered ownership. These transactions are not intended to be exclusive. For example, the transfer of a pledged uncertificated security to a new owner subject to the interest of a new pledgee might be accomplished in several ways. There could be a release of his interest by the old pledgee followed by a transfer of registered ownership from the old owner to the new owner and a pledge from the new owner to the new pledgee. Or, if the respective pledgees wished to maintain complete control over the security, the old pledgee could order a transfer of his interest to the new pledgee under paragraph (c) and the new pledgee could then order the transfer of registered ownership from the old owner to the new owner under paragraph (b). Still other combinations are possible, depending on the positions of the parties.

Subsection (6) insures that stock dividends or splits issued with respect to a pledged uncertificated security and securities or money distributed or paid in exchange for a pledged uncertificated security will remain within the control of the registered pledgee. This result cannot be extended to pledges of certificated securities because the issuer will normally be unaware of the pledgee's rights unless the pledgee has caused a transfer to be registered.

2. The rule of such cases as Turnbull v. Longacre Bank, 249 N.Y. 159, 163 N.E. 135 (1928), which held the issuer liable for paying out dividends to the record holder after the transferee had given notice of the transfer and demanded that a new certificate be issued to him, is left unchanged. However, such cases as Morrison v. Gulf Oil Corporation, 189 Miss. 212, 196 So. 247 (1940), holding that Section 3 of Uniform Stock Transfer Act did not change the common law as to the issuer's liability for dealing with the record holder after mere notice of a pledge, are expressly rejected. Mere notice is not enough under this section to impose upon the issuer the duty of dealing with the pledgee although it may constitute notice to the issuer of a claim of ownership under Part 4.

Subsections (1) and (2) are permissive and do not require that the issuer deal exclusively with the registered owner. It is free to require proof of ownership before paying out dividends or the like if it chooses to. Barbato v. Breeze Corporation, 128 N.J.L. 309, 26 A.2d 53 (1942).

3. This section does not operate to determine who is finally entitled to exercise voting and other rights or to receive payments and distributions. The parties are still free to incorporate their own arrangements as to these matters in seller-purchaser agreements which will be definitive as between them.

4. No change in existing state laws as to the liability of registered owners for calls and assessments is here intended; nor is anything in this section designed to estop a record holder from denying ownership when assessments are levied if he is otherwise entitled to do so under state law. See State ex rel. Squire v. Murfey, Blosson & Co., 131 Ohio

St. 289, 2 N.E.2d 866 (1936); Willing v. Delaplaine, 23 F.Supp. 579 (1937).

5. No interference is intended with the common practice of closing the transfer books or taking a record date for dividend, voting and other purposes, as provided for in by-laws, charters and statutes.

Cross references.Section 8-108 and Part 4 of this Article.

Definitional cross references."Certificated Security". Section 8-102.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Money". Section 1-201.

"Notification". Section 1-201.

"Person". Section 1-201.

"Registered Form". Section 8-102.

"Right". Section 1-201.

"Security". Section 8-102.

"Security Interest". Section 9-105.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated security" for "security" in Subsection (1), added present Subsections (2) through (6), and redesignated former Subsection (2) as present Subsection (7).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 86, 116; 18A Am. Jur. 2d Corporations §§ 642, 896, 1037.
Right of corporation to refuse to register transfer of stock because of stockholder's indebtedness to it, where transfer is by operation of law, 65 A.L.R. 220.
Failure to enter transfer of stock on corporate books as affecting liability of transferor for calls or assessments, 104 A.L.R. 638.
Construction and effect of UCC § 8-207(1) allowing issuer of investment security to treat registered owner as entitled to owner's rights until presentment for registration of transfer, 21 A.L.R.4th 879.
18 C.J.S. Corporations § 441; 19 C.J.S. Corporations § 1154.

§ 55-8-208. Effect of signature of authenticating trustee, registrar or transfer agent.

(1) A person placing his signature upon a certificated security or an initial transaction statement as authenticating trustee, registrar, transfer agent or the like warrants to a purchaser for value of the certificated security or a purchaser for value of an uncertificated security to whom the initial transaction statement has been sent, if the purchaser is without notice of the particular defect that:

(a) the certificated security or initial transaction statement is genuine;

(b) his own participation in the issue or registration of the transfer, pledge or release of the security is within his capacity and within the scope of the authority received by him from the issuer; and

(c) he has reasonable grounds to believe that the security is in the form and within the amount the issuer is authorized to issue.

(2) Unless otherwise agreed a person by so placing his signature does not assume responsibility for the validity of the security in other respects.

History: 1953 Comp., § 50A-8-208, enacted by Laws 1961, ch. 96, § 8-208; 1967, ch. 186, § 20; 1987, ch. 248, § 17.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The warranties here stated express the current understanding and prevailing case law as to the effect of the signatures of authenticating trustees, transfer agents, and registrars. See Jarvis v. Manhattan Beach Co., 148 N.Y. 652, 43 N.E. 68, 31 L.R.A. 776, 51 Am.St.Rep. 727 (1896). Although it has generally been regarded as the particular obligation of the transfer agent to determine whether securities are in proper forms as provided by the by-laws and Articles of Incorporation, neither a registrar nor an authenticating trustee should properly place a signature upon a certificate or transaction statement without determining whether it is at least regular on its face. The obligations of these parties in this respect have therefore been made explicit in terms of due care. See Feldmeier v. Mortgage Securities, Inc., 34 Cal.App.2d 201, 93 P.2d 593 (1939).

2. Those cases which hold that an authenticating trustee is not liable for any defect in the mortgage or property which secures the bond or for any fraudulent misrepresentations made by the issuer are not here affected since these matters do not involve the genuineness or proper form of the security. Ainsa v. Mercantile Trust Co., 174 Cal. 504, 163 P. 898 (1917); Tschetinian v. City Trust Co., 186 N.Y. 432, 79 N.E.

401 (1906); Davidge v. Guardian Trust Co. of New York, 203 N.Y. 331, 96 N.E. 751 (1911).

3. The charter or an applicable statute may affect the capacity of a bank or other corporation undertaking to act as an authenticating trustee, registrar or transfer agent. See, for example, the Federal Reserve Act (U.S.C.A., Title 12, Banks and Banking, Section 248) under which the Board of Governors of the Federal Reserve Bank is authorized to grant special permits to National Banks permitting them to act as trustees. Such corporations are therefore held to certify as to their legal capacity to act as well as to their authority.

4. Authenticating trustees, registrars and transfer agents have normally been held liable for an issue in excess of the authorized amount. Jarvis v. Manhattan Beach Co., supra; Mullen v. Eastern Trust & Banking Co., 108 Me. 498, 81 A. 948 (1911). In imposing upon these parties a duty of due care with respect to the amount they are authorized to help issue, this section does not necessarily validate the security, but merely holds persons responsible for the excess issue liable in damages for any loss suffered by the purchaser.

5. Aside from questions of genuineness and excess issued these parties are not held to certify as to the validity of the security unless they specifically undertake to do so. The case law which has recognized a unique responsibility on the transfer agent's part to testify as to the validity of any security which it countersigns is rejected.

6. This provision does not prevent a transfer agent or issuer from agreeing with a registrar of stock to protect the registrar in respect of the genuineness and proper form of a certificated security or initial transaction statement signed by the issuer or the transfer agent or both. Nor does it interfere with proper indemnity arrangements between the issuer and trustees, transfer agents, registrars and the like.

7. An unauthorized signature is a signature for purposes of this section if and only if it is made effective by Section 8-205.

Cross references.Sections 8-102, 8-205 and 8-406.

Definitional cross references."Agreed", Section 1-201.

"Certificated Security". Section 8-102.

"Genuine". Section 1-201.

"Initial Transaction Statement". Section 8-408.

"Issuer". Section 8-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote the introductory paragraph of Subsection (1), substituted the present language of Subsection (1)(a) for "the security is genuine", and inserted "or registration of the transfer, pledge or release" in Subsection (1)(b) and substituted therein "authority" for "authorization".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 74, 88, 89; 18A Am. Jur. 2d Corporations § 515.
18 C.J.S. Corporations §§ 253, 444; 19 C.J.S. Corporations § 1162.

Part 3

PURCHASE

§ 55-8-301. Rights acquired by purchaser.

(1) Upon transfer of a security to a purchaser (Section 55-8-313 NMSA 1978) the purchaser acquires the rights in the security which his transferor had or had actual authority to convey unless the purchaser's rights are limited by Subsection 4 of Section 55-8-302 NMSA 1978.

(2) A transferee of a limited interest acquires rights only to the extent of the interest transferred. The creation or release of a security interest in a security is the transfer of a limited interest in that security.

History: 1953 Comp., § 50A-8-301, enacted by Laws 1961, ch. 96, § 8-301; 1987, ch. 248, § 18.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 58, Uniform Negotiable Instruments Law.

Purposes.1. The concept of transfer is defined only by example (Section 8-313), but it clearly involves the passing of rights in the security from one party to another. Subsection (1) states the "shelter" provision of the Negotiable Instruments Law - upon transfer of the security a purchaser acquires the rights his transferor had. There are at least three exceptions to this basic rule, two of which limit the purchaser's rights and one of which expands them. First, subsection (1) explicitly makes its rule subject to Section 8-302(4), which prevents certain transferees from being freed of the taint of earlier fraud or notice. The second exception, stated in subsection (2), is that there may be a transfer explicitly limited to an interest less than the transferor's entire interest. Finally Section 8-302 provides that a bona fide purchaser takes certain rights of his own account, regardless of the rights his transferor had.

2. Transfers by operation of law are not intended to be covered by this Article. For example, transfers from decedent to administrator, from ward to guardian, and from bankrupt to trustee in bankruptcy are governed by other law as to both the time they occur and the substance of the transfer. Subsequent delivery and registration on the issuer's record merely confirm what has already happened.

Cross references.Section 3-201 and 8-321.

Definitional cross references."Purchaser". Section 1-201.

"Rights". Section 1-201.

"Security". Section 8-102.

"Security Interest". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote this section to the extent that a detailed comparison is impracticable.

Collection upon stolen or lost negotiable bond or coupon. - Under 55-8-302 NMSA 1978 and this section, a person may become the lawful holder of a negotiable bond or bond coupon where he is a "bona fide purchaser," as defined under the statute, and be entitled to collection upon a negotiable bond or coupon, even though the bond was stolen or lost. 1961-62 Op. Att'y Gen. No. 62-139 (rendered under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bonds § 68; 15A Am. Jur. 2d Commercial Code §§ 74, 84, 90 to 95, 104, 108; 18A Am. Jur. 2d Corporations § 709; 68 Am. Jur. 2d Secured Transactions §§ 61, 169; 69 Am. Jur. 2d Secured Transactions §§ 241, 474.
Rights of purchaser of stolen bonds, 18 A.L.R. 717.
Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 A.L.R. 947.

Effect of entrusting another with stock certificate endorsed or assigned in blank, to estop owner as against bona fide purchaser or pledgee for value, 73 A.L.R. 1405.
Priority as between lien of corporation and bona fide purchaser of corporate stock, 81 A.L.R. 989.
11 C.J.S. Bonds § 62; 18 C.J.S. Corporations §§ 253, 444; 19 C.J.S. Corporations § 1162; 64 C.J.S. Municipal Corporations § 1960; 81A C.J.S. States § 186.

§ 55-8-302. "Bona fide purchaser"; "adverse claim"; title acquired by bona fide purchaser.

(1) A "bona fide purchaser" is a purchaser for value in good faith and without notice of any adverse claim:

(a) who takes delivery of a certificated security in bearer form or in registered form issued or indorsed to him or in blank;

(b) to whom the transfer, pledge or release of an uncertificated security is registered on the books of the issuer; or

(c) to whom a security is transferred under the provisions of Paragraph (c), (d)(i) or (g) of Subsection (1) of Section 55-8-313 NMSA 1978.

(2) "Adverse claim" includes a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security.

(3) A bona fide purchaser in addition to acquiring the rights of a purchaser (Section 55-8-301 NMSA 1978) also requires his interest in the security free of any adverse claim.

(4) Notwithstanding Subsection (1) of Section 55-8-301 NMSA 1978, the transferee of a particular certificated security who has been a party to any fraud or illegality affecting the security, or who as a prior holder of that certificated security had notice of an adverse claim, cannot improve his position by taking from a bona fide purchaser.

History: 1953 Comp., § 50A-8-302, enacted by Laws 1961, ch. 96, § 8-302; 1987, ch. 248, § 19.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 52, 57, 58 and 59, Uniform Negotiable Instruments Law; Section 7, Uniform Stock Transfer Act.

Purposes.1. Any purchaser for value of a security without notice of a particular defect may take free of the issuer's defense based on that defect, but only a purchaser taking by a formally perfect transfer, for value and without notice of any adverse claim, may take free of adverse claims. The "bona fide purchaser" here dealt with is the person

taking free of adverse claims. His rights against the issuer are determined by Part 2 of this Article and his rights to registration are determined by Part 4.

2. Not every form of transfer can confer upon the purchaser the status of bona fide purchaser. In particular, transfers effected through the acknowledgement of a bailee who is not a financial intermediary or through the acknowledgement of a financial intermediary who holds for the transferee a proportionate interest in a fungible bulk do not confer bona fide purchaser status. However, the transferee can acquire all the rights of a bona fide purchaser through the "shelter" provisions of Section 8-301(1) if the transferor had those rights.

3. Protection is extended to bona fide purchasers of all investment securities, whether such securities were considered negotiable or non-negotiable under the prior law. This is the result sought by many cases which have resolved doubts in favor of negotiability despite terms in bonds which militated against their negotiability under the provisions of the Negotiable Instruments Law. See Paxton v. Miller, 102 Ind.App. 511, 200 N.E. 87 (1936); Scott v. Platt, 171 Or. 379, 135 P.2d 769 (1943). Such cases as U.S. Gypsum v. Faroll, 296 Ill.App. 47, 15 N.E.2d 888 (1938), protecting bona fide purchasers of stock certificates under the provisions of the Stock Transfer Act are adopted and approved.

4. An adverse claim may be either legal or equitable, e.g., that the claimant is the beneficial owner of a security, though not the legal owner of it, or that it has been or is proposed to be transferred in breach of trust or a valid restriction on transfer (See Section 8-204 and Comment). Note that there may be claims of ownership that are not "adverse" - e.g., the claim of a principal against his agent including that of a customer against his broker (Section 8-303). The agent's knowledge of his principal's claim thus cannot defeat the agent's right to be a bona fide purchaser under this section.

5. Subsection (4) provides an exception to the "shelter" provisions of Section 8-301(1), but applies only to a transferee of a certificated security who as a prior holder of the particular security had notice of adverse claims or who has been a party to fraud or illegality affecting the particular security.

Cross references.Sections 3-302 and 8-301. Point 4: Section 8-204 and its comment.

Definitional cross references."Bearer Form". Section 8-102.

"Certificated Security". Section 8-102.

"Delivery". Section 1-201.

"Good Faith". Section 1-201.

"Holder". Section 1-201.

"Indorsed". Section 8-308.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Registered Form". Section 8-102.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted the present language for "A 'bona fide purchaser' is a purchaser for value in good faith and without notice of any adverse claim who takes delivery of a security in bearer form or of one in registered form issued to him or endorsed to him or in blank".

Collection upon stolen or lost negotiable bond or coupon. - Under 55-8-301 NMSA 1978 and this section, a person may become the lawful holder of a negotiable bond or bond coupon where he is a "bona fide purchaser," as defined under the statute, and be entitled to collection upon a negotiable bond or coupon, even though the bond was stolen or lost. 1961-62 Op. Att'y Gen. No. 62-139 (rendered under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bonds §§ 63, 71; 15A Am. Jur. 2d Commercial Code §§ 74, 91, 92, 93, 104, 108; 68 Am. Jur. 2d Secured Transactions §§ 61, 65, 74, 169; 69 Am. Jur. 2d Secured Transactions §§ 241, 383, 474.
Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 A.L.R. 947.
Priority as between lien of corporation and bona fide purchaser of lost or stolen stock certificates, 81 A.L.R. 989.
Who is "bona fide purchaser" of investment security under UCC § 8-302, 88 A.L.R.3d 949.
11 C.J.S. Bonds § 81; 18 C.J.S. Corporations §§ 253, 444; 19 C.J.S. Corporations § 1162; 64 C.J.S. Municipal Corporations § 1962; 81A C.J.S. States § 190.

§ 55-8-303. "Broker".

"Broker" means a person engaged for all or part of his time in the business of buying and selling securities, who in the transaction concerned acts for, buys a security from or

sells a security to a customer. Nothing in this article determines the capacity in which a person acts for purposes of any other statute or rule to which the person is subject.

History: 1953 Comp., § 50A-8-303, enacted by Laws 1961, ch. 96, § 8-303; 1987, ch. 248, § 20.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section defines "broker" for purposes of this Article in terms of function in this particular transaction. The term is applicable to the person performing the function. The differentiation under the Securities Exchange Act of 1934 between "broker" and "dealer" is of no significance under this Article. This and similar distinctions are preserved for other purposes by the last sentence of the section.

Definitional cross references."Person". Section 1-201.

"Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, deleted "or" preceding "buys" in the first sentence and substituted "the person" for "such person" in the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Brokers § 1; 15A Am. Jur. 2d Commercial Code §§ 74, 90.
12 C.J.S. Brokers § 1.

§ 55-8-304. Notice to purchaser of adverse claims.

(1) A purchaser (including a broker for the seller or buyer but excluding an intermediary bank) of a certificated security is charged with notice of adverse claims if:

(a) the security whether in bearer or registered form has been indorsed "for collection" or "for surrender" or for some other purpose not involving transfer; or

(b) the security is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor. The mere writing of a name on a security is not such a statement.

(2) A purchaser (including a broker for the seller or buyer, but excluding an intermediary bank) to whom the transfer, pledge or release of an uncertificated security is registered is charged with notice of adverse claims as to which the issuer has a duty under Subsection (4) of Section 55-8-403 NMSA 1978 at the time of registration and which are

noted in the initial transaction statement sent to the purchaser or, if his interest is transferred to him other than by registration of transfer, pledge or release, the initial transaction statement sent to the registered owner or the registered pledgee.

(3) The fact that the purchaser (including a broker for the seller or buyer) of a certificated or uncertificated security has notice that the security is held for a third person or is registered in the name of or indorsed by a fiduciary does not create a duty of inquiry into the rightfulness of the transfer or constitute constructive notice of adverse claims. However, if the purchaser (excluding an intermediary bank) has knowledge that the proceeds are being used or the transaction is for the individual benefit of the fiduciary or otherwise in breach of duty, the purchaser is charged with notice of adverse claims.

History: 1953 Comp., § 50A-8-304, enacted by Laws 1961, ch. 96, § 8-304; 1987, ch. 248, § 21.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 37, 56, Uniform Negotiable Instruments Law.

Purposes.1. Section 8-302 defines "bona fide purchaser" in terms of three distinct elements, "value", "good faith", and lack of "notice of any adverse claim". This section deals only with notice and presents specific situations in which a purchaser is charged with notice of adverse claims as a matter of law. The listing is not exhaustive and does not exclude other situations in which the trier of the facts may determine that similar notice has been given. For example, receipt of notification that the particular security has been lost or stolen raises the question of notice "forgotten" in good faith. Kentucky Rock Asphalt v. Mazza's Admr., 264 Ky. 158, 94 S.W.2d 316 (1936); Graham v. White-Phillips Co., 296 U.S. 27, 56 S.Ct. 21, 80 L.Ed. 20, 102 A.L.R. 24 (1935) but cf., First National Bank of Odessa v. Fazzari, 10 N.Y.2d 394, 179 N.E.2d 493 (1961). Also suspicious characteristics of the transaction may give a purchaser (particularly a commercially sophisticated purchaser such as a broker) "reason to know." U. S. Fidelity & Guaranty Co. v. Goetz, 285 N.Y. 74, 32 N.E.2d 798 (1941); Morris v. Muir, 111 Misc. 739, 180 N.Y.S. 913 (1920).

2. Subsection (1)(a) refers to situations in which a certificated security indorsed "for collection" or "for surrender" is being offered for transfer and follows in effect Section 37 of the Negotiable Instruments Law, which provides that subsequent indorsees acquire only the title of the first indorsee under a restrictive indorsement.

3. A purchaser of an uncertificated security is charged with notice of adverse claims noted in the initial transaction statement. If the security is transferred to him other than by registration on the issuer's records, he is charged with notice of claims noted in the statement sent to the registered owner (or to the registered pledgee if his rights were transferred by notice to or acknowledgement from a registered pledgee).

Situations may arise in which the issuer receives notice of an adverse claim after registration of transfer, pledge or release but before the initial transaction statement is prepared and sent. The issuer ought not to note those claims on the statement. See Section 8-408(1)(d), (2)(d) and (3)(d). If the issuer should mistakenly note such a claim, subsection (2) does not charge the purchaser with notice.

4. In subsection (3) some situations involving purchase from one described or identifiable as a fiduciary are explicitly provided for, again imposing an objective standard, while leaving the door open to other circumstances which may constitute notice of adverse claims. Mere notice of the existence of the fiduciary relation is not enough in itself to prevent bona fide purchase, and the purchaser is free to take the security on the assumption that the fiduciary is acting properly. The fact that the security may be transferred to the individual account of the fiduciary or that the proceeds of the transaction are paid into that account in cash would not be sufficient to charge the purchaser with notice of potential breach of fiduciary obligation but as in State Bank of Binghamton v. Bache, 162 Misc. 128, 293 N.Y.S. 667 (1937) knowledge that the proceeds are being applied to the personal indebtedness of the fiduciary will charge the purchaser with such notice.

5. The notice here involved is to purchasers. A broker acting as such (Section 8-303) is treated in this section as a purchaser though he may not be a purchaser under the definitions of that term (Section 1-201(33)). On the other hand, a bank, stockbroker or other intermediary who, in the particular transaction acts purely in that capacity, is not a purchaser. Cf. subsections (3) and (4) of Section 8-306 and Comments 3 and 4 to that Section. Subsection (3) follows the policy of Section 4 of the Uniform Fiduciaries Act and of Section 3-304(2) with respect to commercial paper. Compare Section 7(a) of the Uniform Act for Simplification of Fiduciary Security Transfers.

The fact that the broker is expressly mentioned in this section carries no negative implication in other sections in which merely the word "purchaser" is used.

An issuer is not a purchaser. Its duty of inquiry is set forth in Part 4.

Cross references.Point 5: Part 4 of this Article. See Sections 8-104, 8-302, 8-305 and 8-308.

Definitional cross references."Adverse Claim". Section 8-302.

"Bearer Form". Section 8-102.

"Broker". Section 8-303.

"Certificated Security". Section 8-102.

"Indorsed". Section 8-308.

"Initial Transaction Statement". Section 8-408.

"Intermediary Bank". Section 4-105.

"Issuer". Section 8-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Registered Form". Section 8-102.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

"Writing". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, inserted "certificated" in the introductory paragraph of Subsection (1) and added present Subsection (2), while redesignating former Subsection (2) as present Subsection (3); in Subsection (3), inserted "of a certificated or uncertificated security" and substituted "constructive notice" for "notice" in the first sentence, and made minor stylistic changes in the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bonds § 65; 15A Am. Jur. 2d Commercial Code §§ 93, 94, 98.
Lis pendens in suit to compel stock transfer, 48 A.L.R.4th 731.
11 C.J.S. Bonds § 86; 18 C.J.S. Corporations §§ 253, 444; 19 C.J.S. Corporations § 1162; 64 C.J.S. Municipal Corporations § 1962; 81A C.J.S. States § 190.

§ 55-8-305. Staleness as notice of adverse claims.

An act or event that creates a right to immediate performance of the principal obligation represented by a certificated security or sets a date on or after which a certificated security is to be presented or surrendered for redemption or exchange does not itself constitute any notice of adverse claims except in the case of a transfer:

(a) after one year from any date set for presentment or surrender for redemption or exchange; or

(b) after six months from any date set for payment of money against presentation or surrender of the security if funds are available for payment on that date.

History: 1953 Comp., § 50A-8-305, enacted by Laws 1961, ch. 96, § 8-305; 1987, ch. 248, § 22.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 52(2), 53, Uniform Negotiable Instruments Law.

Purposes.1. The fact of "staleness" is viewed as notice of certain defects after the lapse of stated periods, but the maturity of the security does not operate automatically to affect holders' rights. The periods of time here stated are shorter than those appearing in the provisions of this Article on staleness as notice of defects or defenses (Section 8-203) since a purchaser who takes a security after funds or other securities are available for its redemption has more reason to suspect claims of ownership than issuer's defenses. An owner will normally turn in his security rather than transfer it at such a time.

Of itself, a default never constitutes notice of a possible adverse claim. To provide otherwise would not tend to drive defaulted securities home and would serve only to disrupt current financial markets where many defaulted securities are actively traded.

2. The owner is provided with a means of protecting himself while his security is being sent in for redemption or exchange. He may endorse it "for collection" or "for surrender," and this constitutes notice of his claims (Section 8-304). The present section does not come into operation unless the time period here stated has elapsed.

3. Unpaid or overdue coupons attached to a bond do not bring it within the operation of this section, although under some circumstances they may give the purchaser "reason to know" of claims of ownership. Georgia Granite R. Co. v. Miller, 144 Ga. 665, 87 S.E. 897 (1916).

4. This section has been made expressly applicable to certificated securities only, since the transfer of an uncertificated security normally will involve communication with the issuer and a consequent opportunity for the issuer to give the transferee effective notice of adverse claims.

Cross references.Point 1: Section 8-203. Point 2: Section 8-304. See Section 8-103.

Definitional cross references."Adverse Claim". Section 8-302.

"Certificated Security". Section 8-102.

"Money". Section 1-201.

"Notice". Section 1-201.

"Purchase". Section 1-201.

"Right". Section 1-201.

"Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "represented" for "evidenced", "certificated security" for "security" and "transfer" for "purchase" in the introductory paragraph, and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bonds § 69; 15A Am. Jur. 2d Commercial Code §§ 81, 94.
Validity, construction and effect of provisions of articles of incorporation or stock certificates relating to call, redemption or retirement of common stock, 48 A.L.R.2d 392.
11 C.J.S. Bonds § 86; 18 C.J.S. Corporations §§ 253, 444; 19 C.J.S. Corporations § 1162; 64 C.J.S. Municipal Corporations § 1965; 81A C.J.S. States § 190.

§ 55-8-306. Warranties on presentment and transfer of certificated securities; warranties of originators of instructions.

(1) A person who presents a certificated security for registration of transfer or for payment or exchange warrants to the issuer that he is entitled to the registration, payment or exchange. But, a purchaser for value and without notice of adverse claims who receives a new, reissued or reregistered certificated security on registration of transfer or receives an initial transaction statement confirming the registration of transfer of an equivalent uncertificated security to him warrants only that he has no knowledge of any unauthorized signature (Section 55-8-311 NMSA 1978) in a necessary indorsement.

(2) A person by transferring a certificated security to a purchaser for value warrants only that:

(a) his transfer is effective and rightful;

(b) the security is genuine and has not been materially altered; and

(c) he knows of no fact which might impair the validity of the security.

(3) If a certificated security is delivered by an intermediary known to be entrusted with delivery of the security on behalf of another or with collection of a draft or other claim

against delivery, the intermediary by delivery warrants only his own good faith and authority even though he has purchased or made advances against the claim to be collected against the delivery.

(4) A pledgee or other holder for security who redelivers a certificated security received, or after payment and on order of the debtor delivers that security to a third person makes only the warranties of an intermediary under Subsection (3) of this section.

(5) A person who originates an instruction warrants to the issuer that:

(a) he is an appropriate person to originate the instruction; and

(b) at the time the instruction is presented to the issuer he will be entitled to the registration of transfer, pledge or release.

(6) A person who originates an instruction warrants to any person specially guaranteeing his signature (Subsection 3 of Section 55-8-312 NMSA 1978) that:

(a) he is an appropriate person to originate the instruction; and

(b) at the time the instruction is presented to the issuer:

(i) he will be entitled to the registration of transfer, pledge or release; and

(ii) the transfer, pledge or release requested in the instruction will be registered by the issuer free from all liens, security interests, restrictions and claims other than those specified in the instruction.

(7) A person who originates an instruction warrants to a purchaser for value and to any person guaranteeing the instruction (Subsection 6 of Section 55-8-312 NMSA 1978) that:

(a) he is an appropriate person to originate the instruction;

(b) the uncertificated security referred to therein is valid; and

(c) at the time the instruction is presented to the issuer:

(i) the transferor will be entitled to the registration of transfer, pledge or release;

(ii) the transfer, pledge or release requested in the instruction will be registered by the issuer free from all liens, security interests, restrictions and claims other than those specified in the instruction; and

(iii) the requested transfer, pledge or release will be rightful.

(8) If a secured party is the registered pledgee or the registered owner of an uncertificated security, a person who originates an instruction of release or transfer to the debtor or, after payment and on order of the debtor, a transfer instruction to a third person, warrants to the debtor or the third person only that he is an appropriate person to originate the instruction and at the time the instruction is presented to the issuer, the transferor will be entitled to the registration of release or transfer. If a transfer instruction to a third person who is a purchaser for value is originated on order of the debtor, the debtor makes to the purchaser the warranties of Paragraphs (b), (c)(ii) and (c)(iii) of Subsection (7) of this section.

(9) A person who transfers an uncertificated security to a purchaser for value and does not originate an instruction in connection with the transfer warrants only that:

(a) his transfer is effective and rightful; and

(b) the uncertificated security is valid.

(10) A broker gives to his customer and to the issuer and a purchaser the applicable warranties provided in this section and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition to applicable warranties given by and in favor of his customer.

History: 1953 Comp., § 50A-8-306, enacted by Laws 1961, ch. 96, § 8-306; 1967, ch. 186, § 21; 1987, ch. 248, § 23.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 65, 66, 67, 69, Uniform Negotiable Instruments Law; Sections 11, 12, Uniform Stock Transfer Act.

Purposes.1. The warranties with respect to certificated securities have been recognized by the prevailing case law as well as by the prior acts cited. See Boston Tow Boat Co. v. Medford Nat. Bank, 232 Mass. 38, 121 N.E. 491 (1919); Burtch v. Child, Hulswit & Co., 207 Mich. 205, 174 N.W. 170 (1919).

Usual estoppel principles apply with respect to transfers of both certificated and uncertificated securities whenever the purchaser has knowledge of the defect, and these warranties will not be effective in such a case. In addition, under Section 1-102(3) these provisions apply only "unless otherwise agreed" and the parties are free to enter into any express agreement they desire where both are aware of possible defects.

2. The second sentence of subsection (1) limits the warranties made by a bona fide purchaser whose presentation of a certificated security is defective in some way but who nonetheless is given a reissued certificated security or an initial transaction statement confirming the transfer of an uncertificated security to him. The effect is to deny the issuer a remedy against such a person unless at the time of presentment the

person had knowledge of an unauthorized signature in a necessary indorsement. The issuer can protect itself by refusing to make the transfer or, if it registers the transfer before it discovers the defect, by pursuing its remedy against a signature guarantor.

3. Subsections (3) and (4) are designed to eliminate all substantive warranties in the case of deliveries of certificated securities by intermediaries and pledgees. Such parties deal primarily with the draft or other claim and, having no access to direct knowledge about the security, they cannot be held to warrant its genuineness or validity. Subsection (8) similarly limits the warranties given by a secured party (or its agent) originating an instruction at the behest of the debtor.

4. The so-called "stock-broker" normally functions as a broker (see definition of "broker", Section 8-303) and on a few occasions another institution such as a bank may function as a broker-e.g. for a standard broker's commission or similar compensation. In those situations the warranties, rights and privileges of the broker are spelled out in subsection (10). Nevertheless either the so-called "stock-broker" or the bank can qualify for the protection given by subsections (3) and (4) to an "intermediary" where in the particular transaction it does not function as a broker-e.g. when it transfers securities on a customer's instructions, either without charge or for a nominal handling charge.

5. Subsection (5) establishes the rights of the issuer against one who originates an instruction (Section 8-308(4)) that is fraudulent or otherwise improper. The issuer's loss-which necessitates the remedy-arises only if the issuer registers the requested transfer, pledge or release and is subjected to liability for improper registration. See Section 8-404(3).

6. Subsection (6) sets forth the warranties made by the instruction originator to a person specially guaranteeing his signature. These warranties mirror those made by the special signature guarantor.

7. Subsection (7) sets forth the warranties made to a purchaser for value by one who originates an instruction. These warranties are quite similar to those made by one transferring a certificated security, subsection (2), the principal difference being the absolute warranty of validity. If upon receipt of the instruction the issuer should dispute the validity of the security, it seems proper to place the burden of proving validity upon the transferor. Because the guarantor of an instruction makes an absolute warranty of rightfulness, Section 8-312(6), he is given the benefit of a similar warranty from the originator in subsection (7).

Cross references.See Section 1-102(3), 8-103, 8-301, 8-311 and 8-405.

Definitional cross references."Adverse Claims". Section 8-302.

"Appropriate Person". Section 8-308.

"Broker". Section 8-303.

"Certificated Security". Section 8-102.

"Debtor". Section 9-105.

"Delivery". Section 1-201.

"Genuine". Section 1-201.

"Good Faith". Section 1-201.

"Indorsement". Section 8-308.

"Initial Transaction Statement". Section 8-408.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Knowledge". Section 1-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Secured Party". Section 9-105.

"Security". Section 8-102.

"Security Interest". Section 1-201.

"Unauthorized Signature". Section 1-201.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote Subsection (1), substituted "certificated security" for "security" in Subsections (2), (3) and (4) while making minor stylistic changes therein, substituted "A pledgee" for "The pledge" at the beginning of Subsection (4), and added present Subsections (5) through (9), while redesignating

former Subsection (5) as present Subsection (10) and inserting "applicable" in the first sentence of Subsection (10).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Brokers §§ 107, 133; 15A Am. Jur. 2d Commercial Code §§ 95 to 97, 100, 105; 18A Am. Jur. 2d Corporations § 714.
Effectiveness, as pledge of transfer of corporate stock, 53 A.L.R.2d 1396.
11 C.J.S. Bonds § 79; 12 C.J.S. Brokers §§ 23, 145; 18 C.J.S. Corporations §§ 253, 444; 19 C.J.S. Corporations § 1162; 64 C.J.S. Municipal Corporations § 1956; 81A C.J.S. States § 186.

§ 55-8-307. Effect of delivery without indorsement; right to compel indorsement.

If a certificated security in registered form has been delivered to a purchaser without a necessary indorsement he may become a bona fide purchaser only as of the time the indorsement is supplied, but against the transferor the transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

History: 1953 Comp., § 50A-8-307, enacted by Laws 1961, ch. 96, § 8-307; 1987, ch. 248, § 24.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 49, Uniform Negotiable Instruments Law; Section 9, Uniform Stock Transfer Act.

Purposes.1. As between the parties the transfer of a certificated security is made complete upon delivery, but the transferee cannot become a bona fide purchaser of the security until indorsement is made. The indorsement does not operate retroactively, and notice may intervene between delivery and indorsement so as to prevent the transferee from becoming a bona fide purchaser. This Article rejects such cases as Bethea v. Floyd, 177 S.C. 521, 181 S.E. 721 (1935), certiorari denied 296 U.S. 622, 56 S.Ct. 143, 80 L.Ed. 442, holding that the indorsement of a note delivered prior to maturity but indorsed thereafter took effect as of the date of delivery to permit the purchaser to become a holder in due course. Although a purchaser taking without a necessary indorsement may be subject to claims of ownership, any issuer's defense of which he had no notice at the time of delivery will be cut off, since the provisions of this Article protect all purchasers for value without notice (Section 8-202).

2. The transferee's right to compel an indorsement where a certificated security has been delivered with intent to transfer is recognized in the case law and the Article of this Act on Documents of Title. See Coats v. Guaranty Bank & Trust Co., 170 La. 871, 129 So. 513 (1930), and Section 7-506 of this Act.

3. A proper indorsement is one of the requisites of transfer which a purchaser of a certificated security has a right to obtain (Section 8-316). A purchaser may not only compel an indorsement under that section but may also recover for any reasonable expense incurred by the transferor's failure to respond to the demand for an indorsement.

Cross references.Point 1: Section 8-202. Point 2: Section 7-506.

Point 3: Section 8-316. See Sections 8-302, 8-308 and 8-309.

Definitional cross references."Bona Fide Purchaser". Section 8-302.

"Certificated Security". Section 8-102.

"Delivery". Section 1-201.

"Indorsement". Section 8-308.

"Purchaser". Section 1-201.

"Registered Form". Section 8-102.

"Right". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "If a certificated security" for "Where a security" at the beginning of the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 101.
Right to compel endorsement of unendorsed "order," 87 A.L.R. 1178.
18 C.J.S. Corporations §§ 253, 444; 19 C.J.S. Corporations § 1162.

§ 55-8-308. Indorsements; instructions.

(1) An indorsement of a certificated security in registered form is made when an appropriate person signs on it or on a separate document an assignment or transfer of the security or a power to assign or transfer it or his signature is written without more upon the back of the security.

(2) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies to whom the security is to be transferred, or who has the power to transfer it. A holder may convert a blank indorsement into a special indorsement.

(3) An indorsement purporting to be only of part of a certificated security representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(4) An "instruction" is an order to the issuer of an uncertificated security requesting that the transfer, pledge or release from pledge of the uncertificated security specified therein be registered.

(5) An instruction originated by an appropriate person is:

(a) a writing signed by an appropriate person; or

(b) a communication to the issuer in any form agreed upon in a writing signed by the issuer and an appropriate person.

If an instruction has been originated by an appropriate person but is incomplete in any other respect, any person may complete it as authorized and the issuer may rely on it as completed even though it has been completed incorrectly.

(6) "An appropriate person" in Subsection (1) of this section means the person specified by the certificated security or by special indorsement to be entitled to the security.

(7) "An appropriate person" in Subsection (5) of this section means:

(a) for an instruction to transfer or pledge an uncertificated security which is then not subject to a registered pledge, the registered owner; or

(b) for an instruction to transfer or release an uncertificated security which is then subject to a registered pledge, the registered pledgee.

(8) In addition to the persons designated in Subsections (6) and (7) of this section, "an appropriate person" in Subsections (1) and (5) of this section includes:

(a) if the person designated is described as a fiduciary but is no longer serving in the described capacity, either that person or his successor;

(b) if the persons designated are described as more than one person as fiduciaries and one or more are no longer serving in the described capacity, the remaining fiduciary or fiduciaries, whether or not a successor has been appointed or qualified;

(c) if the person designated is an individual and is without capacity to act by virtue of death, incompetence, infancy or otherwise, his executor, administrator, guardian or like fiduciary;

(d) if the persons designated are described as more than one person as tenants by the

entirety or with right of survivorship and by reason of death all cannot sign, the survivor or survivors;

(e) a person having power to sign under applicable law or controlling instrument; and

(f) to the extent that the person designated or any of the foregoing persons may act through an agent, his authorized agent.

(9) Unless otherwise agreed, the indorser of a certificated security by his indorsement or the originator of an instruction by his origination assumes no obligation that the security will be honored by the issuer but only the obligations provided in Section 55-8-306 NMSA 1978.

(10) Whether the person signing is appropriate is determined as of the date of signing and an indorsement made by or an instruction originated by him does not become unauthorized for the purposes of this article by virtue of any subsequent change of circumstances.

(11) Failure of a fiduciary to comply with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer, pledge or release, does not render his indorsement or an instruction originated by him unauthorized for the purposes of this article.

History: 1953 Comp., § 50A-8-308, enacted by Laws 1961, ch. 96, § 8-308; 1967, ch. 186, § 22; 1987, ch. 248, § 25.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 31 through 37, 64 through 69, Uniform Negotiable Instruments Law; Section 20, Uniform Stock Transfer Act.

Purposes.1. The simplified method of indorsing certificated securities set forth in the Uniform Stock Transfer Act is continued in subsections (1) and (2). Although more than one special indorsement on a given certificated security is here made possible, the desire for dividends or interest, as the case may be, should operate to bring the security home for registration of transfer within a reasonable period of time. The usual form of assignment which appears in the back of a stock certificate or in a separate "power" may be filled up either in the form of an assignment, a power of attorney to transfer, or both. If it is not filled up at all but merely signed, the indorsement is in blank; if filled up either as an assignment or as a power of attorney to transfer, the indorsement is special.

2. Subsection (3) recognizes, in contradistinction to the rule under the Uniform Negotiable Instruments Law, the validity of a "partial" indorsement of a certificated security-e.g., as to fifty shares of the one hundred represented by a single certificate.

The rights of a transferee under a partial indorsement to the status of a bona fide purchaser are left to the case law.

3. Subsections (4) and (5) together indicate that an instruction is an order from an "appropriate person" (subsection (7)) to the issuer demanding registration of some form of transfer of an uncertificated security. Functionally, presentation of an instruction is quite similar to the presentation of an indorsed certificate for re-registration. The instruction may be in the form of a writing signed by an appropriate person or in any other form agreed upon in writing by the issuer and an appropriate person. Allowing nonwritten forms of instructions will permit the development and employment of means of transmitting instructions electronically.

When a person originates an instruction in which he leaves a blank and the blank later is completed, subsection (5) gives the issuer the same rights it would have had against the originating person had that person completed the blank himself. This is true regardless of whether the person completing the instruction had authority to complete it. Compare Section 8-206 and its Comment, dealing with blanks left upon issue.

4. Subsections (6) and (7) give basic rules for determining who is an appropriate person to indorse a certificated security or to originate a transfer instruction for an uncertificated security. Subsection (8) defines the various situations in which persons other than those designated in subsections (6) and (7) will also be "appropriate persons." The provisions are not mutually exclusive; for example, the same certificated security may be effectively indorsed either by the registered owner under subsection (6) or by his agent under (8)(f). Paragraph (8)(a) is made explicitly alternative to make it clear that there is no conflict with paragraph (3)(a) of Section 8-403, permitting the issuer to rely on the continued power of a fiduciary to act where he is the registered owner and the issuer has not received written notice to the contrary. Similar protection is given to other persons dealing with the security. See also the Comment to Section 8-404.

Paragraphs (e) and (f) in particular are comprehensive. For example, where a "small estate statute" permits a widow to transfer a decedent's securities without administration proceedings, she would be "a person having power to sign under applicable law." Similarly, in the usual partnership case, the signature of a partner would be that of "a person having power to sign under . . . [a] . . . controlling instrument."

Indorsement or origination by "an appropriate person" is included in the scope of the guarantee of signature (Section 8-312). It is prerequisite to the issuer's duty to register a transfer (Section 8-401) and to his exoneration from liability for improper registration (Section 8-404).

5. Subsection (9) makes clear that the indorser of a certificated security and the originator of an instruction do not warrant that the issuer will honor the underlying obligation. In view of the nature of investment securities and the circumstances under which they are normally transferred, a transferor cannot be held to warrant as to the issuer's actions. As a transferor he, of course, remains liable for breach of the

warranties set forth in this Article (Section 8-306).

6. Subsection (10) of this section makes the indorsement or instruction speak as of the date of signing. Section 8-312 on guaranty of signature and Section 8-402 on assurance that indorsements and instructions are effective apply the same reasoning. Thus, the signatures on a security indorsed by A during his lifetime or on behalf of X corporation by Y as president during his incumbency do not become "unauthorized" (Section 8-311) because A dies or Y is replaced as president by Z. Authority to deliver a certificated security and thus to complete the transfer is not covered by this section. Subsection (11) supplements Section 8-403(3)(b) by making it clear that certain matters go to rightfulness of the transfer rather than to the validity of the indorsement or instruction. An example is the failure of a duly appointed guardian to obtain a required court approval of the transfer. Such a guardian is an "appropriate person" under paragraph (8)(c) of this section, and his indorsement may be effective even though, e.g., a required court order is not obtained.

Cross references.Point 1: Section 8-306. Point 4: Section 8-312 and Part 4 of this Article. Point 6: Sections 8-301, 8-302, 8-307, 8-309 and 8-312.

Definitional cross references."Bearer". Section 1-201.

"Certificated Security". Section 8-102.

"Holder". Section 1-201.

"Honor". Section 1-201.

"Issuer". Section 8-201.

"Person". Section 1-201.

"Registered Form". Section 8-102.

"Security". Section 8-102.

"Sign". Section 1-201.

"Uncertificated Security". Section 8-102.

"Writing". Section 1-201.

"Written". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote Subsection (1), deleted "the person" following "specifies" in the third sentence of Subsection (2), rewrote former Subsections (3) through (5) and redesignated them as present Subsections (6), (8) and (9), added present Subsections (3) through (5) and (7), redesignated former Subsections (6) and (7) as present Subsections (10) and (11), substituted "made by or an instruction originated by him" for "by such person" in Subsection (10), inserted "pledge or release" and "or an instruction originated by him" in Subsection (11), and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 351; 15A Am. Jur. 2d Commercial Code §§ 84, 98 to 100, 103, 116, 119; 18A Am. Jur. 2d Corporations § 681.
Effect of entrusting another with stock certificate endorsed or assigned in blank, to estop owner as against bona fide purchaser or pledgee for value, 73 A.L.R. 1405.
Conflict of laws as to title and transfer of corporate stock, 131 A.L.R. 192.
11 C.J.S. Bonds § 67; 18 C.J.S. Corporations § 395; 19 C.J.S. Corporations § 1159; 64 C.J.S. Municipal Corporations § 1952; 81A C.J.S. States § 186.

§ 55-8-309. Effect of indorsement without delivery.

An indorsement of a certificated security, whether special or in blank does not constitute a transfer until delivery of the certificated security on which it appears, or, if the indorsement is on a separate document, until delivery of both the document and the certificated security.

History: 1953 Comp., § 50A-8-309, enacted by Laws 1961, ch. 96, § 8-309; 1987, ch. 248, § 26.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 30, Uniform Negotiable Instruments Law; Sections 1, 10, Uniform Stock Transfer Act.

Purposes.1. There must be a voluntary parting with control in order to effect a valid transfer of a certificated security as between the parties. Levey v. Nason, 279 Mass. 268, 181 N.E. 193 (1932), and National Surety Co. v. Indemnity Insurance Co. of North America, 237 App.Div. 485, 261 N.Y.S. 605 (1933).

2. The provision in Section 10 of the Uniform Stock Transfer Act that an attempted transfer without delivery amounts to a promise to transfer is here omitted. Even under the prior Act the effect of such a promise was left to the applicable law of contracts, and this Article by making no reference to such situations intends to achieve a similar result.

With respect to delivery there is no counterpart to Section 8-307 on right to compel indorsement, such as is envisaged in Johnson v. Johnson, 300 Mass. 24, 13 N.E.2d

788 (1938), where the transferee under a written assignment was given the right to compel a transfer of the certificate.

Cross references.Point 2: Section 8-307. See Sections 8-202(4) and 8-313.

Definitional cross references."Certificated Security". Section 8-102.

"Delivery". Section 1-201.

"Indorsement". Section 8-308.

ANNOTATION

The 1987 amendment, effective June 19, 1987, thrice substituted "certificated security" for "security".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 101, 104; 18A Am. Jur. 2d Corporations § 681.
Necessity of delivery of stock certificate to complete valid gift of stock, 23 A.L.R.2d 1171.
11 C.J.S. Bonds § 67; 18 C.J.S. Corporations § 395; 19 C.J.S. Corporations § 1159; 64 C.J.S. Municipal Corporations § 1952; 81A C.J.S. States § 186.

§ 55-8-310. Indorsement of certificated security in bearer form.

An indorsement of a certificated security in bearer form may give notice of adverse claims (Section 55-8-304 NMSA 1978) but does not otherwise affect any right to registration the holder possesses.

History: 1953 Comp., § 50A-8-310, enacted by Laws 1961, ch. 96, § 8-310; 1987, ch. 248, § 27.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 40, Uniform Negotiable Instruments Law.

Purposes.1. The concept of indorsement applies only to registered certificated securities, and a purported indorsement of bearer paper is normally of no effect.

An indorsement "for collection," "for surrender" or the like, charges a purchaser with notice of adverse claims (Section 8-304(1)(a)) but does not operate beyond this to interfere with any right the holder may otherwise possess to have the security registered in his name.

2. The provisions of Section 40 of the Negotiable Instruments Law as to the liability of

special indorsers of bearer instruments have no applicability here since this Article negates the liability of indorsers as such upon the issuer's obligation (Section 8-308(9)).

Cross references.Sections 8-304 and 8-308.

Definitional cross references."Adverse Claims". Section 8-302.

"Bearer Form". Section 8-102.

"Certificated Security". Section 8-102.

"Holder". Section 1-201.

"Indorsement". Section 8-308.

"Notice". Section 1-201.

"Right". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated security" for "security", "55-8-304 NMSA 1978" for "8-304", and "possesses" for "may possess".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 100. 18 C.J.S. Corporations §§ 436, 444; 19 C.J.S. Corporations § 1162.

§ 55-8-311. Effect of unauthorized indorsement or instruction.

Unless the owner or pledgee has ratified an unauthorized indorsement or instruction or is otherwise precluded from asserting its ineffectiveness:

(a) he may assert its ineffectiveness against the issuer or any purchaser other than a purchaser for value and without notice of adverse claims who has in good faith received a new, reissued or re-registered certificated security on registration of transfer or received an initial transaction statement confirming the registration of transfer, pledge or release of an equivalent uncertificated security to him; and

(b) an issuer who registers the transfer of a certificated security upon the unauthorized indorsement or who registers the transfer, pledge or release of an uncertificated security upon the unauthorized instruction is subject to liability for improper registration (Section 55-8-404 NMSA 1978).

History: 1953 Comp., § 50A-8-311, enacted by Laws 1961, ch. 96, § 8-311; 1987, ch. 248, § 28.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 23, Uniform Negotiable Instruments Law.

Purposes.1. Most present day security purchases are made through brokers. The purchaser who normally receives and sees only a certificated security registered in his own name or an initial transaction statement addressed to him cannot realistically be held to have notice of or to have relied upon a forged or unauthorized indorsement on the original security transferred or upon the unauthorized instruction. A good faith purchaser who has received an initial transaction statement or a new, reissued or re-registered certificate is therefore protected. Compare Telegraph Co. v. Davenport, 97 U.S. 369, 24 L.Ed. 1047 (1878). That line of cases which has refused to apply this rule where the new security is still in the hands of the party to whom it was issued is expressly rejected. See Weniger v. Success Mining Co., 227 F. 548 (C.C.A.Utah 1915); Hambleton v. Central Ohio R.R. Co., 44 Md. 551 (1876).

2. The original owner of a security which has been transferred on the basis of a forged indorsement or instruction is protected by the issuer's liability for wrongful registration of transfer (Section 8-404). The issuer's duty to issue a similar security to the owner unless an overissue would result is made explicit in Part 4 of this Article, as is his obligation to purchase available securities on the open market for transfer to the owner where overissue is involved (see Section 8-104). Compare Prince v. Childs Co., 23 F.2d 605 (1928); West v. Tintic Standard Mining Co., 71 Utah 158, 263 P. 490, 56 A.L.R. 1190 (1929). The issuer's recourse is against the forger and the guarantor of the latter's signature, if any. But since the issuer has a right to require a guarantee of signature, a bona fide purchaser presenting the certificated security or instruction to the issuer should not be held liable on any implied warranty of title theory unless he knew of the forgery (Section 8-306).

3. A bond which has been registered as to principal and subsequently is returned to bearer form is, at that point, a "new security" within the meaning of this Section.

Cross references.Point 2: Sections 8-104, 8-306(1), 8-312 and Part 4 of this Article.

Definitional cross references."Adverse Claim". Section 8-302.

"Certificated Security". Section 8-102.

"Good Faith". Section 1-201.

"Initial Transaction Statement". Section 8-408.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Notice". Section 1-201.

"Purchaser". Section 1-201.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, inserted "or pledgee" and "or instruction" in the introductory paragraph, substituted "certificated security" for "security" throughout the section, added all of the language of Paragraph (a) beginning with "or received", and substituted all of the language of Paragraph (b) following "indorsement" for "is subject to liability for improper registration (Section 8-404)."

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 C.J.S. Bonds § 70; 18 C.J.S. Corporations § 439; 19 C.J.S. Corporations § 1159; 64 C.J.S. Municipal Corporations § 1956; 81A C.J.S. States § 186.

§ 55-8-312. Effect of guaranteeing signature; indorsement or instruction.

(1) Any person guaranteeing a signature of an indorser of a certificated security warrants that at the time of signing:

(a) the signature was genuine;

(b) the signer was an appropriate person to indorse (Section 55-8-308 NMSA 1978); and

(c) the signer had legal capacity to sign.

(2) Any person guaranteeing a signature of the originator of an instruction warrants that at the time of signing:

(a) the signature was genuine;

(b) the signer was an appropriate person to originate the instruction (Section 55-8-308 NMSA 1978) if the person specified in the instruction as the registered owner or registered pledgee of the uncertificated security was, in fact, the registered owner or registered pledgee of such security, as to which fact the signature guarantor makes no warranty;

(c) the signer had legal capacity to sign; and

(d) the taxpayer identification number, if any, appearing on the instruction as that of the registered owner or registered pledgee was the taxpayer identification number of the signer or of the owner or pledgee whom the signer was acting.

(3) Any person specially guaranteeing the signature of the originator of an instruction makes not only the warranties of a signature guarantor (Subsection (2) of this section) but also warrants that at the time the instruction is presented to the issuer:

(a) the person specified in the instruction as the registered owner or registered pledgee of the uncertificated security will be the registered owner or registered pledgee; and

(b) the transfer, pledge or release of the uncertificated security requested in the instruction will be registered by the issuer free from all liens, security interests, restrictions and claims other than those specified in the instruction.

(4) The guarantor under Subsections (1) and (2) or the special guarantor under Subsection (3) of this section does not otherwise warrant the rightfulness of the particular transfer, pledge or release.

(5) Any person guaranteeing an indorsement of a certificated security makes not only the warranties of a signature guarantor under Subsection (1) of this section but also warrants the rightfulness of the particular transfer in all respects.

(6) Any person guaranteeing an instruction requesting the transfer, pledge or release of an uncertificated security makes not only the warranties of a special signature guarantor under Subsection (3) of this section but also warrants the rightfulness of the particular transfer, pledge or release in all respects.

(7) No issuer may require a special guarantee of signature (Subsection (3) of this section), a guarantee of indorsement (Subsection (5) of this section) or a guarantee of instruction (Subsection (6) of this section) as a condition to registration of transfer, pledge or release.

(8) The foregoing warranties are made to any person taking or dealing with the security in reliance on the guarantee and the guarantor is liable to the person for any loss resulting from breach of the warranties.

History: 1953 Comp., § 50A-8-312, enacted by Laws 1961, ch. 96, § 8-312; 1987, ch. 248, § 29.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. In subsection (1) the commonly accepted liability of the guarantor of the signature of the indorser of a certificated security, which includes a warranty of the authority of the signer to sign for the holder as well as of the capacity of the signer to sign, is made express so that issuers and their agents may have a clear understanding of the extent to which they may rely upon such guarantees.

2. Consistent with the coordinate provisions of Section 8-308, 8-401 and 8-404, this section provides that a signature guarantor warrants as to facts "at the time of signing."

3. Subsection (2) sets forth the warranties that can reasonably be expected from the guarantor of the signature of the originator of an instruction, who, though familiar with the signer, does not have before him any evidence that the purported owner or pledgee is, in fact, the owner or pledgee of the subject uncertificated security. This is in contrast to the position of the person guaranteeing a signature on a certificate who can see a certificate in the signer's possession in the name of or indorsed to the signer or in blank. Thus, the warranty of appropriateness in clause (b) is expressly conditioned on the actual registration's conforming to that represented by the originator. If the signer purports to be the owner or pledgee, the guarantor under clause (b), warrants only his identity. If, however, the signer is acting in a representative capacity, the guarantor warrants both his identity and his authority to act for the purported owner or pledgee. The additional warranty of clause (d) as to the taxpayer identification number is intended to prevent error or fraud resulting from identical or similar names. The warranties of subsection (2) are intended to provide satisfactory assurance to the issuer who needs no warranty as to the facts of registration because he can ascertain those facts from his own records.

4. Subsection (3) sets forth a "special guarantee of signature" under which the guarantor additionally warrants both registered ownership or pledge and freedom from undisclosed defects of record. The guarantor of the signature of an indorser of a certificated security effectively makes these warranties to a purchaser for value on the evidence of a clean certificate issued in the name of the indorser, indorsed to the indorser or indorsed in blank. By specially guaranteeing under subsection (3), the guarantor warrants that the instruction will, when presented to the issuer, result in the requested registration free from defects not specified. It is contemplated that the special guarantee of signature will be used principally in brokerage transactions where the broker will be specially guaranteeing the signature on an instruction originated by his own customer. The broker's risk will be no greater than that of a broker who executes the sale of a security for his customer without the absolute assurance that his customer will deliver a clean certificate at settlement.

5. Subsection (4) makes clear that the warranties of a person guaranteeing a signature are limited to those specified in this section and do not include a general warranty of rightfulness. On the other hand subsections (5) and (6) make clear that a person guaranteeing an indorsement or an instruction does warrant that the transfer is rightful in all respects.

6. Subsection (7) makes clear what can be inferred from the combination of Sections 8-401 and 8-402, that the issuer may not require as a condition to transfer a guarantee of the indorsement or instruction nor may it require a special signature guarantee. But the voluntary furnishing of such a guarantee and its acceptance by the issuer may save the time and expense of an inquiry into possible adverse claims (cf. Section 8-403).

7. Subsection (8) is expressly designed to encourage issuers and their agents to rely upon signature guarantees and to avoid needless waste of time and duplication of effort in ascertaining the facts so guaranteed.

Cross references.Point 1: Section 8-308. See Part 4 of this Article.

Definitional cross references."Appropriate Person". Section 8-308.

"Certificated Security". Section 8-102.

"Genuine". Section 1-201.

"Indorsement". Section 8-308.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Person". Section 1-201.

"Security". Section 8-102.

"Security Interest". Section 1-201.

"Sign". Section 1-201.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated security" for "security" and "Section 55-8-308 NMSA 1978"for "Section 8-308" in Subsection (1) and deleted the former last sentence of that subsection which precluded any warranty of the rightfulness of the particular transfer, rewrote former Subsection (2) and redesignated it as Subsection (5), added present Subsections (2) through (4), (6) and (7), and redesignated former Subsection (3) as present Subsection (8), substituting therein "the person" for "such person".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 98, 103, 117.
38 C.J.S. Guaranty § 44.

§ 55-8-313. When transfer to the purchaser occurs; financial intermediary as bona fide purchaser; "financial intermediary".

(1) Transfer of a security or a limited interest (including a security interest) therein to a purchaser occurs only:

(a) at the time he or a person designated by him acquires possession of a certificated security;

(b) at the time the transfer, pledge or release of an uncertificated security is registered to him or a person designated by him;

(c) at this time his financial intermediary acquires possession of a certificated security specially indorsed to or issued in the name of the purchaser;

(d) at the time a financial intermediary, not a clearing corporation, sends him confirmation of the purchase and also by book entry or otherwise identifies as belonging to the purchaser:

(i) a specific certificated security in the financial intermediary's possession;

(ii) a quantity of securities that constitute or are part of a fungible bulk of certificated securities in the financial intermediary's possession or of uncertificated securities registered in the name of the financial intermediary; or

(iii) a quantity of securities that constitute or are part of a fungible bulk of securities shown on the account of the financial intermediary on the books of another financial intermediary;

(e) with respect to an identified certificated security to be delivered while still in the possession of a third person, not a financial intermediary, at the time that person acknowledges that he holds for the purchaser;

(f) with respect to a specific uncertificated security the pledge or transfer of which has been registered to a third person, not a financial intermediary, at the time that person acknowledges that he holds for the purchaser;

(g) at the time appropriate entries to the account of the purchaser or a person designated by him on the books of a clearing corporation are made under Section 55-8-320 NMSA 1978;

(h) with respect to the transfer of a security interest where the debtor has signed a security agreement containing a description of the security, at the time a written notification, which, in the case of the creation of the security interest, is signed by the debtor (which may be a copy of the security agreement) or which, in the case of the release or assignment of the security interest created pursuant to this paragraph, is signed by the secured party, is received by:

(i) a financial intermediary on whose books the interest of the transferor in the security appears;

(ii) a third person, not a financial intermediary, in possession of the security, if it is certificated;

(iii) a third person, not a financial intermediary, who is the registered owner of the security, if it is uncertificated and not subject to a registered pledge; or

(iv) a third person, not a financial intermediary, who is the registered pledgee of the security, if it is uncertificated and subject to a registered pledge;

(i) with respect to the transfer of a security interest where the transferor has signed a security agreement containing a description of the security, at the time new value is given by the secured party; or

(j) with respect to the transfer of a security interest where the secured party is a financial intermediary and the security has already been transferred to the financial intermediary under Paragraphs (a), (b), (c), (d) or (g) of this section, at the time the transferor has signed a security agreement containing a description of the security and value is given by the secured party.

(2) The purchaser is the owner of a security held for him by a financial intermediary, but cannot be a bona fide purchaser of a security so held except in the circumstances specified in Paragraphs (c), (d), (i)[(d)(i)] and (g) of Subsection (1) of this section. If a security so held is part of a fungible bulk as in the circumstances specified in Subparagraphs (d)(ii) and (d)(iii) of Subsection (1) of this section, the purchaser is the owner of a proportionate property interest in the fungible bulk.

(3) Notice of an adverse claim received by the financial intermediary or by the purchaser after the financial intermediary takes delivery of a certificated security as a holder for value or after the transfer, pledge or release of an uncertificated security has been registered free of the claim to a financial intermediary who has given value is not effective either as to the financial intermediary or as to the purchaser. However, as between the financial intermediary and the purchaser the purchaser may demand transfer of an equivalent security as to which no notice of adverse claim has been received.

(4) A "financial intermediary" is a bank, broker, clearing corporation or other person (or

the nominee of any of them) which in the ordinary course of its business maintains security accounts for its customers and is acting in that capacity. A financial intermediary may have a security interest in securities held in account for its customer.

History: 1953 Comp., § 50A-8-313, enacted by Laws 1961, ch. 96, § 8-313; 1967, ch. 186, § 23; 1987, ch. 248, § 30.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 191, Uniform Negotiable Instruments Law; Section 22, Uniform Stock Transfer Act.

Purposes.1. Subsection (1) lists the various methods by which legal rights in a security may be transferred from one person to another. Subsection (1) is expressly made applicable to limited interests, including security interests, as well as to entire interests. Compare Section 8-301(2). The word "only" in the first sentence is intended to provide that the methods of transfer listed are exclusive and that compliance with one of them is essential to a valid transfer. Transfers by operation of law are excepted because they are not transfers to a "purchaser".

2. This section is intended to bring the law of securities transfers into line with modern security trading practices and to allow for future development of those practices. It is recognized that most transfers are not effected through physical delivery of a certificate from seller to buyer, but rather through adjustments in balances of the parties' accounts with various intermediaries. Whether each intermediary has physical possession of a certificate to match every security it "holds" in its customer accounts is of no importance. So long as the intermediary exercises ultimate control, the securities may equally well take the form of an account with a securities depository, with another intermediary or with a transfer agent.

Thus a "financial intermediary," which as defined in subsection (4) must be a person that as part of its ordinary business "maintains security accounts" for its customers, must control the disposition of securities pursuant to its customers' orders but may exercise its control in any of a number of forms-e.g. maintaining possession of certificated securities, being registered owner or registered pledgee of uncertificated securities, or having its own account with another financial intermediary. The important factor is that the intermediary must "hold" securities in an account for the customer. Notice that one who is a professional agent for holding securities accounts is not a financial intermediary with respect to any particular transaction in which it is not holding securities in an account for its customer. For example, a bank may as part of its business hold securities in accounts for its customers and therefore hold a financial intermediary with respect to those accounts; but if it takes a pledge of securities not held in account for the borrower to secure a loan, it is not a financial intermediary with respect to the securities pledged, since it holds the securities for its

own account rather than for a customer. On the other hand, a broker is a financial intermediary with respect to a margin account, since even though it has a personal interest in the securities, it holds securities in an account for a customer.

3. Paragraphs (a) and (b) of subsection (1) describe the most basic forms of transfer for certificated and uncertificated securities respectively. Paragraph (d) is the basic provision for transfers effected through entries in the records of a financial intermediary. For a valid transfer to be effected there must be both an entry made in the records and a confirmation sent to the purchaser. Confirmation is required to ensure that evidence exists to prove that the securities are held by the intermediary in a customer account rather than for its own account. This provision is important principally with regard to potential insolvency of an intermediary. So long as the financial intermediary holds the securities in an account, the

form in which it "holds" the securities makes no difference to the effectuation of a transfer. The form does, however, make a difference as to whether the purchaser can become a bona fide purchaser. See subsection (2) and Section 8-302(1)(c).

Paragraphs (e) and (f) of subsection (1) provide for transfers of certificated and uncertificated securities held by a "third person" who is not a financial intermediary. Acknowledgement by that person that he holds for the purchaser is the only condition to the transfer. Requiring acknowledgement forces the transferee to have the arrangement made explicit.

Paragraph (g) sets forth the requirements for a transfer of a security held by a clearing corporation. The transfer occurs when the appropriate entries are made. No confirmation is required, since the fact that a clearing corporation holds no securities for its own account eliminates the possibility that customers' securities might be intermingled with securities owned by the clearing corporation.

Paragraphs (h), (i), and (j) relate only to transfers of security interests. Paragraph (h) is analogous to Section 9-305, which provides the rule for perfecting a security interest in property in the possession of a bailee. Paragraph (h) makes explicit that if the transferor's interest is in an account with a financial intermediary, that intermediary is the proper person to receive notice of the transfer regardless of whether it has physical possession or registration in its own name or whether it has securities in an account with another intermediary. The notification to the "bailee" must be written and must be signed by the debtor or by the secured party, according to whether the security interest is being created or released. The transfer is also conditioned upon the existence of a written security agreement signed by the debtor and adequately identifying the security. This requirement is included in paragraph (h) because Section 8-321, which sets forth the requirements for creation and perfection of security interests, gives no formality requirements other than the existence of a valid transfer.

Paragraph (i) is similar to Section 9-304(4). Read in conjunction with Section 8-321, it provides for "automatic" perfection for 21 days after new value is given with respect to a

security interest as to which the debtor has signed a security agreement.

Paragraph (j) also deals only with the creation of security interests. In conjunction with Section 8-321, it provides that a financial intermediary that already controls disposition of a security may take a perfected security interest by giving value and having the debtor sign a security agreement.

4. Subsection (2) sets forth the principle that a purchaser is the owner of any security "held for him"-i.e. controlled pursuant to his instructions-by a financial intermediary. For example, a purchaser owns the securities in his custody account with a bank or his margin account with a broker. However, unless specific securities are separately identified as belonging to the purchaser, he cannot become a bona fide purchaser. A bona fide purchaser takes particular securities free of all claims and defenses. If bona fide purchaser status were given to those whose securities are held as part of a fungible bulk, there would be a possibility of inconsistent claims between two or more bona fide purchasers, since if the bulk should prove to be smaller than was expected, the claim of one or both must be compromised. An exception is made with respect to securities held by clearing corporations, since the fact that those entities hold

only for customer accounts makes the chance of inconsistent claims small. Securities held by intermediaries pursuant to paragraphs (c) and (d)(i) of subsection (1) are identifiable as belonging to a particular customer, and the customer therefore can be a bona fide purchaser. Those customers that are not bona fide purchasers own a proportionate property interest in the bulk of securities of that nature held by the intermediary. Thus the group of customers together own the entire bulk, and in the event of insolvency of the intermediary they would as a group be secured to the extent the bulk covered their ownership claims. If the bulk were insufficient to provide each customer his full claim, each would share ratably.

5. Subsection (3) provides protection to both financial intermediary and customer whenever notice of an adverse claim is received after the intermediary takes delivery of a certificated security as a holder for value or after the transfer, pledge or release of an uncertificated security has been registered free of the claim to a financial intermediary. It also states the principle that as between the intermediary and its customer, the latter is entitled to a "clean" security, i.e. one as to which no notice of adverse claim has been received. Isham v. Post, 141 N.Y. 100, 35 N.E. 1084, 23 L.R.A. 90 (1894), which permitted a broker acting as agent to deliver to his customer a security as to which a claim of forgery was made after its receipt by the broker, is rejected. An intermediary is in the business of handling securities. It is better equipped to clear up any questions of genuineness or adverse claim, and even though it acts in whole or in part as agent for its customer, it is not permitted to pass such problems on to its customer. However if the problem arises because of the customer's own act or omission to act, he is estopped to rely on it as a basis for rejecting the security. Section 1-103.

Cross references.Sections 8-301, 8-302, 8-314, 8-315, 8-320, 8-321, 9-304(4) and 9-305.

Definitional cross references."Adverse Claim". Section 8-302.

"Bona Fide Purchaser". Section 8-302.

"Certificated Security". Section 8-102.

"Clearing Corporation". Section 8-102.

"Debtor". Section 9-105.

"Delivery". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote the introductory paragraph of Subsection (1); rewrote Subsections (1)(a), (2) and (3); rewrote former Subsections (1)(b) through (1)(e) and redesignated them as present Subsections (1)(c) through (1)(e) and (1)(g); and added present Subsections (1)(b), (1)(f), (1)(h) through (1)(j) and (4).

Compiler's notes. - The bracketed reference in subsection (2) to "(d)(i)" was inserted to correct the seemingly erroneous reference to Subsections (1)(d) and (1)(i).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Brokers § 133; 15A Am. Jur. 2d Commercial Code §§ 104, 105, 107.
Necessity and sufficiency of appropriation to pass title on sale of corporate stock or securities, 78 A.L.R. 1019.
12 C.J.S. Brokers §§ 21, 124; 15A C.J.S. Confusion of Goods § 1; 18 C.J.S. Corporations §§ 262, 392; 19 C.J.S. Corporations § 1157; 77 C.J.S. Sales § 245.

§ 55-8-314. Duty to transfer, when completed.

(1) Unless otherwise agreed, if a sale of a security is made on an exchange or otherwise through brokers:

(a) the selling customer fulfills his duty to transfer at the time he:

(i) places a certificated security in the possession of the selling broker;

(ii) causes an uncertificated security to be registered in the name of the selling broker or a person designated by the broker;

(iii) if requested, causes an acknowledgment to be made to the selling broker that a certificated or uncertificated security is held for the broker; or

(iv) places in the possession of the selling broker or of a person designated by the broker a transfer instruction for an uncertificated security, providing the issuer does not refuse to register the requested transfer if the instruction is presented to the issuer for registration within thirty days thereafter; and

(b) the selling broker, including a correspondent broker acting for a selling customer fulfills his duty to transfer at the time he:

(i) places a certificated security in the possession of the buying broker or a person designated by the buying broker;

(ii) causes an uncertificated security to be registered in the name of the buying broker or a person designated by the buying broker;

(iii) places in the possession of the buying broker or of a person designated by the buying broker a transfer instruction for an uncertificated security, providing the issuer does not refuse to register the requested transfer if the instruction is presented to the issuer for registration within thirty days thereafter; or

(iv) effects clearance of the sale in accordance with the rules of the exchange on which the transaction took place.

(2) Except as provided in this section and unless otherwise agreed, a transferor's duty to transfer a security under a contract of purchase is not fulfilled until he:

(a) places a certificated security in form to be negotiated by the purchaser in the possession of the purchaser or of a person designated by the purchaser;

(b) causes an uncertificated security to be registered in the name of the purchaser or a person designated by the purchaser; or

(c) if the purchaser requests, causes an acknowledgment to be made to the purchaser that a certificated or uncertificated security is held for the purchaser.

(3) Unless made on an exchange a sale to a broker purchasing for his own account is within Subsection (2) and not within Subsection (1) of this section.

History: 1953 Comp., § 50A-8-314, enacted by Laws 1961, ch. 96, § 8-314; 1987, ch. 248, § 31.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section, together with the section on warranties to the purchaser (Section 8-306) and the section on transfer to the purchaser (Section 8-313), states the

rights and duties of the parties involved in the transfer of a security from the original transferor to the ultimate purchaser. Particular emphasis has been placed upon transactions on organized exchanges or through brokers or dealers since they account for the great bulk of security sales. Normally the sale of a security on such an exchange or through brokers involves at least three intermediate transactions, and perhaps more, depending upon the number of correspondent brokers concerned. Rarely is the same security transferred through the entire transaction, and the duty of each intermediate party in the chain of transfer must therefore be stated. The increased use of clearing houses is also recognized-in subparagraph (1)(b)(iv) a selling broker is specifically permitted to make delivery by clearing the sale through such a clearing agency.

2. Subparagraphs (1)(a)(i), (1)(a)(ii), (1)(b)(i) and (1)(b)(ii) set forth the basic methods of fulfilling the duty to transfer in exchange transactions. The selling customer can fulfill his duty by physically delivering a certificated security to the selling broker or by effecting the transfer of an uncertificated security to him on the records of the issuer. Similarly the selling broker can satisfy its duty to transfer to the buying broker by delivering a certificate or causing registration of an uncertificated security. Further, with respect to exchange transactions subparagraphs (a)(iv) and (b)(iii) of subsection (1) provide that the duty to transfer can be conditionally satisfied by the delivery of an instruction. Such delivery does not constitute complete performance if the instruction is timely presented for registration and the issuer refuses to comply with its request. The burden of timely presentment is placed on the recipient of the instruction and it is not intended that instructions so given will circulate in the manner in which certificated securities now commonly circulate by indorsement. It is contemplated that this method of performance will be commonly employed in transactions settled through brokers, with, in many cases, the selling broker specially guaranteeing the signature of the originator of the instruction pursuant to Section 8-312(3).

3. Under subsection (2), absent agreement, one transferring a security to a purchaser in a transaction not consummated on an exchange or through brokers must either make physical delivery of a certificated security or cause the registration of transfer of an uncertificated security. Further, at the request of the purchaser he can satisfy his duty by causing acknowledgement to be given to the purchaser by a third person who controls the security (Section 8-313(1)(d) and (e)). He cannot, for example, just put a certificated security in transit and impose the risk of loss upon the recipient; nor can he fulfill his duty by delivering to the purchaser a transfer instruction.

4. Subsection (3) covers the situation in which one in business as a broker is, in the particular transaction, his own customer. When he buys or sells for a customer other than himself, whether as agent or as principal, he is a "broker" under this Article (Section 8-303) and the transaction is within subsection (1) of this section.

Cross references.Sections 8-303, 8-306 and 8-313.

Definitional cross references."Agreed". Section 1-201.

"Broker". Section 8-303.

"Certificated Security". Section 8-102.

"Contract". Section 1-201.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Purchaser". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote this section to the extent that a detailed comparison is impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Brokers § 133; 15A Am. Jur. 2d Commercial Code §§ 104, 105.
11 C.J.S. Bonds § 69; 18 C.J.S. Corporations §§ 262, 392; 19 C.J.S. Corporations § 1157; 64 C.J.S. Municipal Corporations § 1948; 81A C.J.S. States § 186.

§ 55-8-315. Action against transferee based upon wrongful transfer.

(1) Any person against whom the transfer of a security is wrongful for any reason, including his incapacity, as against anyone except a bona fide purchaser, may:

(a) reclaim possession of the certificated security wrongfully transferred;

(b) obtain possession of any new certificated security representing all or part of the same rights;

(c) compel the origination of an instruction to transfer to him or a person designated by him an uncertificated security constituting all or part of the same rights; or

(d) have damages.

(2) If the transfer is wrongful because of an unauthorized indorsement of a certificated security, the owner may also reclaim or obtain possession of the security or a new certificated security, even from a bona fide purchaser, if the ineffectiveness of the purported indorsement can be asserted against him under the provisions of this article on unauthorized indorsements (Section 55-8-311 NMSA 1978).

(3) The right to obtain or reclaim possession of a certificated security or to compel the origination of a transfer instruction may be specifically enforced and the transfer of a certificated or uncertificated security enjoined and a certificated security impounded pending the litigation.

History: 1953 Comp., § 50A-8-315, enacted by Laws 1961, ch. 96, § 8-315; 1987, ch. 248, § 32.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 7. Uniform Stock Transfer Act.

Purposes.1. This Section grants to all owners of securities-certificated or uncertificated-a remedy for wrongful transfer. The general rule permitting an owner to reclaim possession of a certificated security wrongfully transferred is continued in paragraph (1)(a). Also, the owner of either a certificated or uncertificated security that has been wrongfully transferred may obtain a certificated security representing the same rights or may compel the origination of an effective transfer instruction for an uncertificated security comprising the same rights. Finally, the owner may have damages.

An exception is made, as in the prior law, in favor of bona fide purchasers. However, where the transfer is based upon a forged or unauthorized indorsement the exception operates in favor only of a good faith purchaser who is protected by Section 8-311. See that section and the comments thereto.

2. This section is not intended to exclude any rights an owner may have to damages for conversion under the case law. But see Section 8-318, which protects innocent brokers and other agents and bailees from liability for conversion.

Cross references.Sections 8-302, 8-311 and 8-318.

Definitional cross references."Action". Section 1-201.

"Bona Fide Purchaser". Section 8-302.

"Certificated Security". Section 8-102.

"Indorsement". Section 8-308.

"Instruction". Section 8-308.

"Person". Section 1-201.

"Right". Section 1-201.

"Security". Section 8-102.

"Unauthorized Indorsement". Section 1-201.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote Subsections (1) and (3), and inserted "of a certificated security" and substituted "a new certificated security" for "new security" in Subsection (2) while also substituting the NMSA citation for a UCC citation at the end of that subsection.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 91, 108; 18A Am. Jur. 2d Corporations §§ 710, 711.
Enjoining transfer of stock on corporate books, 58 A.L.R. 1421; 75 A.L.R. 154; 97 A.L.R. 220.
Issuance of stock certificate to joint tenants as creating gift inter vivos, 5 A.L.R.4th 373.
Lis pendens in suit to compel stock transfer, 48 A.L.R. 4th 731.
18 C.J.S. Corporations § 439; 19 C.J.S. Corporations § 1159.

§ 55-8-316. Purchaser's right to requisites for registration of transfer pledge or release on books.

Unless otherwise agreed, the transferor of a certificated security or the transferor, pledgor or pledgee of an uncertificated security on due demand must supply his purchaser with any proof of his authority to transfer, pledge or release or with any other requisite necessary to obtain registration of the transfer, pledge or release of the security but if the transfer, pledge or release is not for value, a transferor, pledgor or pledgee need not do so unless the purchaser furnishes the necessary expenses. Failure within a reasonable time to comply with a demand made gives the purchaser the right to reject or rescind the transfer, pledge or release.

History: 1953 Comp., § 50A-8-316, enacted by Laws 1961, ch. 96, § 8-316; 1987, ch. 248, § 33.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The registration of the transfer of a security is a matter of vital importance to a purchaser and he is here provided with the means of obtaining such formal requirements for registration as signature guarantees, proof of authority, transfer tax stamps and the like. The transferor is the one in a position to supply most conveniently whatever documentation may be requisite for registration of transfer, and his duty to do so upon demand within a reasonable time is here stated affirmatively. But if the transfer is not for value the transferee should pay expenses. For these purposes a release from pledge by a secured party to a debtor is a transfer for value.

2. If the transferor's duty is not performed the transferee may reject or rescind the contract to transfer, pledge or release. He is not bound to do so-he may prefer his action for damages for breach of contract. If an essential item is peculiarly within the province of the transferor so that he is the only one who can obtain it, the purchaser may specifically enforce his right. Compare Section 8-307.

Cross references.Section 8-307.

Definitional cross references."Certificated Security". Section 8-102.

"Purchaser". Section 1-201.

"Reasonable Time". Section 1-204.

"Right". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, in the first sentence, inserted "must", inserted "of a certificated security or the transferor, pledgor or pledgee of an uncertificated security", deleted "which may be" following "requisite", and inserted "pledgor or pledgee"; inserted "pledge or release" several times throughout the section and made minor stylistic changes therein.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 101, 109; 18A Am. Jur. 2d Corporations § 715.
18 C.J.S. Corporations § 435; 19 C.J.S. Corporations § 1159.

§ 55-8-317. Creditors' rights.

(1) Subject to the exceptions in Subsections (3) and (4) of this section, no attachment or levy upon a certificated security or any share or other interest represented thereby which is outstanding is valid until the security is actually seized by the officer making the attachment or levy, but a certificated security which has been surrendered to the issuer may be reached by a creditor by legal process at the issuer's chief executive office in the United States.

(2) An uncertificated security registered in the name of the debtor may not be reached by a creditor except by legal process at the issuer's chief executive office in the United States.

(3) The interest of a debtor in a certificated security that is in the possession of a secured party not a financial intermediary or in an uncertificated security registered in the name of a secured party not a financial intermediary (or in the name of a nominee of the secured party) may be reached by a creditor by legal process upon the secured party.

(4) The interest of a debtor in a certificated security that is in the possession of or registered in the name of a financial intermediary or in an uncertificated security registered in the name of a financial intermediary may be reached by a creditor by legal process upon the financial intermediary on whose books the interest of the debtor appears.

(5) Unless otherwise provided by law, a creditor's lien upon the interest of a debtor in a security obtained pursuant to Subsection (3) or (4) of this section is not a restraint on the transfer of the security, free of the lien, to a third party for new value; but in the event of a transfer, the lien applies to the proceeds of the transfer in the hands of the secured party or financial intermediary, subject to any claims having priority.

(6) A creditor whose debtor is the owner of a security is entitled to aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching the security or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by ordinary legal process.

History: 1953 Comp., § 50A-8-317, enacted by Laws 1961, ch. 96, § 8-317; 1987, ch. 248, § 34.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 13, 14, Uniform Stock Transfer Act.

Purposes.1. In dealing with certificated securities the instrument itself is the vital thing, and therefore a valid levy cannot be made unless all possibility of the security's wrongfully finding its way into a transferee's hands has been removed. This can be accomplished only when the security is in the possession of a public officer, the issuer,

or an independent third party. A debtor who has been enjoined can still transfer the security in contempt of court. See Overlock v. Jerome-Portland Copper Mining Co., 29 Ariz. 560, 243 P. 400 (1926). Therefore, although injunctive relief is provided in subsection (6) so that creditors may use this method to gain control of the security, the security itself must be reached to constitute a proper levy whenever the debtor has possession. The method used in Hodes v. Hodes, 176 Or. 102, 155 P.2d 564 (1945), where the Oregon court enjoined the transfer of a security in a safe deposit box in the state of Washington, directing a copy of the writ to be served upon the issuer, although not operative as an effective levy, is a method of reaching the security approved by the section.

2. Whenever the security is not in the form of a negotiable instrument in the debtor's possession, an effective levy can be made by serving process upon the person controlling transfer. Thus subsection (2) provides that when the security is uncertificated and registered in the debtor's name-or, what in effect is the same situation, whenever a certificated security is in the issuer's possession (Section 8-102(1)(c))-levy can be made only by serving process upon the issuer. The most logical place to serve the issuer would be the place where the transfer records are maintained, but that location might be difficult to identify, especially when the separate elements of a computer network might be situated in different places. The chief executive office is selected as the appropriate place by analogy to Section 9-103(3)(d). See Comment 5(c) to that section.

This section indicates only how attachment is to be made, not when it is legally justified. For that reason there is no conflict between this section and Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

3. An attachment filed at the issuer's office against certificated securities is ineffective unless the security itself has been surrendered to the issuer. The case law holdings that priority in time of transfer or attachment governed the validity of the levy are rejected under this Article as under the Stock Transfer Act. See for example, National Bank of the Pacific v. Western Pac. R. Co., 157 Cal. 573, 108 P. 676, 27 L.R.A., N.S., 987, 21 Ann. Cas. 1391 (1910).

4. Subsection (3) provides that when a security, either certificated or uncertificated, is controlled by a secured party, an effective lien can be established by service on the secured party. This section does not attempt to provide for rights as between the creditor and the secured party, as, for example, whether or when the secured party must liquidate the security.

Subsection (4) recognizes that securities are frequently held in account for customers by banks or brokers and that such securities may be registered not only in the name of the debtor but, more commonly, in street or other nominee name. Additionally, in such cases, the securities may have been commingled, repledged or deposited so that no particular security could be identified as that of the debtor. The subsection provides that the debtor's account can be reached by process upon the entity upon whose books the interest of the debtor appears. This appears to be the most effective way of preventing

the transfer of the debtor's interest and thus protecting the creditor. It is only that entity that is aware of the debtor's interest, irrespective of where the securities are located or in what name they happen to be registered.

Subsection (5) expressly provides that securities in which the debtor's interest is reached pursuant to subsection (3) or (4) may be transferred for new value, free of the creditor's lien, but also provides that when and if they are transferred, the lien will be transferred to the proceeds. Nothing in subsection (5) is intended to validate any transfer that would otherwise constitute a fraudulent conveyance. Furthermore, subsection (5) is expressly subject to the procedural laws of the states, and no attempt has been made to prescribe the consequences of obtaining such a lien or the procedures for its enforcement.

5. Particular terms to describe creditor's process have been avoided in this section. This section is not intended to have any effect on the availability of garnishment or similar third-party process as a pre-judgment or post-judgment remedy. Cf. Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969); Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972); Mitchell v. W. T. Grant Co., 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974). Such matters are a proper concern of the procedural rules of the states, subject, of course, to constitutional limitations.

6. This section deals with the problems of attaching or levying creditors. It does not apply in cases where a governmental agency, for reasons of public safety or the like, seeks to confiscate securities. See, for example, the situation in Silesian American Corp. v. Clark, 332 U.S. 469, 68 S.Ct. 179, 92 L.Ed. 81 (1947), upon which this section has no bearing.

Definitional cross references."Certificated Security". Section 8-102.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Financial Intermediary". Section 8-313.

"Issuer". Section 8-201.

"Secured Party". Section 9-105.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote Subsection (1), redesignated former Subsection (2) as present Subsection (6) while substituting "reached" for "be attached or levied upon" and made minor stylistic changes therein, and added present Subsections (2) through (5).

Law reviews. - For article, "Attachment in New Mexico-Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 39, 305, 588; 15A Am. Jur. 2d Commercial Code § 110; 30 Am. Jur. 2d Executions §§ 143, 254.
Shares of corporate stock as subject of execution or attachment, 1 A.L.R. 653.
Withdrawal value of stock in building and loan association as basis of attachment or execution by member or as subject of garnishment by member's creditor, 94 A.L.R. 1017.
Situs of corporate stock (or stock in joint stock company) for purpose of attachment, garnishment or execution, 122 A.L.R. 338.
Effect of attachment, garnishment, execution, etc., as regards right or duty of corporation to refuse to transfer stock on books to one presenting properly endorsed certificate, because of knowledge or suspicion of conflicting rights of registered holder or of a third person, 139 A.L.R. 290; 75 A.L.R.2d 746.
7 C.J.S. Attachment §§ 223, 224; 21 C.J.S. Creditors' Suits § 14; 33 C.J.S. Execution §§ 98, 99.

§ 55-8-318. No conversion by good faith conduct.

An agent or bailee who in good faith (including observance of reasonable commercial standards if he is in the business of buying, selling or otherwise dealing with securities) has received certificated securities and sold, pledged or delivered them or has sold or caused the transfer or pledge of uncertificated securities over which he had control according to the instructions of his principal, is not liable for conversion or for participation in breach of fiduciary duty although the principal had no right so to deal with the securities.

History: 1953 Comp., § 50A-8-318, enacted by Laws 1961, ch. 96, § 8-318; 1987 ch. 248, § 35.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This Section negates the liability of agents, including brokers, and of bailees for innocent conversion or participation in breach of fiduciary duty. Gruntal v. National Surety Co., 254 N.Y. 468, 173 N.E. 682 (1930) is followed. Compare Section 7(a) of the Uniform Act for Simplification of Fiduciary Security Transfers.

Notice that the concept of good faith includes the objective element of observing reasonable commercial standards when the agent or bailee is in the business of dealing with securities.

Cross reference.Section 7-404.

Definitional cross references."Certificated Security". Section 8-102.

"Delivery". Section 1-201.

"Good Faith". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated securities and sold, pledged or delivered them or has sold or caused the transfer or pledge of uncertificated securities over which he had control" for "securities and sold, pledged or delivered them", and substituted "so to deal with the securities" for "to dispose of them".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 108, 111.
Rights of purchaser of stolen bonds, 18 A.L.R. 717.
Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 A.L.R. 947.
2A C.J.S. Agency § 221; 8 C.J.S. Bailments § 40; 12 C.J.S. Brokers §§ 91, 92.

§ 55-8-319. Statute of frauds.

A contract for the sale of securities is not enforceable by way of action or defense unless:

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price;

(b) delivery of a certificated security or transfer instruction has been accepted or transfer of an uncertificated security has been registered and the transferee has failed to send written objection to the issuer within ten days after receipt of the initial transaction statement confirming the registration, or payment has been made but the contract is enforceable under this provision only to the extent of the delivery, registration or

payment;

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under Paragraph (a) of this section has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for the sale of a stated quantity of described securities at a defined or stated price.

History: 1953 Comp., § 50A-8-319, enacted by Laws 1961, ch. 96, § 8-319; 1987, ch. 248, § 36.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 4, Uniform Sales Act (which was based on Section 17 of the statute of 29 Charles II).

Purposes.1. This section is intended to conform the statute of frauds provisions with regard to securities to the policy of the like provisions in Article 2 Section 2-201. The chief difference is that this Section requires that quantity and price be specified.

2. What will be sufficient specification will vary with the circumstances. Where the transaction is on an exchange or an over-the-counter market where daily quotations of the security are available "100 shares X. Corp. comm. at market" should suffice. If there is no readily available standard to interest "at market" there is no "defined or stated price."

3. Paragraph (b) sets forth several actions which, if taken by a transferee, constitute manifestation of intent to purchase. The person receiving an initial transaction statement is given a period of 10 days to subject, since there is no overt manifestation of intent. While acceptance of delivery of a certificate or instruction is seen as an overt manifestation so that there is no grace period, in practice there will often be a question as to what constitutes acceptance by an organization. Failure to object to delivery within a reasonable period will be a factor to consider. Making payment is a more definite indication of intent.

4. Paragraph (c) is particularly important in the relationship of broker (Section 8-303) and customer. Normally a great volume of such business is done over the telephone. Orders are executed almost immediately and confirmed on the same or the next business day, usually on standard forms which as to the broker more than meet the minimal requirements of paragraph (a). It is reasonable to require the customer to raise his objection, if any, within ten days after the confirmation has been received (Section 1-201).

Cross reference.Section 2-201.

Definitional cross references."Action". Section 1-201.

"Broker". Section 8-303.

"Certificated Security". Section 8-102.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Initial Transaction Statement". Section 8-408.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Party". Section 1-201.

"Purchase". Section 1-201.

"Reasonable Time". Section 1-204.

"Security". Section 8-102.

"Send". Section 1-201.

"Signed". Section 1-201.

"Uncertificated Security". Section 8-102.

"Writing". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted the present language of Paragraph (b) for "delivery of the securities has been excepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment", and made minor stylistic changes in Paragraphs (c) and (d).

Statute of frauds not applicable where note and memorandum present. - The statute of frauds had no application to the sale of outstanding corporate stock where the agreement was confined by execution of promissory note and memorandum. Nygren v. Graves, 84 N.M. 358, 503 P.2d 641 (1972).

Nor to broker-customer relationship. - Neither the statute of frauds nor this section applies to the relationship between a broker and customer which creates a relation of trust and confidence. Reinhart v. Rauscher Pierce Sec. Corp., 83 N.M. 194, 490 P.2d 240 (Ct. App. 1971).

And effect of complete performance of contract by one party. - The statute of frauds has no application where there has been a full and complete performance of the contract by one of the contracting parties, and the party so performing may sue on the contract in a court of law; he is not compelled to abandon the contract and sue in equity or on a quantum meruit. Particularly is this said to be true where the agreement has been completely performed as to the part thereof which comes within the provisions of the statute, and the part remaining to be performed is merely the payment of money. Boggs v. Anderson, 72 N.M. 136, 381 P.2d 419 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 90, 113 to 115; 72 Am. Jur. 2d Statute of Frauds §§ 130, 144.
Contracts relating to corporate stock as within provisions of statute of frauds dealing with sale of goods, etc., 14 A.L.R. 394; 59 A.L.R. 597.
Recovering purchase price under sale of corporate stock where title has not passed as affected by provision of sales act, 99 A.L.R. 275.
Statute of frauds as applied to agreements of repurchase or repayment on sale of corporate stock or other personal property, 121 A.L.R. 312.
Signing of contract or memorandum by agent of undisclosed principal as satisfying statute of frauds, 138 A.L.R. 330.
Parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds, 81 A.L.R.2d 991.
Buyer's note as payment within statute of frauds, 81 A.L.R.2d 1355.
37 C.J.S. Frauds, Statute of § 142.

§ 55-8-320. Transfer or pledge within central depository system.

(1) In addition to other methods, a transfer, pledge or release of a security or any interest therein may be effected by the making of appropriate entries on the books of a clearing corporation reducing the account of the transferor, pledgor or pledgee and increasing the account of the transferee, pledgee or pledgor by the amount of the obligation, or the number of shares or rights transferred, pledged or released, if the security is shown on the account of a transferor, pledgor or pledgee on the books of the clearing corporation; is subject to the control of the clearing corporation; and

(a) if certificated:

(i) is in the custody of the clearing corporation, another clearing corporation, a custodian bank or a nominee of any of them; and

(ii) is in bearer form or indorsed in blank by an appropriate person or registered in the

name of the clearing corporation, a custodian bank or a nominee of any of them; or

(b) if uncertificated, is registered in the name of the clearing corporation, another clearing corporation, a custodian bank or a nominee of any of them.

(2) Under this section entries may be made with respect to like securities or interests therein as a part of a fungible bulk and may refer merely to a quantity of a particular security without reference to the name of the registered owner, certificate or bond number or the like and, in appropriate cases, may be on a net basis taking into account other transfers, pledges or releases of the same security.

(3) A transfer under this section is effective (Section 55-8-313 NMSA 1978) and the purchaser acquires the rights of the transferor (Section 55-8-301 NMSA 1978). A pledge or release under this section is the transfer of a limited interest. If a pledge or the creation of a security interest is intended, the security interest is perfected at the time when both value is given by the pledgee and the appropriate entries are made (Section 55-8-321 NMSA 1978). A transferee or pledgee under this section may be a bona fide purchaser (Section 55-8-302 NMSA 1978).

(4) A transfer or pledge under this section is not a registration of transfer under Sections 55-8-401 through 55-8-408 NMSA 1978.

(5) That entries made on the books of the clearing corporation as provided in Subsection (1) of this section are not appropriate does not affect the validity or effect of the entries or the liabilities or obligations of the clearing corporation to any person adversely affected thereby.

History: 1953 Comp., § 50A-8-320, enacted by Laws 1967, ch. 186, § 3; 1987, ch. 248, § 37.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Consistent with the underlying purposes and policies of this Act "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties"-subsection (2)(b) of Section 1-102-this section expressly authorizes a newly developing and commercially useful method of transferring or pledging securities on the organized securities markets, particularly among brokers and banks but not necessarily so limited. A clearing corporation is a special kind of financial intermediary. It holds securities on deposit from brokers, banks and other financial institutions, and clears trades among its depositors by making entries on its records. This section sets forth rules for determining when such entries are effective to constitute a transfer (Section 8-313(1)(g)).

The basic requirements, outlined in subsection (1), are that the security ultimately be

subject to the control of the clearing corporation making the entries and that the security be in a form that would allow the clearing corporation (or a person acting subject to its orders) to have a new security registered in the name of, and transferred to, a purchaser. The latter requirement is specified in some detail. A certificated security must be in the custody of either the clearing corporation making the entries, another clearing corporation, a custodian bank or nominee; and it must be either in bearer form, registered in the name of the clearing corporation (or of one of the clearing corporations if there are more than one involved), or else indorsed so that the clearing corporation (or one of them) could obtain registration of a transfer from the issuer. (The phrase "registered in the name of the clearing corporation" in subparagraph (1)(a)(ii) should be interpreted liberally so as to include restrictive indorsements and also to include registration or indorsement to either of the clearing corporations.) An uncertificated security must be registered in the name of a clearing corporation, a custodian bank or a nominee.

The requirement that the security be subject to the control of the clearing corporation means that if a certificated security is in the custody of, or an uncertificated security is registered in the name of, another clearing corporation or a custodian bank, the clearing corporation on whose records the entries in question are made must have the right to give orders to that person as to how and when to dispose of the security. That right may be an indirect one-for example, a security is subject to the control of Clearing Corporation A if the security is certificated and has been deposited in A's account with Clearing Corporation B, which in turn has deposited the security in its account with C, which may be either another clearing corporation or a custodian bank. Clearing Corporation A can give orders to B which in turn can give orders to C.

2. Subsection (2) makes clear that securities of the same issue may be treated as fungible interests, and that entries may be merely debits and credits to the accounts of the participants.

3. Subsection (4) makes clear that transfer, pledge or release under this Section does not affect the registration of ownership or pledge on the issuer's records.

Subsection (5) states that the entries made pursuant to this Section are effective to transfer the subject securities regardless of the fact that the entries were not appropriate. A person wronged by an inappropriate transfer may pursue his remedies against the transferee and against the clearing corporation. The nature of the rights between the clearing corporation and its participants is left to private contract and case law. See Section 8-315 as to actions against the transferee.

Cross references.Sections 1-102(2)(b), 8-301, 8-302, 8-313, 8-315 and 8-321.

Definitional cross references."Appropriate Person". Section 8-308.

"Bearer Form". Section 8-102.

"Bona Fide Purchaser". Section 8-302.

"Certificated Security". Section 8-102.

"Clearing Corporation". Section 8-102.

"Custodian Bank". Section 8-102.

"Fungible". Section 1-201.

"Indorsed". Section 8-308.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Rights". Section 1-201.

"Security". Section 8-102.

"Security Interest". Section 1-201.

"Uncertificated Security". Section 8-102.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote Subsections (1) and (3), inserted "or releases" near the end of Subsection (2), substituted the NMSA citations for "Part 4 of this article" in Subsection (4), and made minor stylistic changes therein and in Subsection (5).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 74, 104, 107; 68 Am. Jur. 2d Secured Transactions § 14.
Appropriation to pass title on sale of corporate stock or securities, 78 A.L.R. 1019.
37 C.J.S. Frauds, Statute of §§ 142, 143.

§ 55-8-321. Enforceability; attachment; perfection and termination of security interests.

(1) A security interest in a security is enforceable and can attach only if it is transferred to the secured party or a person designated by him pursuant to a provision of Subsection (1) of Section 55-8-321 [55-8-313] NMSA 1978.

(2) A security interest so transferred pursuant to agreement by a transferor who has rights in the security to a transferee who has given value is a perfected security interest, but a security interest that has been transferred solely under Paragraph (i) of Subsection (1) of Section 55-8-131 [55-8-313] NMSA 1978 becomes unperfected after twenty-one days unless, within that time, the requirements for transfer under any other provision of Paragraph (1) of Section 55-8-313 NMSA 1978 are satisfied.

(3) A security interest in a security is subject to the provisions of Chapter 55, Article 9 NMSA 1978, but:

(a) no filing is required to perfect the security interest; and

(b) no written security agreement signed by the debtor is necessary to make the security interest enforceable, except as otherwise provided in Paragraph (h), (i), or (j) of Subsection (1) of Section 55-8-313 NMSA 1978.

The secured party has the rights and duties provided under Section 55-9-207 NMSA 1978, to the extent they are applicable, whether or not the security is certificated, and, if certificated, whether or not it is in his possession.

(4) Unless otherwise agreed, a security interest in a security is terminated by transfer to the debtor or a person designated by him pursuant to a provision of Subsection (1) of Section 55-8-313 NMSA 1978. If a security is thus transferred, the security interest, if not terminated becomes unperfected unless the security is certificated and is delivered to the debtor for the purpose of ultimate sale or exchange or presentation, collection, renewal or registration of transfer. In that case, the security interest becomes unperfected after twenty-one days unless, within that time, the security (or securities for which it has been exchanged) is transferred to the secured party or a person designated by him pursuant to a provision of Subsection (1) of Section 55-8-313 NMSA 1978.

History: 1978 Comp., § 55-8-321, enacted by Laws 1987, ch. 248, § 38.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section is intended to govern the creation, perfection and termination of security interests in all securities, certificated and uncertificated. Subsection (1) requires an effective transfer under Section 8-313(1) as formal evidence of the security interest. The requirement that there be formal evidence of the creation of a security interest in collateral other than securities can be satisfied by having the debtor sign a security agreement or by having the secured party take possession of the collateral. Section 9-203. Transfers pursuant to paragraphs (a)-(g) of Section 8-313(1) all involve either delivery to the secured party or else some other specific event that is the functional equivalent of delivery. Transfers pursuant to paragraphs (h)-(j) do not involve any event that serves that function, but they require a security agreement signed by the

debtor.

2. Subsection (2) provides that when value has been given and the debtor has rights in the collateral, an appropriate transfer will result not only in an enforceable security interest but also in one that is perfected. Under this section, an unperfected security interest in a security cannot be created. A security interest created by transfer under Section 8-313(1)(i), however, may become unperfected if, within 21 days, the requirements of another method of effective transfer are not satisfied.

3. Subsection (3) expressly makes a security interest in securities subject to the provisions of Article 9 except those provisions dealing with the creation and perfection of security interests. Those matters are governed by this section. In addition, the provisions of Section 9-207, which govern the rights and duties of the pledgee of a certificated security, are extended, to the extent they are applicable, to all secured parties, whether or not the possession of a certificated security is involved. Thus, in the absence of agreement to the contrary, the secured party, who might be the registered owner of an uncertificated security, would have the duty to remit dividends he received to the debtor or to apply them in reduction of the obligation under Section 9-207(2)(c).

4. Subsection (4) provides that a security interest is terminated by retransfer to the debtor unless the parties otherwise agree. Even when the parties agree that the security interest is to continue, it will become unperfected unless there is delivery of a certificated security for the limited purposes described in the second sentence. Compare Section 9-304(5) and (6).

Cross references.Sections 8-313 and 9-203. See generally Article 9.

Definitional cross references."Certificated Security". Section 8-102.

"Debtor". Section 9-105.

"Person". Section 1-201.

"Rights". Section 1-201.

"Secured Party". Section 9-105.

"Security". Section 8-102.

"Security Agreement". Section 9-105.

"Security Interest". Section 1-201.

"Signed". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Effective dates. - Laws 1987, ch. 248 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 19, 1987.

Compiler's notes. - The bracketed section references were inserted in Subsections (1) and (2) to correct seemingly erroneous references.

Part 4

REGISTRATION

§ 55-8-401. Duty of issuer to register transfer, pledge or release.

(1) If a certificated security in registered form is presented to the issuer with a request to register transfer or an instruction is presented to the issuer with a request to register transfer, pledge or release, the issuer shall register the transfer, pledge or release as requested if:

(a) the security is indorsed or the instruction was originated by the appropriate person or persons (Section 55-8-308 NMSA 1978);

(b) reasonable assurance is given that those indorsements or instructions are genuine and effective (Section 55-8-402 NMSA 1978);

(c) the issuer has no duty as to adverse claims or has discharged the duty (Section 55-8-403 NMSA 1978);

(d) any applicable law relating to the collection of taxes has been complied with; and

(e) the transfer, pledge or release is in fact rightful or is to a bona fide purchaser.

(2) If an issuer is under a duty to register a transfer, pledge or release of a security, the issuer is also liable to the person presenting a certificated security or an instruction for registration or his principal for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer, pledge or release.

History: 1953 Comp., § 50A-8-401, enacted by Laws 1961, ch. 96, § 8-401; 1987, ch. 248, § 39.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Section 8-201(3) defines "issuer" as used in this Part 4 as the person on whose behalf transfer books are maintained. Transfer agents, registrars or the like have rights and duties under this Part within the scope of their respective functions, similar to those of the issuer (Section 8-406).

2. There is a substantial and heterogeneous body of case law as to the issuer's duty to register a transfer and as to his liability for improper registration, e.g., on an unauthorized signature (Section 8-311), or where the indorsement is not that of an appropriate person (Section 8-308), and generally under circumstances where the issuer is deemed to have had notice of an adverse claim (Section 8-302) and thus of the possible wrongfulness of the transfer.

In general this section and those which follow it continue the well-settled rules found in the case law as to duty to register and as to liability for improper registration on an unauthorized signature, or where the indorsement is not that of an appropriate person. They also extend the application of those rules to uncertificated securities.

In all other areas, the issuer's potential liability for wrongful registration of transfer has been substantially reduced. The rules found in the case law are drastically modified in furtherance of a considered policy to speed up the registration process by narrowing the field in which the issuer historically has first sought to assure itself that it cannot be held to be on notice of an adverse claim, and, failing that assurance, has imposed rigorous requirements of proof that there is no possible impropriety.

3. This section states the basic duty of the issuer to register transfers. It states that a duty exists, but only if certain preconditions exist. If any of the preconditions do not exist, there is no duty to register transfer. If the indorsement on a security is a forgery, there is no duty. If the instruction to transfer an uncertificated security is not originated by an appropriate person, there is no duty. If there has not been compliance with applicable tax laws, there is no duty. If the security is properly indorsed but nevertheless the transfer is in fact wrongful, there is no duty unless the transfer is to a bona fide purchaser (and the other preconditions exist). Cf. Kaiser-Frazer Corp. v. Otis & Co., 195 F.2d 838 (2d Cir. 1952), certiorari denied 73 S.Ct. 89, 344 U.S. 856, 97 L.Ed. 664.

This section does not constitute a mandate that all preconditions must be met before the issuer registers a transfer. If it so desires, the issuer can waive the reasonable assurances specified in paragraph (b). If it has confidence in the responsibility of the persons requesting transfer, it can ignore questions of compliance with tax laws. If it has no duty to inquire into or otherwise recognize adverse claims, it can and it should register transfer without inquiry as to the rightfulness of a transfer.

Sections 8-402 and 8-403 are the sections dealing with the specific rules as to assurances and duty to inquire.

4. By subsection (2) the person entitled to registration may not only compel it but may hold the issuer liable in damages for unreasonable delay.

5. See Section 8-404 as to the issuer's liability for wrongful registration of transfer.

Cross references.Point 1: Sections 8-201(3) and 8-406.

Point 2: Sections 8-204, 8-301, 8-308 and 8-311.

Definitional cross references."Adverse Claim". Section 8-302.

"Appropriate Person". Section 8-308.

"Bona Fide Purchaser". Section 8-302.

"Certificated Security". Section 8-102.

"Genuine". Section 1-201.

"Indorsement". Section 8-308.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Person". Section 1-201.

"Registered Form". Section 8-102.

"Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote Subsection (1) and, in Subsection (2), substituted "If" for "Where", twice inserted "pledge or release", and substituted "a certificated security or an instruction" for "it".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 89, 103, 116 to 118.
Transfer on corporate books as requisite of gift of stock, 38 A.L.R. 1366.
Failure to enter transfer of stock on books of corporation as affecting liability of transferor, 45 A.L.R. 137; 104 A.L.R. 638.
Corporation's refusal to issue, convert or transfer stock as conversion, 54 A.L.R. 1157.
Right of corporation to refuse to register transfer of stock because of stockholder's indebtedness to it, where transfer is by operation of law, 65 A.L.R. 220.
Necessity of delivery of stock certificate to complete valid gift of stock, 99 A.L.R. 1077; 23 A.L.R. 1171.
Assumption of payment or guarantee of corporation's indebtedness as condition of

transfer of its stock, 103 A.L.R. 1417.
Right of pledgee of corporate stock to transfer of stock on books of company, 116 A.L.R. 571.
Corporation's knowledge or suspicion of conflicting rights, 139 A.L.R. 273; 75 A.L.R.2d 746.
Rights, duties and liability of corporation in connection with stock of infants or incompetents, 3 A.L.R.2d 881.
Rights, duties and liability in connection with transfer of stock of decedent, 7 A.L.R.2d 1240.
Remedy for refusal of corporation or its agent to register or effectuate transfer of stock, 22 A.L.R.2d 12.
Transfer on corporate books as sufficient for gift of stock, 6 A.L.R.4th 250.
Lis pendens in suit to compel stock transfer, 48 A.L.R.4th 731.
11 C.J.S. Bonds § 17; 18 C.J.S. Corporations §§ 434, 435; 19 C.J.S. Corporations § 1159; 64 C.J.S. Municipal Corporations § 1949; 81A C.J.S. States § 186.

§ 55-8-402. Assurance that indorsements and instructions are effective.

(1) The issuer may require the following assurance that each necessary indorsement of a certificated security or each instruction (Section 55-8-308 NMSA 1978) is genuine and effective:

(a) in all cases, the guarantee of the signature (Subsection (1) or (2) of Section 55-8-312 NMSA 1978) of the person indorsing a certificated security or originating an instruction including, in the case of an instruction, a warranty of the taxpayer identification number or, in the absence thereof, other reasonable assurance of identity;

(b) if the indorsement is made or the instruction is originated by an agent, appropriate assurance of authority to sign;

(c) if the indorsement is made or the instruction is originated by a fiduciary, appropriate evidence of appointment or incumbency;

(d) if there is more than one fiduciary, reasonable assurance that all who are required to sign have done so; and

(e) if the indorsement is made or the instruction is originated by a person not covered by any of the foregoing, assurance appropriate to the case corresponding as nearly as may be to the foregoing.

(2) A "guarantee of the signature" in Subsection (1) of this section means a guarantee signed by or on behalf of a person reasonably believed by the issuer to be responsible. The issuer may adopt standards with respect to responsibility if they are not manifestly unreasonable.

(3) "Appropriate evidence of appointment or incumbency" in Subsection (1) of this section means:

(a) in the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within sixty days before the date of presentation for transfer, pledge or release; or

(b) in any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the issuer to be responsible or, in the absence of that document or certificate, other evidence reasonably deemed by the issuer to be appropriate. The issuer may adopt standards with respect to the evidence if they are not manifestly unreasonable. The issuer is not charged with notice of the contents of any document obtained pursuant to this Paragraph (b) except to the extent that the contents relate directly to the appointment or incumbency.

(4) The issuer may elect to require reasonable assurance beyond that specified in this section but if it does so and, for a purpose other than that specified in Paragraph (b) of Subsection 3 of this section, both requires and obtains a copy of a will, trust, indenture, articles of co-partnership, by-laws or other controlling instrument, it is charged with notice of all matters contained therein affecting the transfer, pledge or release.

History: 1953 Comp., § 50A-8-402, enacted by Laws 1961, ch. 96, § 8-402; 1987, ch. 248, § 40.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. As is noted in the Comment to Section 8-401, the issuer is absolutely liable for wrongful registration of transfer when the signature of the indorser is unauthorized or is not that of an appropriate person or when an instruction is not originated by an appropriate person. The issuer is entitled to require such assurance as is reasonable under the circumstances that all necessary indorsements are effective, and thus to minimize its risk. This section establishes the requirements the issuer may make in terms of documentation which, except in the rarest of instances, should be easily furnished. If a demand for further assurance is reasonable under the circumstances, subsection (4) applies.

2. Under subsection (1)(a) the issuer may require in all cases a guarantee of signature (Section 8-312). When an instruction is presented the issuer always may require either a warranty of taxpayer identification number or some other reasonable assurance as to the identity of the originator. Subsection (2) allows the issuer to require that the person making these guarantees be one reasonably believed to be responsible, and the issuer may adopt standards of responsibility which are not manifestly unreasonable. In this aspect this section approves the practice of the organized securities markets.

3. This section, by paragraphs (b) through (e) of subsection (1), permits the issuer to seek confirmation of the effectiveness of the indorsement or instruction. The permitted methods act as a double check on matters which are within the warranties of the guarantor of signature. See Section 8-312. In addition, to some extent they act also as a check on the right to transfer (i.e. to deliver the indorsed certificated security or to transmit an instruction). Thus, an agent may be required to submit his power of attorney, a corporation to submit a certified resolution evidencing the authority of its signing officer to sign, an executor or administrator to submit the usual "short-form certificate", etc. But failure of a fiduciary to obtain court approval of the transfer or to comply with other requirements does not make his signature unauthorized. Section 8-308(11). Hence court orders and other controlling instruments are omitted from subsection (1).

Subsection (1)(c) authorizes the issuer to require "appropriate evidence" of appointment or incumbency, and subsection (3) indicates what evidence will be "appropriate". In the case of a fiduciary appointed or qualified by a court that evidence will be a court certificate dated within sixty days before the date of presentation. Where the fiduciary is not appointed or qualified by a court, as in the case of a successor trustee, subsection (3)(b) applies. Compare Section 4 of the Uniform Act for Simplification of Fiduciary Security Transfers. If the security is registered in the name of the fiduciary, the issuer may under Section 8-403(3)(a) assume without inquiry that the fiduciary status continues until written notice to the contrary is received. Hence no evidence of appointment or incumbency is needed unless such a notice has been received. Compare Section 2 of the Uniform Act for Simplification of Fiduciary Security Transfers.

Where subsection (3)(b) applies, the issuer may require a copy of a trust instrument or other document showing the appointment, or it may require the certificate of a responsible person. In the absence of such a document or certificate, it may require other appropriate evidence. If a document is obtained solely as "appropriate evidence of appointment or incumbency" under subsection (3)(b), the issuer is not charged with notice of its contents except to the extent that the contents relate directly to the appointment or incumbency. But if the document is obtained for any other purpose, the issuer may be charged under subsection (4). See Point 6 below.

4. There are many other types of situations where, under the case law, the issuer would be deemed to have notice of possible adverse claims, and therefore would register transfer at its peril. Typical are: knowledge that the registered owner is dead, the fact that he is described or identifiable as a fiduciary, etc. Perhaps the most ubiquitous is where a will, trust indenture or other controlling instrument is on file with the issuer or transfer agent for some other purpose (e.g., in the banking as distinct from the corporate agency department of a trust company), but, unless specifically asked for, would not come to the attention of the officers responsible for the registration of security transfers. Here, under the cases, there is an area of liability based upon notice of possible adverse claims affecting the right to deliver the security, an area to which the warranties of the guarantor of signature specifically do not extend. See Section 8-

312(4). Also, it is the area in which in the past issuers and their agents, fearing possible lawsuits based upon unauthorized transfers by fiduciaries and the like, have made it a practice to demand complete and convincing evidence that the transfer is proper in all of its aspects. Sections 8-403 and 8-404 strictly circumscribe the issuer's liability in such cases, and this section therefore makes no provisions for assurances to cover them.

5. Circumstances may indicate that a necessary signature was unauthorized or was not that of an appropriate person. Such circumstances would be ignored at risk of absolute liability, and to minimize that risk the issuer may properly exercise the option given by subsection (4) to require assurance beyond that specified in subsection (1). On the other hand, the facts at hand may reflect only on the rightfulness of the transfer. Such facts do not operate, as they did under prior law, automatically to create a duty of inquiry, unless there is timely notification of the existence of an adverse claim. See Section 8-403(1) and (4). If there is a duty of inquiry under Section 8-403, the issuer may follow the procedure provided in Section 8-403(2) or (5), or it may discharge the duty of inquiry as to a certificated security "by any reasonable means". The same is true if the issuer's overriding duty to conduct its functions in good faith (Section 1-203) comes into play-e.g., where the certificates security is indorsed or the instruction is originated by a person known to the employee handling the transaction for the issuer to be wanted by the police.

6. Specifically to implement the policy of this Act to discourage issuers from requiring excessive documentation, subsection (4) provides that if the issuer elects to require additional documentation for any purpose other than to obtain "appropriate evidence of appointment or incumbency" under subsection (3)(b) and both requires and obtains a copy of a will, trust, indenture, article of co-partnership, by-laws or other controlling instrument, it is charged with notice of all matters contained therein affecting the transfer. It follows that an instrument voluntarily submitted, without having been "required" by the issuer, may be returned without examination.

But if the issuer has no duty to inquire and demands more than reasonable assurance that the instruction or the necessary indorsements are genuine and effective, the presenter of the instruction or the certificated security may refuse the demand and sue for improper refusal to register Section 8-401.

Cross references.Point 1: Sections 8-308 and 8-311.

Point 2: Section 8-312.

Point 3: Sections 8-308 and 8-312.

Point 4: Sections 8-312, 8-403 and 8-404.

Point 5: Sections 1-203 and 8-403.

Point 6: Section 8-401.

Definitional cross references."Adverse Claim". Section 8-302.

"Certificated Security". Section 8-102.

"Genuine". Section 1-201.

"Indorsement". Section 8-308.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Signed". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, rewrote Subsection (1), added "pledge or release" at the end of Subsections (3)(a) and (4), and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 74, 89, 98, 116 to 120; 18A Am. Jur. 2d Corporations § 718.
Liabilities and duties of corporation in respect to sale or transfer of corporate stock held by one having life estate, 126 A.L.R. 1298.
Duty of corporation to refuse to transfer stock on books to one who presents properly indorsed certificate on ground of knowledge or suspicion of conflicting rights of registered holder or third person, 139 A.L.R. 273; 75 A.L.R.2d 746.
Rights, duties and liability of corporation in connection with transfer of stock of decedent, 7 A.L.R.2d 1240.
18 C.J.S. Corporations § 435; 19 C.J.S. Corporations § 1159.

§ 55-8-403. Issuer's duty as to adverse claims.

(1) An issuer to whom a certificated security is presented for registration shall inquire into adverse claims if:

(a) a written notification of an adverse claim is received at a time and in a manner affording the issuer a reasonable opportunity to act on it prior to the issuance of a new, reissued or reregistered certificated security and the notification identifies the claimant, the registered owner and the issue of which the security is a part and provides an address for communications directed to the claimant; or

(b) the issuer is charged with notice of an adverse claim from a controlling instrument it has elected to require under Subsection (4) of Section 55-8-402 NMSA 1978.

(2) The issuer may discharge any duty of inquiry by any reasonable means, including notifying an adverse claimant by registered or certified mail at the address furnished by him or, if there be no such address, at his residence or regular place of business that the certificated security has been presented for registration of transfer by a named person, and that the transfer will be registered unless within thirty days from the date of mailing the notification, either:

(a) an appropriate restraining order, injunction or other process issues from a court of competent jurisdiction; or

(b) there is filed with the issuer an indemnity bond, sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar or other agent of the issuer involved from any loss it or they may suffer by complying with the adverse claim.

(3) Unless an issuer is charged with notice of an adverse claim from a controlling instrument which it has elected to require under Subsection (4) of Section 55-8-402 NMSA 1978 or receives notification of an adverse claim under Subsection (1) of this section, if a certificated security presented for registration is endorsed by the appropriate person or persons the issuer is under no duty to inquire into adverse claims. In particular:

(a) an issuer registering a certificated security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship, and thereafter the issuer may assume without inquiry that the newly registered owner continues to be the fiduciary until the issuer receives written notice that the fiduciary is no longer acting as such with respect to the particular security;

(b) an issuer registering transfer on an endorsement by a fiduciary is not bound to inquire whether the transfer is made in compliance with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer; and

(c) the issuer is not charged with notice of the contents of any court record or file or other recorded or unrecorded document even though the document is in its possession and even though the transfer is made on the endorsement of a fiduciary to the fiduciary himself or to his nominee.

(4) An issuer is under no duty as to adverse claims with respect to an uncertificated security except:

(a) claims embodied in a restraining order, injunction or other legal process served upon

the issuer if the process was served at a time and in a manner affording the issuer a reasonable opportunity to act on it in accordance with the requirements of Subsection (5) of this section;

(b) claims of which the issuer has received a written notification from the registered owner or the registered pledgee if the notification was received at a time and in a manner affording the issuer a reasonable opportunity to act on it in accordance with the requirements of Subsection (5) of this section;

(c) claims (including restrictions on transfer not imposed by the issuer) to which the registration of transfer to the present registered owner was subject and were so noted in the initial transaction statement sent to him; and

(d) claims as to which an inssuer [issuer] is charged with notice from a controlling instrument it has elected to require under Subsection (4) of Section 55-8-402 NMSA 1978.

(5) If the issuer of an uncertificated security is under a duty as to an adverse claim, he discharges that duty by:

(a) including a notation of the claim in any statements sent with respect to the security under Subsections (3), (6) and (7) of Section 55-8-408 NMSA 1978; and

(b) refusing to register the transfer or pledge of the security unless the nature of the claim does not preclude transfer or pledge subject thereto.

(6) If the transfer or pledge of the security is registered subject to an adverse claim, a notation of the claim must be included in the initial transaction statement and all subsequent statements sent to the transferee and pledgee under Section 55-8-408 NMSA 1978.

(7) Notwithstanding Subsections (4) and (5) of this section, if an uncertificated security was subject to a registered pledge at the time the issuer first came under a duty as to a particular adverse claim, the issuer has no duty as to that claim if transfer of the security is requested by the registered pledgee or an appropriate person acting for the registered pledgee unless:

(a) the claim was embodied in legal process which expressly provides otherwise;

(b) the claim was asserted in a written notification from the registered pledgee;

(c) the claim was one as to which the issuer was charged with notice from a controlling instrument it required under Subsection (4) of Section 55-8-402 NMSA 1978 in connection with the pledgee's request for transfer; or

(d) the transfer requested is to the registered owner.

History: 1953 Comp., § 50A-8-403, enacted by Laws 1961, ch. 96, § 8-403; 1977, ch. 127, § 1; 1987, ch. 248, § 41.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 3, Uniform Fiduciaries Act.

Purposes.1. In consonance with the general policy of this Part 4 (See the Comments to Sections 8-401 and 8-402), and subject always to the overriding duty of good faith in the performance of its functions (Section 1-203) this section limits the issuer's duty as to adverse claims to the specific situations stated in subsections (1) as to certificated securities and (4) as to uncertificated securities.

Paragraph (a) of subsection (1) is the ordinary "stop transfer" notice commonly resorted to by the owner of a lost or stolen certificated security or in a situation where breach of trust, disregard of a valid restriction on transfer, or other improper action is feared to have occurred or to be about to occur.

Notification under paragraph (a) of subsection (1) must be "written" (Section 1-201(46)) and must be "received" (Section 1-201(26)) "at a time and in a manner which affords the issuer a reasonable opportunity to act on it prior to the issuance of a new, reissued or re-registered security." Cf. Section 1-201(27). Its contents must be such as to make reasonably clear who makes the claim and with respect to what security, and where communications may be addressed to him. Compare Section 5(a) of the Uniform Act for Simplification of Fiduciary Security Transfers.

A notification once so received is easily keyed to the appropriate records. Therefore, no defense of "forgotten notice", possibly relevant on the issue of bona fide purchase as to bearer form securities, is available under this section.

As to paragraph (b) see the Comment to Section 8-402.

2. With respect to certificated securities subsection (2) does not limit the issuer to any specific method of discharging a duty of inquiry. It may use "any reasonable means" including the procedure spelled out in the subsection. That procedure, based on a New York statute respecting adverse claims to bank deposits and on commercial practice, should be effective in the large majority of cases to protect the rights of all interested parties and relieve the issuer of further responsibility. No delay during the thirty day period will be "reasonable" under Section 8-401(2).

3. Subsection (3) is the converse of subsection (1) and spells out some specific situations in which under prior law a duty to inquire existed or may have existed. Compare Sections 2 and 3 of the Uniform Act for Simplification of Fiduciary Security Transfers. As to the effect of subsection (3)(a) on the effectiveness of an indorsement, see the Comment to Section 8-404.

4. Transfer of uncertificated securities does not take place until registration, so that any mandated delay seriously impairs an owner's ability to sell or pledge his security. Since a prudent purchaser may not pay unless he receives a clean initial transaction statement, the effect of a rule giving the issuer a duty to inquire any time it received any written notice of an adverse claim, however, frivolous, would be disastrous. Because of this important difference between certificated and uncertificated securities, there are separate provisions as to duty to inquire. Subsections (4), (5), (6) and (7) apply only to uncertificated securities, and are intended to accommodate the interests of owners, purchasers, issuers and adverse claimants.

Subsection (4) states that an issuer has no duty as to adverse claims except in four described situations. Mere written notifications result in a duty only when they come from existing owners and pledgees and are analogous to stop payment orders on checks. There is a duty is to claims to which the security was subject when it was purchased by the present owner, a situation with which the owner is already familiar. There is a duty as to claims arising from the issuer's request for documentation under Section 8-402.

The significant difference of subsection (4) from subsection (1) is that claims asserted by third parties, in order to impose a duty on the issuer, must be supported by legal process. This will constitute assurances that the claim is not merely frivolous and that its assertion is more than harassment. In most cases the owner will have been notified and have had the opportunity to be heard. While claims thus asserted may ultimately be adjudged invalid, the owner will not be tied up by a bare written communication from the claimant. On the other hand, while a more substantial burden is imposed on the claimant, there is a channel through which he can assert his claim before the rights of a bona fide purchaser intervene.

If the claimant sues the owner in a court that has no jurisdiction over the issuer and an injunction is issued against the owner forbidding him to transfer the security, the issuer has a duty under paragraph (4)(a) if it receives an authenticated copy of the order. Even though in that situation the order is not directed to the issuer, it is "legal process served upon the issuer" for purposes of paragraph (4)(a). There is sufficient guarantee that the complaint is not frivolous. Further, the issuer might breach its duty to act in good faith if it registered a transfer in spite of such clear evidence of impropriety.

5. Once it is established that the claim imposes a duty on the issuer, notations of the claim must be contained in all statements sent with respect to the security, and registration of transfer or pledge must be refused unless the nature of the claim is consistent with transfer or pledge subject to the claim. When transfer or pledge is registered subject to the claim, subsection (6) requires that the claim be noted in all statements sent to the transferee or pledgee.

Subsection (7) deals with the situation in which an uncertificated security is already subject to as registered pledge when the issuer first learns of an adverse claim as to which it has a duty. In that event, the registered pledgee who became such without

notice of the claim may be a bona fide purchaser with the right to transfer the security free of the claim. That right cannot be curtailed by the claim of a third party (including the registered owner) unless legal process embodying the claim expressly deals with the pledgee's interest. There is obviously no curtailment of the pledgee's right when the claim is asserted by the pledgee himself. It should be curtailed if the pledgee's right to obtain registration of transfer is called into question by a controlling instrument which the issuer elects to require before acting on the pledgee's request. Since the transfer to the registered owner is the equivalent of a release of the pledge, such a transfer does not terminate the issuer's duty as to the claim.

Cross references.Sections 1-203, 8-304, 8-401, 4-402, 8-404, 8-405 and 8-408.

Definitional cross references."Adverse Claim". Section 8-302.

"Appropriate Person". Section 8-308.

"Certificated Security". Section 8-102.

"Indorsement". Section 8-308.

"Initial Transaction Statement". Section 8-408.

"Issuer". Section 8-201.

"Notice". Section 1-201.

"Notification". Section 1-201.

"Person". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

"Written". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated security" for "security" several times in this section, deleted former Subsection (3)(d) relating to transfer of a security upon an endorsement by a corporation, added Subsections (4) through (7), and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 89, 98, 116 to 119.
Duty of corporation upon presentation for transfer of stock standing in one's name as

trustee or other fiduciary, 56 A.L.R. 1199.
Liabilities and duties of corporation in respect to sale or transfer of corporate stock held by one having life estate, 126 A.L.R. 1298.
Duty of corporation to refuse to transfer stock on books to one who presents properly endorsed certificate on ground of knowledge or suspicion of conflicting rights of registered holder or third person, 139 A.L.R. 273; 75 A.L.R.2d 746.
18 C.J.S. Corporations § 435; 19 C.J.S. Corporations § 1159.

§ 55-8-404. Liability and non-liability for registration.

(1) Except as provided in any law relating to the collection of taxes, the issuer is not liable to the owner, pledgee or any other person suffering loss as a result of the registration of a transfer, pledge or release of a security if:

(a) there were on or with a certificated security the necessary indorsements or the issuer had received an instruction originated by an appropriate person (Section 55-8-308 NMSA 1978); and

(b) the issuer had no duty as to adverse claims or has discharged the duty (Section 55-8-403 NMSA 1978).

(2) If an issuer has registered a transfer of a certificated security to a person not entitled to it the issuer on demand shall deliver a like security to the true owner unless:

(a) the registration was pursuant to Subsection (1) of this section;

(b) the owner is precluded from asserting any claim for registering the transfer under Subsection (1) of Section 55-8-405 NMSA 1978; or

(c) the delivery would result in overissue, in which case the issuer's liability is governed by Section 55-8-104 NMSA 1978.

(3) If an issuer has improperly registered a transfer, pledge or release of an uncertificated security, the issuer on demand from the injured party shall restore the records as to the injured party to the condition that would have obtained if the improper registration had not been made unless:

(a) the registration was pursuant to Subsection (1) of this section; or

(b) the registration would result in overissue, in which case the issuer's liability is governed by Section 55-8-104 NMSA 1978.

History: 1953 Comp., § 50A-8-404, enacted by Laws 1961, ch. 96, § 8-404; 1987, ch. 248, § 42.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section states the basic exonerative policy of this Article where there is no duty to inquire into adverse claims and the certificated security is appropriately indorsed or the issuer receives an instruction from an appropriate person.

Note that under subsection (1)(a) exoneration depends on whether or not the necessary indorsements were in fact on or with the security. The issuer cannot, for example, defend a suit based on its having registered a transfer on a forged indorsement on the ground that it received the assurances listed in Section 8-402 and was under no duty to go further. It has that option under Section 8-402(4).

Note, however, that this Act excludes from the category of "unauthorized indorsement" (Section 8-311) certain situations that might have been included in that category under prior law-e.g., where there has been a change of circumstances subsequent to the signature (subsection (10) of Section 8-308), and where the signature is that of a fiduciary who has failed to obtain court approval of the transfer (subsection (11) of Section 8-308). Similarly, when an issuer acts on the assumption permitted by section (3)(a) of Section 8-403, that a fiduciary registered owner continues to act as such, the "necessary indorsement" under subsection (1)(a) of this section is that of the registered owner under Section 8-308(8)(a), even though a successor has in fact been appointed. In these and other cases, where the question is one affecting only the rightfulness of the transfer, the issuer need only establish that it had no duty under Section 8-403 to inquire into adverse claims or that it has discharged any such duty.

2. The registered owner's right to receive a new security where the issuer has wrongfully registered a transfer is established, but the cases have also recognized his right to elect between an equitable action to compel issue of a new security and an action for damages. Cf. Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, 149 N.W. 754 (1914). Such election of remedies is no longer available. The true owner of a certificated security is now required to take a new security except where an overissue would result and a similar security is not reasonably available for purchase. See Section 8-104. The true owner of an uncertificated security is entitled and required to take restoration of the records to their proper state, with a similar exception for overissue.

Nothing in subsections (2) and (3) is intended to deny the owner the right to choose the form of his security whenever the issuer maintains securities of the same issue in both certificated and uncertificated form (Section 8-407).

Cross references.Point 1: Sections 8-308, 8-402 and 8-403.

Point 2: Sections 8-104, 8-405 and 8-407.

Definitional cross references."Adverse Claim". Section 8-302.

"Appropriate Person". Section 8-308.

"Certificated Security". Section 8-102.

"Deliver". Section 1-201.

"Indorsement". Section 8-308.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Overissue". Section 8-104.

"Party". Section 1-201.

"Person". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security." Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, inserted "pledgee" and "pledge or release" in the introductory paragraph of Subsection (1), substituted all of the language following "with" in Subsection (1)(a) for "the security the necessary indorsement (Section 8-308)", substituted the NMSA citations for UCC citations in Subsections (1)(b) and (2), substituted "certificated security" for "security" in the introductory paragraph of Subsection (2), added Subsection (3), and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 89, 102, 103, 119, 121; 18A Am. Jur. 2d Corporations § 716.
Remedy for refusal of corporation or its agent to register or effectuate transfer of stock, 22 A.L.R. 12.
Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 A.L.R. 947.
Duty of corporation upon presentation for transfer of stock standing in one's name as trustee or other fiduciary, 56 A.L.R. 1199.
Issuance by corporation of new stock certificates without requiring surrender of old, 61 A.L.R. 436; 150 A.L.R. 148.
Liabilities and duties of corporation in respect to sale or transfer of corporate stock held by one having life estate, 126 A.L.R. 1298.

Duty of corporation to refuse to transfer stock on books to one who presents properly endorsed certificate on ground of knowledge or suspicion of conflicting rights of registered holder or third person, 139 A.L.R. 273; 75 A.L.R.2d 746.
Rights, duties and liability of corporation in connection with transfer of stock of infant or incompetent, 3 A.L.R.2d 881.
Rights, duties and liability of corporation in connection with transfer of stock of decedent, 7 A.L.R.2d 1240.
18 C.J.S. Corporations § 438; 19 C.J.S. Corporations § 1159.

§ 55-8-405. Lost, destroyed and stolen certificated securities.

(1) If a certificated security has been lost, apparently destroyed or wrongfully taken and the owner fails to notify the issuer of that fact within a reasonable time after he has notice of it and the issuer registers a transfer of the security before receiving notification, the owner is precluded from asserting against the issuer any claim for registering the transfer under Section 55-8-404 NMSA 1978 or any claim to a new security under this section.

(2) If the owner of a certificated security claims that the security has been lost, destroyed or wrongfully taken, the issuer shall issue a new certificated security or, at the option of the issuer, an equivalent uncertificated security in place of the original security if the owner:

(a) so requests before the issuer has notice that the security has been acquired by a bona fide purchaser;

(b) files with the issuer a sufficient indemnity bond; and

(c) satisfies any other reasonable requirements imposed by the issuer.

(3) If, after the issue of a new certificated or uncertificated security, a bona fide purchaser of the original certificated security presents it for registration of transfer, the issuer shall register the transfer unless registration would result in overissue, in which event the issuer's liability is governed by Section 55-8-104 NMSA 1978. In addition to any rights on the indemnity bond, the issuer may recover the new certificated security from the person to whom it was issued or any person taking under him except a bona fide purchaser or may cancel the uncertificated security unless a bona fide purchaser or any person taking under a bona fide purchaser is then the registered owner or registered pledgee thereof.

History: 1953 Comp., § 50A-8-405, enacted by Laws 1961, ch. 96, § 8-405; 1987, ch. 248, § 43.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 17, Uniform Stock Transfer Act.

Purposes.1. By failing to notify the issuer within a reasonable time after he knows or has reason to know of the loss or theft of his certificated security, the owner is estopped from asserting the ineffectiveness of a forged or unauthorized indorsement and the wrongfulness of the registration of the transfer. Compare Section 8-311. If the lost security was indorsed by the owner, then the registration of the transfer was not wrongful under Section 8-404 unless notice had been given to the issuer.

2. The long standing corporate practice of voluntarily issuing new certificated securities to replace lost, destroyed or stolen ones is now incorporated into law. Where reasonable requirements are satisfied and a sufficient indemnity bond supplied, a court order is no longer necessary but, of course, the court may compel a recalcitrant issuer to take action.

Subsection (2) gives the issuer the alternative of issuing an uncertificated security rather than a new certificated security. This alternative will exist only when the particular issue is partly certificated and partly uncertificated; and as a practical matter the ultimate choice will belong to the owner (Section 8-407). Compare Section 8-104 and its Comment.

3. Where an "original" certificated security has reached the hands of a bona fide purchaser, the registered owner-who was in the best position to prevent the loss, destruction or theft of his security-is now deprived of the new security issued to him as a replacement. If the security is certificated, the issuer has a right to recover it; and if the security is uncertificated, the issuer may simply cancel the registration. This changes the prior law under which the original security was ineffective after the issue of a replacement except insofar as it might represent an action for damages in the hands of a bona fide purchaser. Keller v. Eureka Brick Mach. Mfg. Co., 43 Mo.App. 84, 11 L.R.A. 472 (1890). Where both the original and the new security have reached bona fide purchasers the issuer is now required to honor both securities unless an overissue would result and the security is not reasonably available for purchase. See Section 8-104. In the latter case alone, the bona fide purchaser of the original security is relegated to an action for damages. In either case, the issuer itself may recover on the indemnity bond.

Cross references.Sections 8-104, 8-311, 8-312, 8-402, 8-403 and 8-404 and 8-407.

Definitional cross references."Bona Fide Purchaser". Section 8-302.

"Certificated Security". Section 8-102.

"Issuer". Section 8-201.

"Notice". Section 1-201.

"Notify". Section 1-201.

"Overissue". Section 8-104.

"Person". Section 1-201.

"Reasonable Time". Section 1-204.

"Rights". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated security" for "security" several times in this section; inserted "or, at the option of the issuer, and equivalent uncertificated security" in the introductory paragraph of subsection (2); substituted "a new certificated or uncertificated security" for "the new security" in the first sentence of Subsection (3) and added all of the language of the second sentence of that subsection beginning with "or may cancel"; and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 89, 102, 119 to 121; 18A Am. Jur. 2d Corporations §§ 518, 522, 523; 52 Am. Jur. 2d Lost and Destroyed Instruments § 8.
Rights of purchaser of stolen bonds, 1 A.L.R. 717; 85 A.L.R. 357; 102 A.L.R. 28.
Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 A.L.R. 947.
Issuance by corporation of new stock certificates without requiring surrender of old, 61 A.L.R. 436; 150 A.L.R. 148.
Constitutionality, construction and application of statute relating to lost, destroyed or stolen certificate of corporate stock, 125 A.L.R. 997.
Degree or quantum of evidence necessary to establish a lost instrument and its contents, 148 A.L.R. 400.
Statutory requirements respecting replacement of lost stock certificates as applicable to foreign corporations, 8 A.L.R.2d 1198.
11 C.J.S. Bonds § 82; 18 C.J.S. Corporations § 438; 54 C.J.S. Lost Instruments § 1 et seq.

§ 55-8-406. Duty of authenticating trustee, transfer agent or registrar.

(1) If a person acts as authenticating trustee, transfer agent, registrar, or other agent for

an issuer in the registration of transfers of its certificated securities or in the registration of transfers, pledges and releases of its uncertificated securities, in the issue of new securities or in the cancellation of surrendered securities:

(a) he is under a duty to the issuer to exercise good faith and due diligence in performing his functions; and

(b) with regard to the particular functions he performs, he has the same obligation to the holder or owner of a certificated security or to the owner or pledgee of an uncertificated security and has the same rights and privileges as the issuer has in regard to those functions.

(2) Notice to an authenticating trustee, transfer agent, registrar or other agent is notice to the issuer with respect to the functions performed by the agent.

History: 1953 Comp., § 50A-8-406, enacted by Laws 1961, ch. 96, § 8-406; 1987, ch. 248, § 44.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Transfer agents, registrars and the like are here expressly held liable to both the issuer and the owner for wrongful refusal to register a transfer as well as wrongful registration of a transfer in any case within the scope of their respective functions where the issuer would itself be liable. Those cases which have regarded these parties solely as agents of the issuer and have therefore refused to recognize their liability to the owner for mere non-feasance, i.e., refusal to register a transfer, are now rejected. Hulse v. Consolidated Quicksilver Mining Corp., 65 Idaho 768, 154 P.2d 149 (1944); Nicholson v. Morgan, 119 Misc. 309, 196 N.Y.Supp. 147 (1922); Lewis v. Hargadine-McKittrick Dry Goods Co., 305 Mo. 396, 274 S.W. 1041 (1924).

2. The practice frequently followed by authenticating trustees of issuing certificates of indebtedness rather than authenticating duplicate certificates where securities have been lost or stolen now becomes obsolete in view of the provisions of the preceding section of this Article, which makes express provision for the issue of substitute securities. It can no longer be considered a breach of trust or lack of due diligence for trustees to authenticate new securities (or initial transaction statements). Cf. Switzerland General Ins. Co. v. N.Y.C. & H.R.R. Co., 152 App.Div. 70, 136 N.Y.S. 726 (1912).

3. "Good faith and due diligence" require the use of reasonable care and the observance of "reasonable" commercial standards, and preclude arbitrary , capricious, over-cautious and super-technical objections and requirements. See Powers v. Universal Film Mfg. Co., 162 App.Div. 806, 148 N.Y.S. 114 (1914). Compliance with the provisions of this Article as to the documents which an issuer may properly require

before registering a transfer in cases where there has been no notice of adverse claims (Section 8-402) constitutes due diligence on the part of these agents, and by insisting upon more then could incur liability for wrongful refusal to register a transfer.

Cross references.Point 3: Sections 8-401, 8-402, 8-403 and 8-404. See Sections 1-201, 8-207, 8-208, 8-312, 8-401, 8-402, 8-403, 8-405, 8-407 and 8-408.

Definitional cross references."Certificated Security". Security 8-102.

"Good Faith". Section 1-201.

"Holder". Section 1-201.

"Issuer". Section 8-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated securities or in the registration of transfers, pledges and releases of its uncertificated securities" for "securities or" in the introductory paragraph of Subsection (1); substituted "a certificated security or to the owner or pledgee of an uncertificated security" for "the security" in Subsection (1)(b); and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code §§ 89, 116, 120.
2A C.J.S. Agency § 155; 18 C.J.S. Corporations § 438; 90 C.J.S. Trusts § 310.

§ 55-8-407. Exchangeability of securities.

(1) No issuer is subject to the requirements of this section unless it regularly maintains a system for issuing the class of securities involved under which both certificated and uncertificated securities are regularly issued to the category of owners, which includes the person in whose name the new security is to be registered.

(2) Upon surrender of a certificated security with all necessary indorsements and presentation of a written request by the person surrendering the security, the issuer, if he has no duty as to adverse claims or has discharged the duty (Section 55-8-403

NMSA 1978), shall issue to the person or a person designated by him an equivalent uncertificated security subject to all liens, restrictions and claims that were noted on the certificated security.

(3) Upon receipt of a transfer instruction originated by an appropriate person who so requests, the issuer of an uncertificated security shall cancel the uncertificated security and issue an equivalent certificated security on which must be noted conspicuously any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under Subsection (4) of Section 55-8-403 NMSA 1978) to which the uncertificated security was subject. The certificated security shall be registered in the name of and delivered to:

(a) the registered owner, if the uncertificated security was not subject to a registered pledge; or

(b) the registered pledgee, if the uncertificated security was subject to a registered pledge.

History: 1978 Comp., § 55-8-407, enacted by Laws 1987, ch. 248, § 45.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section deals with the right of the holder of a certificated security to exchange it for an equivalent uncertificated security and the right of the registered owner or registered pledgee of an uncertificated security to obtain a certificated security in exchange for it. This section is applicable only in those situations where both certificated and uncertificated securities exist within the same issue and either form is available to the particular owner. Subsection (1) so limits its applicability.

Neither this nor any other section of this Article is intended to mandate the establishment or continuance of a dual system of registration. It is contemplated that some issuers may provide for both forms of securities on a more or less indefinite basis. Issuers of existing issues which are necessarily wholly certificated may make uncertificated securities available with the intention to phase out the certificated securities over a period of time. Some issuers, if permitted by relevant law, may restrict the availability of uncertificated securities to particular categories of owners, e.g., brokers, banks and institutions.

Subsection (2) provides the mechanism for the holder of a certificated security to surrender it to the issuer and have an equivalent uncertificated security issued in exchange. Subsection (3) provides an analogous mechanism for the registered owner of an unencumbered uncertificated security or the registered pledgee of an otherwise unencumbered uncertificated security to obtain equivalent certificated securities from the issuer. Since Section 8-403 treats adverse claims with respect to certificated

securities differently from adverse claims with respect to uncertificated securities, subsection (2) requires the issuer to honor the request only if it has no duty as to adverse claims. If it honored the request despite the presence of such a duty, the adverse claimant's right to block transfer might be modified. For example, if the issuer of a certificated security had received written notice from the claimant, it would be under a duty to inquire and to delay registration of transfer pending the results of the inquiry. However, if it issued an uncertificated security in place of the certificate, then it would no longer be under a duty (Section 8-403(4)(b)) and would register transfer to a bona fide purchaser without including any notation of the claim (Section 8-403(5)).

On the other hand, if the issuer is under a duty as to adverse claims with respect to an uncertificated security it will also be under a similar duty with respect to a certificated security issued to represent the same interest. Compare subsections (1) and (4) of Section 8-403. Potential purchasers will be unable to purchase free of the claim, since they will be given notice through notation on the certificate. See Sections 8-304, 8-202 and 1-201(25).

Cross references.Sections 8-104, 8-403 and 8-405.

Definitional cross references."Adverse Claim". Section 8-302.

"Appropriate Person". Section 8-308.

"Certificated Security". Section 8-102.

"Conspicuous". Section 1-201.

"Delivery". Section 1-201.

"Indorsement". Section 8-308.

"Instruction". Section 8-308.

"Issuer". Section 8-201.

"Person". Section 1-201.

"Security". Section 8-102.

"Uncertificated Security". Section 8-102.

"Written". Section 1-201.

ANNOTATION

Effective dates. - Laws 1987, ch. 248 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 19, 1987.

§ 55-8-408. Statements of uncertificated securities.

(1) Within two business days after the transfer of an uncertificated security has been registered, the issuer shall send to the new registered owner and, if the security has been transferred subject to a registered pledge, to the registered pledgee a written statement containing:

(a) a description of the issue of which the uncertificated security is a part;

(b) the number of shares or units transferred;

(c) the name and address and any taxpayer identification number of the new registered owner and, if the security has been transferred subject to a registered pledge, the name and address and any taxpayer identification number of the registered pledgee;

(d) a notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under Subsection (4) of Section 55-8-403 NMSA 1978) to which the uncertificated security is or may be subject at the time of registration or a statement that there are none of those liens, restrictions or adverse claims; and

(e) the date the transfer was registered.

(2) Within two business days after the pledge of an uncertificated security has been registered, the issuer shall send to the registered owner and the registered pledgee a written statement containing:

(a) a description of the issue of which the uncertificated security is a part;

(b) the number of shares or units pledged;

(c) the name and address and any taxpayer identification number of the registered owner and the registered pledgee;

(d) a notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under Subsection (4) of Section 55-8-403 NMSA 1978) to which the uncertificated security is or may be subject at the time of registration or a statement that there are none of those liens, restrictions or adverse claims; and

(e) the date the pledge was registered.

(3) Within two business days after the release from pledge of an uncertificated security has been registered, the issuer shall send to the registered owner and the pledgee

whose interest was released a written statement containing:

(a) a description of the issue of which the uncertificated security is a part;

(b) the number of shares or units released from pledge;

(c) the name and address and any taxpayer identification number of the registered owner and the pledgee whose interest was released;

(d) a notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under Subsection (4) of Section 55-8-403 NMSA 1978) to which the uncertificated security is or may be subject at the time of registration or a statement that there are none of those liens, restrictions or adverse claims; and

(e) the date the release was registered.

(4) An "initial transaction statement" is the statement sent to:

(a) the new registered owner and, if applicable, to the registered pledgee pursuant to Subsection (1) of this section;

(b) the registered pledgee pursuant to Subsection (2) of this section; or

(c) the registered owner pursuant to Subsection (3) of this section. Each initial transaction statement shall be signed by or on behalf of the issuer and must be identified as "Initial Transaction Statement".

(5) Within two business days after the transfer of an uncertificated security has been registered, the issuer shall send to the former registered owner and the former registered pledgee, if any, a written statement containing:

(a) a description of the issue of which the uncertificated security is a part;

(b) the number of shares or units transferred;

(c) the name and address and any taxpayer identification number of the former registered owner and of any former registered pledgee; and

(d) the date the transfer was registered.

(6) At periodic intervals no less frequent than annually and at any time upon the reasonable written request of the registered owner, the issuer shall send to the registered owner of each uncertificated security a dated written statement containing:

(a) a description of the issue of which the uncertificated security is a part;

(b) the name and address and any taxpayer identification number of the registered owner;

(c) the number of shares or units of the uncertificated security registered in the name of the registered owner on the date of the statement;

(d) the name and address and any taxpayer identification number of any registered pledgee and the number of shares or units subject to the pledge; and

(e) a notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under Subsection (4) of Section 55-8-403 NMSA 1978) to which the uncertificated security is or may be subject or a statement that there are none of those liens, restrictions or adverse claims.

(7) At periodic intervals no less frequent than annually and at any time upon the reasonable written request of the registered pledgee, the issuer shall send to the registered pledgee of each uncertificated security a dated written statement containing:

(a) a description of the issue of which the uncertificated security is a part;

(b) the name and address and any taxpayer identification number of the registered owner;

(c) the name and address and any taxpayer identification number of the registered pledgee;

(d) the number of shares or units subject to the pledge; and

(e) a notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under Subsection (4) of Section 55-8-403 NMSA 1978) to which the uncertificated security is or may be subject or a statement that there are none of those liens, restrictions or adverse claims.

(8) If the issuer sends the statements described in Subsections (6) and (7) of this section at periodic intervals no less frequent than quarterly, the issuer is not obliged to send additional statements upon request unless the owner or pledgee requesting them pays to the issuer the reasonable cost of furnishing them.

(9) Each statement sent pursuant to this section must bear a conspicuous legend reading substantially as follows: "This statement is merely a record of the rights of the addressee as of the time of its issuance. Delivery of this statement, of itself, confers no rights on the recipient. This statement is neither a negotiable instrument nor a security."

History: 1978 Comp., § 55-8-408, enacted by Laws 1987, ch. 248, § 46.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section obliges the issuer of uncertificated securities to send certain statements. The required statements are of two types. Transaction statements, required by subsections (1), (2), (3) and (5) are analogous to debit and credit advices and the periodic statements can be reconciled from them. Periodic statements, required by subsections (6) and (7) are analogous to bank statements and will advise owners and pledgees of their positions at given points in time.

The transaction statements, which are mandated upon the registration of transfer, pledge or release, must be sent within two days after the relevant registration, but it is contemplated that such statements will be prepared virtually simultaneously with the actual registration and sent immediately thereafter. They are intended to serve two functions. They are notice to the transferor-(the owner in the case of transfer or pledge, the pledgee in the case of release from pledge, and both the owner and the pledgee in the case of transfer subject to a pledge, transfer of the pledge interest alone or simultaneous transfer and release from pledge)-that his interest has been altered. In the event of fraudulent, unauthorized or otherwise improper registration, the transaction statement will serve as notice that timely action should be taken.

More importantly, these statements are notice to the transferee (new owner in the case of a transfer, pledgee in the case of a pledge, present owner in the case of a release) that the increase of his interest has, in fact, been registered. Furthermore, since all statements except those required by subsection (5) must include a notation of defects or an express statement that there are none, these statements will give the transferee the assurance equivalent to that afforded by a "clean" certificated security and create an estoppel against the issuer. Since registration is the critical step in the transfer of rights, the issuer's transaction statement should include, and the purchaser who receives the statement should be charged with notice of, only those claims, liens and restrictions existing at the time of registration. Compare Section 8-304(2).

It is contemplated that transferees will and should be able to rely on these statements and, in many cases, will not part with their consideration until they receive them. To ensure that the statements will have the desired effect of establishing rights for the transferee against the issuer, subsection (4) requires that the copy of each transaction statement sent to the transferee, called an "initial transaction statement," be signed. Note that Section 1-201(39) does not require a manual signature for compliance with this requirement. Compare also Sections 8-103(b), 8-105(3)(d), 8-202, 8-204(b), 8-205, 8-206, 8-208, 8-304, 8-311, 8-319 and 8-403 for the effects of initial transaction statements.

2. Whenever the issuer registers a transfer of the pledge interest alone, subsections (2) and (3) read together require the issuer to send transaction statements to both the registered owner and the former registered pledgee as well as to the new registered pledgee. Compare Section 8-207(4) and its Comment 1.

3. The frequency of one year, with which periodic statements must be sent to owners and pledgees, is intended to be a minimum requirement for all issuers, including closely held corporations. Owners and pledgees are entitled to request additional statements of position at any time. It is contemplated, however, that publicly held issuers will adopt the practice of sending quarterly statements conforming to the common practice of sending quarterly reports and dividend checks. For those that do, subsection (8) eliminates the obligation to furnish additional statements of position on request unless the issuer is reimbursed for the additional cost.

4. Subsection (9) requires that a conspicuous legend be borne by each statement as a protection against unjustified reliance on statements of uncertificated securities by persons who might deal with them. Except for this requirement and the requirement of subsection (4) that the words "Initial Transaction Statement" be included, the form of the statements required by this section is not prescribed. Perhaps the forms now used by the transfer agents of mutual funds to confirm acquisitions, dispositions, reinvestment of dividends, periodic liquidations and statements of position will serve as a model.

Cross references.Point 1: Sections 8-103, 8-105, 8-202, 8-204, 8-205, 8-206, 8-208 and 8-304.

Point 2: Section 8-207.

Definitional cross references."Adverse Claim". Section 8-302.

"Conspicuous". Section 1-201.

"Delivery". Section 1-201.

"Issuer". Section 8-201.

"Rights". Section 1-201.

"Security". Section 8-102.

"Send". Section 1-201.

"Signed". Section 1-201.

"Uncertificated Security". Section 8-102.

"Written". Section 1-201.

ANNOTATION

Effective dates. - Laws 1987, ch. 248 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 19, 1987.

Article 9

Secured Transactions; Sales of Accounts, Contract Rights and Chattel Paper

Part 1

Short Title, Applicability and Definitions

Sec.

Part 2

Validity of Security Agreement and Rights of Parties Thereto

Part 3

Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority

Part 4

Filing

Part 5

Default

Part 1

SHORT TITLE, APPLICABILITY AND DEFINITIONS

§ 55-9-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code - Secured Transactions.

History: 1953 Comp., § 50A-9-101, enacted by Laws 1961, ch. 96, § 9-101.

OFFICIAL COMMENT

This article sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures. It supersedes prior legislation dealing with such security devices as chattel mortgages, conditional sales, trust receipts, factor's liens and assignments of accounts receivable (see note to Section 9-102).

Consumer installment sales and consumer loans present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification. Many states now regulate such loans and sales under small loan acts, retail installment selling acts and the like. The National Conference of Commissioners on Uniform State Laws has proposed a Uniform Consumer Credit Code dealing with this subject. While this article applies generally to security interests in consumer goods, it is not designed to supersede such regulatory legislation (see notes to Sections 9-102 and 9-203). Nor is this article designed as a substitute for small loan acts or retail installment selling acts in any state which does not presently have such legislation.

Pre-code law recognized a wide variety of security devices, which came into use at various times to make possible different types of secured financing. Differences between one device and another persisted, in formal requisites, in the secured party's rights against the debtor and third parties, in the debtor's rights against the secured party and in filing requirements, although many of those differences no longer served

any useful function. Thus an unfiled chattel mortgage was by the law of many states "void" against creditors generally; a conditional sale, often available as a substitute for the chattel mortgage, was in some states valid against all creditors without filing, and in states where filing is required was, if unfiled, void only against lien creditors. The recognition of so many separate security devices had the result that half a dozen filing systems covering chattel security devices might be maintained within a state, some on a county basis, others on a statewide basis, each of which had to be separately checked to determine a debtor's status.

Nevertheless, despite the great number of security devices there remained gaps in the structure. In many states, for example, a security interest could not be taken in inventory or a stock in trade although there was a real need for such financing. It was often baffling to try to maintain a technically valid security interest when financing a manufacturing process, where the collateral starts out as raw materials, becomes work in process and ends as finished goods. Furthermore, it was by no means clear, even to specialists, how under pre-code law a security interest might be taken in many kinds of intangible property - such as television or motion picture rights - which have come to be an important source of commercial collateral.

While the chattel mortgage was adaptable for use in almost any situation where goods are collateral, there were limitations, sometimes highly technical, on the use of other devices, such as the conditional sale and particularly the trust receipt. The cases are many in which a security transaction described by the parties as a conditional sale or a trust receipt was later determined by a court to be something else, usually a chattel mortgage. The consequence of such a determination was typically to void the security interest against creditors because the security agreement was not filed

as a chattel mortgage (even though it may have been filed as a conditional sale or a trust receipt). The already mentioned difficulty of financing on the security of inventory has been got around to some extent by the device known as "field warehousing" as well as by the use of the trust receipt. After 1940 a number of states generally authorized inventory financing by enacting statutes, similar although not uniform, known as "factor's lien" acts. Also after 1940 the increasingly important business of lending against accounts receivable inspired new statutes in that field in more than thirty states.

The growing complexity of financing transactions forced legislatures to keep piling new statutory provisions on top of our inadequate and already sufficiently complicated nineteenth-century structure of security law. The results of this continuing development were increasing costs to both parties and increasing uncertainty as to their rights and the rights of third parties dealing with them.

The aim of this article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.

Under this article the traditional distinctions among security devices, based largely on

form, are not retained; the article applies to all transactions intended to create security interests in personal property and fixtures, and the single term "security interest" substitutes for the variety of descriptive terms which had grown up at common law and under a hundred-year accretion of statutes. This does not mean that the old forms may not be used, and Section 9-102 (2) makes it clear that they may be.

This article does not determine whether "title" to collateral is in the secured party or in the debtor and adopts neither a "title theory" nor a "lien theory" of security interests. Rights, obligations and remedies under the article do not depend on the location of title (Section 9-202). The location of title may become important for other purposes - as, for example, in determining the incidence of taxation - and in such a case the parties are left free to contract as they will. In this connection the use of a form which has traditionally been regarded as determinative of title (e. g., the conditional sale) could reasonably be regarded as evidencing the parties' intention with respect to title to the collateral.

Under the article distinctions based on form (except as between pledge and non-possessory interests) are no longer controlling. For some purposes there are distinctions based on the type of property which constitutes the collateral - industrial and commercial equipment, business inventory, farm products, consumer goods, accounts receivable, documents of title and other intangibles - and, where appropriate, the article states special rules applicable to financing transactions involving a particular type of property. Despite the statutory simplification a greater degree of flexibility in the financing transaction is allowed than is possible under existing law.

The scheme of the article is to make distinctions, where distinctions are necessary, along functional rather than formal lines.

This has made possible a radical simplification in the formal requisites for creation of a security interest.

A more rational filing system replaces the present system of different files for each security device which is subject to filing requirements. Thus not only is the information contained in the files made more accessible but the cost of procuring credit information, and, incidentally, of maintaining the files, is greatly reduced.

The article's flexibility and simplified formalities should make it possible for new forms of secured financing, as they develop, to fit comfortably under its provisions, thus avoiding the necessity, so apparent in recent years, of year by year passing new statutes and tinkering with the old ones to allow legitimate business transactions to go forward.

The rules set out in this article are principally concerned with the limits of the secured party's protection against purchasers from and creditors of the debtor. Except for procedure on default, freedom of contract prevails between the immediate parties to the security transaction.

ANNOTATION

Failure to comply with code precludes mortgagee from foreclosure. - Mortgagee was precluded from foreclosing on a mortgage taken on property subject to an executory sales contract of which it had actual notice, since it failed to comply with the provisions of the uniform commercial code on secured transactions, including failing to comply with the filing provisions of the code. First Nat'l Bank v. Luce, 87 N.M. 94, 529 P.2d 760 (1974).

Law reviews. - For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d §§ 387 et seq., 465 et seq., 681 et seq.; 68 Am. Jur. 2d Secured Transactions § 1 et seq.
Construction and effect of U.C.C., art. 9, dealing with secured transactions, sales of accounts, contract rights and chattel paper, 30 A.L.R.3d 9; 69 A.L.R.3d 1162; 76 A.L.R.3d 11; 99 A.L.R.3d 807; 99 A.L.R.3d 1080; 7 A.L.R.4th 308; 11 A.L.R.4th 241.
6A C.J.S. Assignments § 93; 8 C.J.S. Bailments § 103; 14 C.J.S. Chattel Mortgages §§ 2, 311; 35 C.J.S. Factors §§ 45 to 58; 53 C.J.S. Liens § 1 et seq.; 72 C.J.S. Pledges §§ 28 et seq., 40 et seq.; 78 C.J.S. Sales §§ 554, 638.

§ 55-9-102. Policy and subject matter of article.

(1) Except as otherwise provided in Section 9-104 [55-9-104 NMSA 1978] on excluded transactions, this article applies:

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

(b) to any sale of accounts or chattel paper.

(2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in Section 9-310 [55-9-310 NMSA 1978].

(3) The application of this article to a security interest in a secured obligation is not

affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

History: 1953 Comp., § 50A-9-102, enacted by Laws 1961, ch. 96, § 9-102; 1985, ch. 193, § 6.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The main purpose of this section is to bring all consensual security interests in personal property and fixtures under this article, except for certain types of transactions excluded by Section 9-104. In addition certain sales of accounts and chattel paper are brought within this article to avoid difficult problems of distinguishing between transactions intended for security and those not so intended. As to security interests in fixtures created under the law applicable to real estate, see Section 9-313(1).

1. Except for sales of accounts and chattel paper, the principal test whether a transaction comes under this article is: is the transaction intended to have effect as security? For example, Section 9-104 excludes certain transactions where the security interest (such as an artisan's lien) arises under statute or common law by reason of status and not by consent of the parties. Transactions in the form of consignments or leases are subject to this article if the understanding of the parties or the effect of the arrangement shows that a security interest was intended. (As to consignments the provisions of Sections 2-326, 9-114 and 9-408 should be consulted.) When it is found that a security interest as defined in Section 1-201 (37) was intended, this article applies regardless of the form of the transaction or the name by which the parties may have christened it. The list of traditional security devices in Subsection (2) is illustrative only; other old devices, as well as any new ones which the ingenuity of lawyers may invent, are included, so long as the requisite intent is found. The controlling definition is that contained in Subsection (1).

The article does not in terms abolish existing security devices. The conditional sale or bailment-lease, for example, is not prohibited; but even though it is used, the rules of this article govern.

2. If an obligation is to repay money lent and is not part of chattel paper, it is either an instrument or a general intangible. A sale of an instrument or general intangible is not within this article, but a transfer intended to have effect as security for an obligation of the transferor is covered by Subsection (1)(a). In either case the nature of the transaction is not affected by the fact that collateral is transferred with the instrument or general intangible. Such a transfer is treated as a transfer by operation of law, whether or not it is articulated in the agreement.

An assignment of accounts or chattel paper as security for an obligation is covered by

Subsection (1) (a). Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by Subsection (1) (b) whether intended for security or not, unless excluded by Section 9-104. The buyer then is treated as a secured party, and his interest as a security interest. See Sections 9-105(1) (m) and 1-201(37). Certain sales which have nothing to do with commercial financing transactions are excluded by Section 9-104(f); compare Spurlin v. Sloan, 368 S.W.2d 314 (Ky. 1963). See also Section 9-302 (1) (e), exempting from filing casual or isolated assignments, and Section 9-302(2), preserving the perfected status of a security interest against the original debtor when a secured party assigns his interest.

3. In general, problems of choice of law in this article as to the validity of security agreements are governed by Section 1-105. Problems of choice of law as to perfection of security interests and the effect of perfection or nonperfection thereof, including rules requiring reperfection, are governed by Section 9-103.

4. An illustration of Subsection (3) is as follows:

The owner of Blackacre borrows $10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This article is not applicable to the creation of the real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgage continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This article leaves to other law the question of the effect on rights under the mortgage of delivery or nondelivery of the mortgage or of recording or nonrecording of an assignment of the mortgagee's interest. See Section 9-104(j). But under Section 3-304(5) recording of the assignment does not of itself prevent X from holding the note in due course.

5. While most sections of this article apply to a security interest without regard to the nature of the collateral or its use, some sections state special rules with reference to particular types of collateral. An index of sections where such special rules are stated follows:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING TABLE:

ACCOUNTS

Section
9-102(1)(b) Sale of accounts subject to article
9-103(1) When article applies; conflict of laws rules
9-104(f) Certain sales of accounts excluded from article
9-106 Definitions
9-205 Permissible for debtor to make collections

9-206(1) Agreement not to assert defenses against assignee
9-301(1)(d) Unperfected security interest subordinate to certaintransferees
9-302(1)(e) What assignments need not be filed
9-306(5) Rule when goods whose sale gave rise to an account return to seller's possession
9-318(1) Rights of assignee subject to defenses
9-318(2) Modification of contract after assignment of contract right
9-318(3) When account debtor may pay assignor
9-318(4) Term prohibiting assignment ineffective
9-401 Place of filing
9-502 Collection rights of secured party
9-504(2) Rights on default where underlying transaction was sale of accounts or contract rights

CHATTEL PAPER

9-102(1)(b) Sale subject to article
9-104(f) Certain sales excluded from article
9-105(1)(b) Definition
9-205 Permissible for debtor to make collections
9-206(1) Agreement not to assert defenses against assignee
9-207(1) Duty of secured party in possession to preserve rights against prior parties
9-301(1)(c) Unperfected security interest subordinate to certaintransferees
9-304(1) Perfection by filing
9-305 When possession by secured party perfects security interest
9-306(5) Rule when goods whose sale results in chattel paper return to seller's possession
9-308 When purchasers of chattel paper have priority over security interest
9-318(1) Rights of assignee subject to defenses
9-318(3) When account debtor may pay assignor
9-502 Collection rights of secured party
9-504(2) Rights on default where underlying transaction was sale

DOCUMENTS AND INSTRUMENTS

9-105(1)(e) Definition of document (and see 1-201)
9-105(1)(g) Definition of instrument
9-206(1) Rule where buyer of goods signs both negotiable instrument and security agreement
9-207(1) Duty of secured party in possession of instrument to preserve rights against prior parties
9-301(1)(c) Unperfected security interest subordinate to certaintransferees
9-302(1)(b) What interests need not be filed
and (f)

9-304(1) How security interest can be perfected
9-304(2, 3) Perfection of security interest in goods in possession of issuer of negotiable document or of other bailee
9-304(4, 5) Perfection of security interest in instruments or negotiable documents without filing or transfer of possession
9-305 When possession by secured party perfects security interest
9-308 When purchasers of instruments have priority over security interest
9-309 When purchasers of negotiable instruments or negotiable documents have priority over security interest
9-501(1) Rights on default where collateral is documents
9-502 Collection rights of secured party

GENERAL INTANGIBLES

9-103(2) When article applies; conflict of laws rules
9-105 Obligor is "account debtor"
9-106 Definition
9-301(1)(d) Unperfected security interest subordinate to certaintransferees
9-318(1) Rights of assignee subject to defenses
9-318(3) When account debtor may pay assignor
9-502 Collection rights of secured party

GOODS
(See also Consumer Goods, Equipment, Farm Products, Inventory)

9-103 When article applies with regard to goods of a type normally used in more than one jurisdiction; goods covered by certificate of title; conflict of laws rules
9-105(1)(h) Definition
9-109 Classification of goods as consumer goods, equipment, farm products and inventory
9-203 Formal requisites of security agreement covering certain types of goods (crops or timber)
9-204 Validity of after-acquired property clause covering certain types of goods (crops, consumer goods)
9-205 Permissible for debtor to accept returned goods
9-206(2) When security agreement can limit or modify warranties on sale
9-301(1)(c) Unperfected security interest subordinate to certaintransferees
9-304(2, 3) Perfection of security interest in goods in possession of issuer of negotiable document or of other bailee
9-304(5) Perfection of security interest without filing or transfer of possession where goods in possession of certain bailees
9-305 When possession by secured party perfects security interest
9-306(5) Rule when goods whose sale gave rise to account or chattel paper return to seller's possession

9-307 When buyers of goods from debtor take free of security interest
9-313 Goods which are or become fixtures
9-314 Goods affixed to other goods
9-315 Goods commingled in a product
9-401(1) Place of filing for fixtures
9-402 Form of financing statement covering fixtures
9-504(1) Sale of goods by secured party after default subject to Article 2 (Sales)

CONSUMER GOODS

9-109(1) Definition
9-203(2) Transaction, although subject to this article, may also be subject to certain regulatory statutes
9-204(2) Validity of after-acquired property clause
9-206(1) Buyer's agreement not to assert defenses against an assignee subject to statute or decision which establishes rule for buyers of consumer goods
9-302(1)(d) When filing not required
9-307(2) When buyers from debtor take free of security interest
9-401(1)(a) Place of filing
9-505(1) Secured party's duty to dispose of repossessed consumer goods
9-507(1) Secured party's liability for improper disposition of consumer goods after default

EQUIPMENT

9-103(2) When article applies with regard to certain types of equipment normally used in more than one jurisdiction; conflict of laws rules
9-109(2) Definition
9-302(1)(c) When filing not required to perfect security interest in certain farm equipment
9-307(2) When buyers of certain farm equipment from debtor take free of security interest
9-401(1) Place of filing for equipment used in farming operation
9-503 Secured party's right after default to remove or to render equipment unusable

FARM PRODUCTS

9-109(3) Definition
9-203(1)(b) Formal requisites of security agreement covering crops
9-307 When a buyer of farm products takes free of security interest
9-312(2) Priority of secured party who gives new value to enable debtor to produce crops

9-401(1) Place of filing
9-402(1) and(3)Form of financing statement covering crops

INVENTORY

9-103(3) When article applies with regard to certain types of inventory normally used in more than one jurisdiction; conflict of laws rules
9-109(4) Definition
9-114 Consigned goods
9-306(5) Rule where goods whose sale gave rise to account or chattel paper return to seller's possession
9-307(1) When buyers from debtor take free of security interest
9-312(3), When purchase money security interest takes priority over 9-304(5) conflicting security interest
9-408 Financing statements covering consigned or leased goods

Cross references.Sections 9-103 and 9-104.

Point 1: Section 2-326.

Point 2: Section 1-105.

Definitional cross references."Account". Section 9-106.

"Chattel paper". Section 9-105.

"Contract". Section 1-201.

"Document". Section 9-105.

"General intangibles". Section 9-106.

"Goods". Section 9-105.

"Instrument". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

Use of conditional sale device or method gave to seller a security interest in ski lifts in accordance with this section. Riblet Tramway Co. v. Monte Verde Corp. 453 F.2d 313 (10th Cir. 1972).

And code to determine legal effects of lease agreement. - Where the terms of the lease agreement are not in dispute and the issue between parties is as to its legal effect, it is to be determined under the framework of the code. Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970).

Sales of accounts are secured transactions governed by the UCC. GMA, Inc. v. Boerner, 70 Bankr. 77 (Bankr. D.N.M. 1987).

Action by Indian for violation of tribal law in repossessing pickup truck. - See GMAC v. Chischilly, 96 N.M. 113, 628 P.2d 683 (1981).

Law reviews. - For comment on Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), see 8 Nat. Resources J. 183 (1968).

For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment § 144; 15A Am. Jur. 2d Commercial Code § 11; 68 Am. Jur. 2d Secured Transactions §§ 3, 5 to 8, 15 to 20, 31, 32, 47 to 52, 86 to 94, 103 to 105, 113, 116, 117, 125, 127, 130 to 134, 157, 158, 170, 172; 69 Am. Jur. 2d Secured Transactions §§ 271, 272, 277, 431, 447, 511, 513, 540, 582, 636, 637.
Title and rights incident to trust receipts generally, 168 A.L.R. 366.
Trust receipts contrasted with conditional sale contracts, 175 A.L.R. 1374.
Constitutionality, construction and application of statute respecting sale, assignment or transfer of retail installment contracts, 10 A.L.R.2d 447.
Carrier's certificate of convenience and necessity, franchise or permit as subject to transfer or encumbrance, 15 A.L.R.2d 883.
Bill of sale, absolute on its face, as a chattel mortgage, 33 A.L.R.2d 364.
Lease of real estate for term of years as subject of chattel mortgage, 33 A.L.R.2d 1277.
Necessity that mortgage covering oil and gas lease be recorded as real estate mortgage, and/or filed or recorded as chattel mortgage, 34 A.L.R.2d 902.
Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation, 53 A.L.R.2d 1396.
Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property, 68 A.L.R.2d 1259.
Validity of chattel mortgage on stock of goods which mortgagor has right to sell, where mortgagee takes possession of goods before third person's rights attacked, 71 A.L.R.2d 1416.
Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like, 72 A.L.R.2d 342.
Priority as between seller or conditional seller of personalty and claimant under after

acquired property clause of mortgage or other instrument, 86 A.L.R.2d 1152.
Construction and effect of U.C.C. art. 9, dealing with secured transactions, sales of accounts, contract rights and chattel paper, 30 A.L.R.3d 9; 69 A.L.R.3d 1162; 76 A.L.R.3d 11; 99 A.L.R. 3d 807; 99 A.L.R.3d 1080; 7 A.L.R.4th 308; 11 A.L.R.4th 241.
Effectiveness of original financing statement under U.C.C. Article 9 after change in debtor's name, identity, or business structure, 99 A.L.R.3d 1194.
6A C.J.S. Assignments § 93; 8 C.J.S. Bailments § 102; 14 C.J.S. Chattel Mortgages §§ 3, 311; 35 C.J.S. Factors §§ 45 to 58; 53 C.J.S. Liens § 1 et seq.; 72 C.J.S. Pledges § 40; 78 C.J.S. Sales §§ 554, 638.

§ 55-9-103. Perfection of security interests in multiple state transactions.

(1) Documents, instruments and ordinary goods.

(a) This subsection applies to documents and instruments and to goods other than those covered by a certificate of title described in Subsection (2) of this section, mobile goods described in Subsection (3) of this section, and minerals described in Subsection (5) of this section.

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

(c) If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or non-perfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty-day period.

(d) When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Sections 55-9-301 through 55-9-318 NMSA 1978 to perfect the security interest:

(i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;

(ii) if the action is taken before the expiration of the period specified in Subparagraph (i)

of this paragraph, the security interest continues perfected thereafter; or

(iii) for the purpose of priority over a buyer of consumer goods (Subsection (2) of Section 55-9-307 NMSA 1978), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in Subparagraphs (i) and (ii) of this paragraph.

(2) Certificate of title.

(a) This subsection applies to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection.

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.

(c) Except with respect to the rights of a buyer described in the next paragraph, a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this state and thereafter covered by a certificate of title issued by this state is subject to the rules stated in Paragraph (d) of Subsection (1) of this section.

(d) If goods are brought into this state while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this state and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.

(3) Accounts, general intangibles and mobile goods.

(a) This subsection applies to accounts (other than an account described in Subsection (5) of this section on minerals) and general intangibles (other than uncertificated securities) and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in Subsection (2) of this section.

(b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.

(c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the accounts debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

(d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

(e) A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who become a purchaser after the change.

(4) Chattel paper.

The rules stated for goods in Subsection (1) of this section apply to a possessory security interest in chattel paper. The rules stated for accounts in Subsection (3) of this section apply to a nonpossessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.

(5) Minerals.

Perfection and the effect of perfection or nonperfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located.

(6) Uncertificated securities.

The law (including the conflict of laws rules) of the jurisdiction of organization of the issuer governs the perfection and the effect of perfection or nonperfection of a security interest in uncertificated securities.

History: 1953 Comp., § 50A-9-103, enacted by Laws 1961, ch. 96, § 9-103; 1985, ch. 193, § 7; 1987, ch. 248, § 47.

OFFICIAL COMMENT

Prior uniform statutory provisions. Paragraph 1(d): Section 14, Uniform Conditional Sales Act.

Purposes.1. The general rules on choice of law between the original parties in Section 1-105 apply to this article. However, when conflicting claims to collateral arise, the question depends on

There are, however, exceptions to this basic rule:

2. If the parties to a transaction creating a purchase money security interest in goods understand when the security interest attaches that the collateral will be kept in another jurisdiction, the law of that jurisdiction governs perfection and the effect of perfection or nonperfection until 30 days after the debtor receives possession of the goods (Paragraph (1) (c)). A filing in that jurisdiction perfects the security interest even before the goods are removed. The 30-day period is not a period of grace during which filing is unnecessary or has retroactive effect, but merely states the period during which the other jurisdiction is the place of filing. The effect of late filing is governed by other provisions, such as Sections 9-301 and 9-312.

3. If the goods reach that jurisdiction within the 30 days, the effectiveness of the filing in that jurisdiction continues without interruption. If the collateral is not kept in that jurisdiction before the end of the 30-day period, Paragraph (1) (c) ceases to be applicable and thereafter the law of the jurisdiction where the collateral is controls perfection. A failure of the collateral to reach the intended destination jurisdiction before the expiration of the 30-day period because of a conflicting claim or otherwise may cause disappointment of expectations that the law of the destination jurisdiction will govern continuously, and caution may dictate filing both in that jurisdiction and in the jurisdiction where the security interest attaches.

This section uses the concepts that goods are "kept" in a state or "brought" into a state, and related terms. These concepts imply a stopping place of a permanent nature in the state, not merely transit or storage intended to be transitory.

4.(a) Where the collateral is an automobile or other goods covered by a certificate of title issued by any state and the security interest is perfected by notation on the certificate of title, perfection is controlled by the certificate of title rather than by the law

of the state wherein the security interest attached (Subsection (2)).

(b) It has long been hoped that "exclusive certificate of title laws" would provide a sure means of controlling property interests in goods like automobiles, which because of their nature cannot readily be controlled by local or statewide filing alone. In theory the certificate of title should control the property interests in the vehicle wherever the vehicle may be. However, two circumstances operate to prevent the perfect operation of the certificate of title device:

First, some states have never adopted certificate of title laws. This results in a problem in the issuance of a certificate of title when the vehicle moves from a noncertificate to a certificate state, because the certificate-issuing officer is in no position to conduct a complete search to ascertain the condition of the title in a state of origin which requires no filing or in which filing could be in any one or more of several localities. Also, it seems that when a vehicle moves from a certificate to a noncertificate state, the officers issuing a new registration for the vehicle are not always meticulous to notify secured parties shown on the certificate to give them a chance to perfect their security interests in the noncertificate state when a new registration is issued. Moreover, some vehicles like mobile homes are not always registered and title certificates are not always issued even in a state which may have certificate laws applicable thereto, because the certificate laws may apply only if the mobile homes use the highways. Registration plates of a mobile home having a certificate could be removed and there would be nothing visible to show that a certificate had ever been issued for it.

Second, various fraudulent devices based on allegations of loss of the certificate of title enable a dishonest person to obtain both an original and a duplicate of title; to have a security interest shown on only one thereof; and then to effect a transfer into a new state on the basis of the clean certificate, no matter how diligent the officers in the second state may be.

Given these practical problems, the choice of applicable rules of law after interstate removals of vehicles subject to certificate of title laws is most difficult. This article provides the rules set forth below.

(c) The security interest perfected by notation on a certificate of title will be recognized without limit as to time; but, of course, perfection by this method ceases if the certificate of title is surrendered (Paragraph (2) (b)). Since the secured party ordinarily holds the certificate, surrender thereof could not occur without his action in the matter in some respect. If the vehicle is reregistered in another jurisdiction while the secured party still holds the certificate, a danger of deception to third parties arises. The section provides that the certificate ceases to control after 4 months following removal if reregistration has occurred, but during the 4 months the secured party has the same protection for cases of interstate removal as is set forth in Paragraph (1) (d) of the section and Comment 7, subject to additional limitation if the reregistration also involves a new "clean" certificate of title in the removal jurisdiction and a nonprofessional buyer buys while that new certificate is outstanding. See Paragraph (2) (d) and Comment 4 (e).

(d) If a vehicle not described in the preceding paragraph (i. e., not covered by a certificate of title) is removed to a certificate state and a certificate is issued therefor, the holder of a security interest has the same 4-month protection, subject to the provision discussed in the next paragraph of comment.

(e) Where "this state" issues a certificate of title on collateral that has come from another state subject to a security interest perfected in any manner, problems will arise if this state, from whatever cause, fails to show on its certificate the security interest perfected in the other jurisdiction. This state will have every reason, nevertheless, to make its certificate of title reliable to the type of person who most needs to rely on it. Paragraph (2) (d) of the section therefore provides that the security interest perfected in the other jurisdiction is subordinate to the rights of a limited class of persons buying the goods while there is a clean certificate of title issued by this state, without knowledge of the security interest perfected in the other jurisdiction. The limited class are buyers who are nonprofessionals, i. e., not dealers and not secured parties, because these are ordinarily professionals. The protective rule mentioned does not apply if this state adopts a device used under some certificate of title laws, namely, stating on the certificate of title that the vehicle may be subject to security interests not shown on the certificate, where the collateral came from a noncertificate state.

In any event the security interest perfected out of state becomes unperfected unless reperfected in this state under the usual 4-month rule (Paragraph (2) (d) of the section). States which place a cautionary statement on a certificate of title coming from a noncertificate state make provision to reissue the certificate without the caution after four months.

One difficulty is that no state's certificate of title law makes any provision by which a foreign security interest may be reperfected in that state, without the cooperation of the owner or other person holding the certificate in temporarily surrendering the certificate. But that cooperation is not likely to be forthcoming from an owner who wrongfully procured the issuance of a new certificate not showing the out-of-state security interest, or from a local secured party finding himself in a priority contest with the out-of-state secured party. The only solution for the out-of-state secured party under present certificate of title laws seems to be reperfect by possession, i. e., by repossessing the goods.

5. The general rules of the section based on location of the collateral could not be applied to certain types of intangible collateral which have no location in any realistic sense, or to certain movable chattels which have no permanent location.

(a) For accounts and general intangibles there is no indispensable or symbolic document which represents the underlying claim, whose endorsement or delivery is the one effectual means of transfer. There is a considerable body of case law dealing with the situs of choses in action such as these. This case law is in the highest degree confused, contradictory and uncertain: it affords no base on which to build a statutory

rule.

An account arises typically out of a sale; the contract of sale may be executed in State A, the goods shipped from a warehouse in State B to buyer (account debtor) in State C. The account may then be assigned to an assignee in State D. The seller-assignor may keep his principal records in State E. Under the non-notification system of accounts financing, the seller-assignor, despite the assignment, bills and collects from the account debtor; under notification financing the account debtor makes payment to the assignee, but the bills may be prepared and sent out by either assignor or assignee. The contacts of the transaction are with many jurisdictions: to which one is it appropriate to look for the governing law? Even more complicated situations may be anticipated when the collateral consists of novel or uncommon types of personal property, which fall within the definition of general intangibles.

If we bear in mind that our principal question is where certain financing statements shall be filed, two things become clear.

First: since the purpose of filing is to allow subsequent creditors of the

(b) Another class of collateral for which a special rule is stated in Subsection (3) is mobile goods of types which are normally moved for use from one jurisdiction to another. Such goods are generally classified as equipment; sometimes they may be classified as inventory, for example, goods leased by a professional lessor. Subsection (3) provides that a security interest in such equipment or inventory is subject to this article when the debtor's location, i. e., ordinarily its chief executive office, is in this state.

While automobiles are obviously mobile goods, they will in most cases be covered by Subsection (2) of this section and therefore excluded from Subsection (3) by Paragraph (a) thereof. If an automobile is not covered by a certificate of title and is classified as equipment or as inventory under lease, it will be subject to Subsection (3). Automobiles and other mobile goods which are classified as consumer goods are not subject to Subsection (3).

The rule of Subsection (3) applies to goods of a type "normally used" in more than one jurisdiction; there is no requirement that particular goods be in fact used out of state. Thus, if an enterprise whose chief executive office is in State X keeps in State Y goods of the type covered by Subsection (3), the rule of Subsection (3) requires filing in State X even though the goods never leave State Y.

(c) "Chief executive office" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief executive office" is not defined in this section or elsewhere in this act. Doubt may arise as to which is the "chief executive office" of a multistate enterprise, but it would be rare that there could be

more than two possibilities. A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place. The subsection states a rule which will be simple to apply in most cases, and which makes it possible to dispense with much burdensome and useless filing.

(d) If the location of the debtor is moved after a security interest has been perfected in another jurisdiction, the secured party has four months within which to refile, unless the perfection in the original jurisdiction would have expired earlier (Paragraph (3) (e)).

(e) Under Subsection (3) each state other than that of the debtor's location in effect disclaims jurisdiction over certain accounts and general intangibles which, by common law rules, might be held to be within its jurisdiction; in the same way there is a disclaimer of jurisdiction over mobile chattels, even though they may be physically located within the state much of the time. If the jurisdiction whose law controls under this rule is a United States jurisdiction or has enacted legislation permitting perfection of the security interest by filing or recording in that jurisdiction, the law of that jurisdiction will be recognized in the disclaiming jurisdiction as perfecting the security interest. The jurisdiction of the debtor's location may not, however, have such legislation. For example, mobile equipment is used in New York; the debtor's chief place of business is in a Canadian jurisdiction which will not permit or recognize filing as to property not physically located therein. Paragraph (3) (c) solves this difficulty by permitting perfection through filing in the jurisdiction in the United States in which the debtor has its major executive office in the United States. Where the debtor is not located in the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the secured party may alternatively perfect by notification to account debtors.

(f) A sentence in Paragraph (3) (d) provides a special rule for security interests in airplanes owned by a foreign air carrier. Without that sentence Subsection (3) might refer such a case to the law of a foreign nation whose law is difficult or impossible to ascertain. The sentence clears up such doubts by treating as the location of the carrier the office designated for service of process in the United States under the Federal Aviation Act of 1958. To the extent that it is applicable, the Convention on the International Recognition of Rights in Aircraft (Geneva Convention) supersedes state legislation on this subject, as set forth in Section 9-302(3), but some nations are not parties to that convention.

6. Subsection (4) deals with chattel paper, a semi-intangible security interest which may be perfected either by possession or by filing (Sections 9-304(1) and 9-305). As to possessory security, Subsection (4) provides that chattel paper shall be subject to the same rule as goods in Subsection (1). As to nonpossessory security, Subsection (4) provides that it shall be subject to the same rule as the intangibles under Subsection (3), except that notification to the account debtor is ruled out as an optional means of perfection under Paragraph (3) (c). The reason for this is that a different alternative, possession, is available for chattel paper.

7. In addition to the foregoing rules defining which jurisdiction governs perfection of a security interest in the first instance, "this state" (i.e., a destination state after removal) adds its own rules requiring reperfection following removal of collateral other than that described in Subsections (2), (3), and (5). "This state" will for four months recognize perfection under the law of the jurisdiction from which the collateral came, unless the remaining period of effectiveness of the perfection in that jurisdiction was less than four months (Paragraph (1) (d)). After the four-month period or the remaining period of effectiveness, whichever is shorter, the secured party must comply with perfection requirements in this state. This rule differs from the former rule of Section 14 of the Uniform Conditional Sales Act. Under that section a conditional seller was required to file within 10 days after he "received notice" that the goods had been removed into this state. Apparently, under the Uniform Conditional Sales Act, if the seller never "received notice" his interest continued or became perfected in this state without filing. Paragraph (1)(d) proceeds on the theory that not only the secured party whose collateral has been removed but also creditors of and purchasers from the debtor "in this state" should be considered.

The four-month period is long enough for a secured party to discover in most cases that the collateral has been removed and refile in this state; thereafter, if he has not done so, his interest, although originally perfected in the jurisdiction from which the collateral was removed, is subject to defeat here by purchasers of the collateral. Compare the situation arising under Section 9-403(2) when a filing lapses.

It should be noted that a "purchaser" includes a secured party. Section 1-201(32) and (33). The rights of a purchaser with a security interest against an unperfected security interest are governed by Section 9-312.

In case of delay beyond the four-month period, there is no "relation back"; and this is also true where the security interest is perfected for the first time in this state.

If the removal occurs within a short period, like two weeks, before the lapse of the filing in the original state, the secured party has only that period, not the full four months, to reperfect in "this state". But ordinarily he would have filed a continuation statement in the original jurisdiction; and he may do so to avoid lapse and allow himself the full four months if he is searching for the collateral and needs more time.

Paragraph (1) (d) does not apply to the case of goods removed from one filing district to another within this state (see Subsection (3) of Section 9-401), but only to property brought into this state from another jurisdiction.

8. Subsection (5) deals with problems relating to the financing of minerals (including oil and gas) as these products come from the ground. In some cases rights in oil and gas in the ground have been split into a large variety of interests. As the oil or gas issues from the ground, it may be encumbered by the group of persons having interests therein. Or the product may be sold at minehead or wellhead and the resulting accounts assigned. The question arises as to the place of filing. The usual rule of this section in

Subsection (2) would make the place to search for encumbrances on the accounts the locations of the respective assignors; but the assignors might be a number of individuals located throughout the country. To avoid the difficult problems of search thus created, Subsection (5) provides that the place for filing with respect to security interests in the minerals as they issue from the ground at minehead or wellhead or in the accounts arising out of the sale of the minerals at minehead or wellhead shall be in the state where the minehead or wellhead is located. Section 9-401 similarly provides that the place to file within the state is in the real property records in the county where the minehead or wellhead is located. These rules conform to pre-code practice and to practice which seems to have continued in the early code period before express provision was made for these situations.

The term "at wellhead" is intended to encompass arrangements based on sale of the product as soon as it issues from the ground and is measured, without technical distinctions as to whether title passes at the "Christmas tree" or the far side of a gathering tank or at some other point. The term "at minehead" is a comparable concept.

Cross references.Sections 1-105, 9-302 and 9-401.

Definitional cross references."Accounts". Section 9-106.

"Attaches". Section 9-203.

"Chattel Paper". Section 9-105.

"Collateral". Section 9-105.

"Consumer Goods". Section 9-109.

"Debtor". Section 9-105.

"Document". Section 9-105.

"Equipment". Section 9-109.

"General intangibles". Section 9-106.

"Goods". Section 9-105.

"Instrument". Section 9-109.

"Purchase money security interest". Section 9-107.

"Purchaser". Section 1-201(33).

"Security interest". Section 1-201(37).

ANNOTATION

The 1987 amendment, effective June 19, 1987, inserted "(other than uncertificated securities)" in Subsection (3)(a), added Subsection (6), and made minor stylistic changes throughout the section.

Federal Aviation Act of 1958. - The Federal Aviation Act of 1958, referred to in Subsection (3)(d), appears as various sections throughout Titles 14, 15, 16, 31, 40, 48, 49, and 50 of the United States Code.

Use of conditional sale device or method gives seller security interest in ski lifts in accordance with this section. Riblet Tramway Co. v. Monte Verde Corp. 453 F.2d 313 (10th Cir. 1972).

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 11; 16 Am. Jur. 2d Conflict of Laws §§ 2, 4, 50, 54; 68 Am. Jur. 2d Secured Transactions §§ 15 to 27, 38, 147, 156, 174, 177; 69 Am. Jur. 2d Secured Transactions §§ 366, 371 to 373, 388, 412, 466, 477, 507, 530.
Construction and application of statutory provision respecting registration of mortgages or other liens on personal property in case of residents of other states, 10 A.L.R.2d 764.
Conflict of laws as to chattel mortgages and conditional sales of chattels, 13 A.L.R.2d 1312.
6A C.J.S. Assignments § 7; 14 C.J.S. Chattel Mortgages §§ 13, 104; 73 C.J.S. Property § 12; 78 C.J.S. Sales §§ 568, 578, 639.

§ 55-9-104. Transactions excluded from article.

This article does not apply

(a) to a security interest subject to any statute of the United State to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or

(b) to a landlord's lien; or

(c) to a lien given by statute or other rule of law for services or materials except as provided in Section 9-310 [55-9-310 NMSA 1978] on priority of such liens; or

(d) to a transfer of a claim for wages, salary, or other compensation of an employee; or

(e) to a transfer by a governmental subdivision or agency; or

(f) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness; or

(g) to a transfer of an interest in or claim in or under any policy of insurance, except as provided with respect to proceeds (Section 9-306 [55-9-306 NMSA 1978]) and priorities in proceeds (Section 9-312 [55-9-312 NMSA 1978]); or

(h) to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or

(i) to any right of set-off; or

(j) except to the extent that provision is made for fixtures in Section 9-313 [55-9-313 NMSA 1978], to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or

(k) to a transfer in whole or in part of any claim arising out of tort; or

(l) to a transfer of an interest in any deposit account (Subsection (1) of Section 9-105 [55-9-105 NMSA 1978]), except as provided with respect to proceeds (Section 9-306) and priorities in proceeds (Section 9-312).

History: 1953 Comp., § 50A-9-104, enacted by Laws 1961, ch. 96, § 9-104; 1985, ch. 193, § 8.

OFFICIAL COMMENT

Prior uniform statutory provisions. None.

Purposes.To exclude certain security transactions from this article.

1. Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this article. The Ship Mortgage Act, 1920, is an example of such a federal act. The present provisions of the Federal Aviation Act of 1958 (49 U.S.C. § 1403 et seq.) call for registration of title to and liens upon aircraft with the civil aeronautics administrator and such registration is recognized as equivalent to filing under this article (Section 9-302(3)); but to the extent that the Federal Aviation Act does not regulate the rights of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this article.

Although the Federal Copyright Act contains provisions permitting the mortgage of a

copyright and for the recording of an assignment of a copyright (17 U.S.C. §§ 28, 30) such a statute would not seem to contain sufficient provisions regulating the rights of the parties and third parties to exclude security interests in copyrights from the provisions of this article. Compare Republic Pictures Corp. v. Security-First National Bank of Los Angeles, 197 F.2d 767 (9th Cir. 1952). Compare also with respect to patents, 35 U.S.C. § 47. The filing provisions under these acts, like the filing provisions of the Federal Aviation Act, are recognized as the equivalent to filing under this article. Section 9-302(3) and (4).

Even such a statute as the Ship Mortgage Act is far from a comprehensive regulation of all aspects of ship mortgage financing. That act contains provisions on formal requisites, on recordation and on foreclosure but not much more. If problems arise under a ship mortgage which are not covered by the act, the federal admiralty court must decide whether to improvise an answer under "federal law" or to follow the law of some state with which the mortgage transaction has appropriate contacts. The exclusionary language in Paragraph (a) is that this article does not apply to such security interest "to the extent" that the federal statute governs the rights of the parties. Thus if the federal statute contained no relevant provision, this article could be looked to for an answer.

2. Except for fixtures (Section 9-313), the article applies only to security interests in personal property. The exclusion of landlord's liens by Paragraph (b) and of leases and other interests in or liens on real estate by Paragraph (j) merely reiterates the limitations on coverage already made explicit in Section 9-102(3). See Comment 4 to that section.

3. In all jurisdictions liens are given suppliers of many types of services and materials either by statute or by common law. It was thought to be both inappropriate and unnecessary for this article to attempt a general codification of that lien structure which is in considerable part determined by local conditions and which is far removed from ordinary commercial financing. Moreover, federal law may displace state law in situations such as admiralty liens. Paragraph (c) therefore excludes statutory liens from the article. Section 9-310 states a rule for determining priorities between such liens and the consensual security interests covered by this article.

4. In many states assignments of wage claims and the like are regulated by statute. Such assignments present important social problems whose solution should be a matter of local regulation. Paragraph (d) therefore excludes them from this article.

5. Certain governmental borrowings include collateral in the form of assignments of water, electricity or sewer charges, rents on dormitories or industrial buildings, tools, etc. Since these assignments are usually governed by special provisions of law, these governmental transfers are excluded from this article.

6. In general sales as well as security transfers of accounts and chattel paper are within the article (see Section 9-102). Paragraph (f) excludes from the article certain transfers of such intangibles which, by their nature, have nothing to do with commercial financing transactions.

Similarly, this paragraph excludes from the article such transactions as that involved in Lyon v. Ty-Wood Corporation, 212 Pa.Super. 69, 239 A.2d 819 (1968) and Spurlin v. Sloan, 368 S.W.2d 314 (Ky. 1963).

7. Rights under life insurance and other policies, and deposit accounts, are often put up as collateral. Such transactions are often quite special, do not fit easily under a general commercial statute and are adequately covered by existing law. Paragraphs (g) and (l) make appropriate exclusions, but provision is made for coverage of deposit accounts and certain insurance money as proceeds.

8. The remaining exclusions go to other types of claims which do not customarily serve as commercial collateral: judgments under Paragraph (h), set-offs under Paragraph (i) and tort claims under Paragraph (k).

Cross references.Point 1: Section 9-302(3).

Point 2: Sections 9-102(3) and 9-313.

Point 3: Sections 9-102(2) and 9-310.

Point 6: Section 9-102.

Definitional cross references."Account". Section 9-106.

"Chattel paper". Section 9-105.

"Contract". Section 1-201.

"Deposit account". Section 9-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

ANNOTATION

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment § 144; 15A Am. Jur. 2d Commercial Code § 37; 68 Am. Jur. 2d Secured Transactions §§ 5, 6, 28, 29, 31, 32, 47, 59, 60, 74, 130 to 132, 141, 163, 187; 69 Am. Jur. 2d Secured Transactions §§ 218, 227, 231, 277, 370, 431, 447, 451, 582, 636, 637.
Priority as between statutory landlord's lien and security interest perfected in accordance with Uniform Commercial Code, 99 A.L.R.3d 1006.
Effect of U.C.C. Article 9 upon conflict, as to funds in debtor's bank account, between secured creditor and bank claiming right of setoff, 3 A.L.R.4th 998.
82 C.J.S. Statutes § 315.

§ 55-9-105. Definitions and index of definitions.

(1) In Chapter 55, Article 9 NMSA 1978, unless the context otherwise requires:

(a) "account debtor" means the person who is obligated on an account, chattel paper or general intangible;

(b) "chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

(c) "collateral" means the property subject to a security interest, and includes accounts and chattel paper which have been sold;

(d) "debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires;

(e) "deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit;

(f) "document" means document of title as defined in the general definitions of Article 1 (Section 55-1-201 NMSA 1978) and a receipt of the kind described in Subsection (2) of Section 55-7-201 NMSA 1978;

(g) "encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests;

(h) "goods" includes all things which are movable at the time the security interest

attaches or which are fixtures (Section 55-9-313 NMSA 1978), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also includes standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals and growing crops;

(i) "instrument" means a negotiable instrument (defined in Section 55-3-104 NMSA 1978) or a certificated security (defined in Section 55-8-102 NMSA 1978) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment;

(j) "mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like;

(k) an advance is made "pursuant to commitment" if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation;

(l) "security agreement" means an agreement which creates or provides for a security interest;

(m) "secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party; and

(n) "transmitting utility" means any person primarily engaged in the railroad, street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline or the transmission or the production and transmission of electricity, steam, gas or water or the provision of sewer service.

(2) Other definitions applying to Chapter 55, Article 9 NMSA 1978 and the sections in which they appear are:

"account". Section 55-9-106 NMSA 1978;

"attach". Section 55-9-203 NMSA 1978;

"construction mortgage". Subsection 1 of Section 55-9-313 NMSA 1978;

"consumer goods". Subsection (1) of Section 55-9-109 NMSA 1978;

"equipment". Subsection (2) of Section 55-9-109 NMSA 1978;

"farm products". Subsection (3) of Section 55-9-109 NMSA 1978;

"fixture". Section 55-9-313 NMSA 1978;

"fixture filing". Section 55-9-313 NMSA 1978;

"general intangibles". Section 55-9-106 NMSA 1978;

"inventory". Subsection (4) of Section 55-9-109 NMSA 1978;

"lien creditor". Subsection (3) of Section 55-9-301 NMSA 1978;

"proceeds". Subsection (1) of Section 55-9-306 NMSA 1978;

"purchase money security interest". Section 55-9-107 NMSA 1978; and

"United States". Section 55-9-103 NMSA 1978.

(3) The following definitions in other articles apply to Chapter 55, Article 9 NMSA 1978:

"check". Section 55-3-104 NMSA 1978;

"contract for sale". Section 55-2-106 NMSA 1978;

"holder in due course". Section 55-3-302 NMSA 1978;

"note". Section 55-3-104 NMSA 1978; and

"sale". Section 55-2-106 NMSA 1978.

(4) In addition, Chapter 55, Article 1 NMSA 1978 contains general definitions and principles of construction and interpretation applicable throughout Chapter 55, Article 9 NMSA 1978.

History: 1953 Comp., § 50A-9-105, enacted by Laws 1961, ch. 96, § 9-105; 1985, ch. 193, § 9; 1987, ch. 248, § 48.

OFFICIAL COMMENT

Prior uniform statutory provisions. Various.

Purposes.

1. General. It is necessary to have a set of terms to describe the parties to a secured transaction, the agreement itself, and the property involved therein; but the selection of the set of terms applicable to any one of the existing forms (e. g., mortgagor and mortgagee) might carry to some extent the implication that the existing law referable to that form was to be used for the construction and interpretation of this article. Since it is desired to avoid any such implication, a set of terms has been chosen which have no common law or statutory roots tying them to a particular form.

In place of such terms as "chattel mortgage," "conditional sale," "assignment of accounts receivable," "trust receipt," etc., this article substitutes the general term "security agreement" defined in Paragraph (1) (

l). In place of "mortgagor," "mortgagee," "conditional vendee," "conditional vendor," etc., this article substitutes "debtor", defined in Paragraph (1) (d), and "secured party", defined in Paragraph (1) (m). The property subject to the security agreement is "collateral", defined in Paragraph (1) (c). The interest in the collateral which is conveyed by the debtor to the secured party is a "security interest", defined in Section 1-201(37).

2. Parties. The parties to the security agreement are the "debtor" and the "secured party."

"Debtor": In all but a few cases the person who owes the debt and the person whose property secures the debt will be the same. Occasionally, one person furnishes security for another's debt, and sometimes property is transferred subject to a secured debt of the transferor which the transferee does not assume; in such cases, under the second sentence of the definition, the term "debtor" may, depending upon the context, include either or both such persons. Section 9-112 sets out special rules which are applicable where collateral is owned by a person who does not owe a debt.

"Secured Party": The term includes any person in whose favor there is a security interest (defined in Section 1-201). The term is used equally to refer to a person who as a seller retains a lien on or title to goods sold, to a person whose interest arises initially from a loan transaction, and to an assignee of either. Note that a seller is a "secured party" in relation to his customer; the seller becomes a "debtor" if he assigns the chattel paper as collateral. This is also true of a lender who assigns the debt as collateral. With the exceptions stated in Section 9-104(f) the article applies to any sale of accounts or chattel paper: the term "secured party" includes an assignee of such intangibles whether by sale or for security, to distinguish him from the payee of the account, for example, who becomes a "debtor" by pledging the account as security for a loan.

On the applicability of the terms "debtor" and "secured party" to consignments and leases see Section 9-408 and comment thereto.

"Account debtor": Where the collateral is an account, chattel paper or general intangible the original obligor is called the "account debtor", defined in Paragraph (1) (a).

3. Property subject to the security agreement. "Collateral", defined in Paragraph (1) (c), is a general term for the tangible and intangible property subject to a security interest. For some purposes the code makes distinctions between different types of collateral and therefore further classification of collateral is necessary. Collateral which consists of tangible property is "goods", defined in Paragraph (1) (h); and "goods" are again subdivided in Section 9-109. For purposes of this article all intangible collateral fits one of five categories, two of which, "accounts", and "general intangibles" are defined in the following Section 9-106; the other three, "documents", "instruments" and "chattel paper",

are defined in Paragraphs (1) (f), (1) (i) and (1) (b) of this section.

"Goods": The definition in Paragraph (1) (h) is similar to that contained in Section 2-105 except that the sales article definition refers to "time of identification to the contract for sale", while this definition refers to "the time the security interest attaches".

For the treatment of fixtures, Section 9-313 should be consulted. It will be noted that the treatment of fixtures under Section 9-313 does not at all points conform to their treatment under Section 2-107 (goods to be severed from realty). Section 2-107 relates to sale of such goods; Section 9-313 to security interests in them. The discrepancies between the two sections arise from the differences in the types of interest covered. A comparable discrepancy exists as to minerals. In the case of timber, both sections treat it as goods if it is to be severed under a contract of sale, but not otherwise.

If in any state minerals before severance are deemed to be personal property, they fall outside the article's definition of "goods" and would therefore fall in the catchall definition, "general intangibles", in Section 9-106. The special provisions of Section 9-103(5) would not apply and those of Section 9-103(3) would apply. The resulting problems should be considered locally.

For the purpose of this article, goods are classified as "consumer goods", "equipment", "farm products" and "inventory"; those terms are defined in Section 9-109. When the general term "goods" is used in this article, it includes, as may be appropriate in the context, the subclasses of goods defined in Section 9-109.

"Instrument": The term as defined in Paragraph (1) (i) includes not only negotiable instruments and investment securities but also any other intangibles evidenced by writings which are in ordinary course of business transferred by delivery. As in the case of chattel paper "delivery" is only the minimum stated and may be accompanied by other steps.

If a writing is itself a security agreement or lease with respect to specific goods it is not an instrument although it otherwise meets the term of the definition. See comment below on "chattel paper".

The fact that an instrument is secured by collateral, whether the collateral be other instruments, documents, goods, accounts or general intangibles, does not change the character of the principal obligation as an instrument or convert the combination of instrument and collateral into a separate code classification of personal property. The single qualification to this principle is that an instrument which is secured by chattel paper is itself part of the chattel paper, while also retaining its identity as an instrument.

"Document": See the comments under Sections 1-201(15) and 7-201.

"Chattel paper": To secure his own financing a secured party may wish to borrow against or sell the security agreement itself along with his interest in the collateral which he has received from his debtor. Since the refinancing of paper secured by specific goods presents some problems of its own, the term "chattel paper" is used to describe this kind of collateral. The comments under Section 9-308 further describe this concept.

Charters of vessels are excluded from the definition of chattel paper because they fit under the definition of accounts. See comment to Section 9-106. The term "charter" as used herein and in Section 9-106 includes bareboat charters, time charters, successive voyage charters, contracts of affreightment, contracts of carriage and all other arrangements for use of vessels.

4. The following transactions illustrate the use of the term "chattel paper" and some of the other terms defined in this section.

A dealer sells a tractor to a farmer on conditional sales contract or purchase money security interest. The conditional sales contract is a "security agreement", the farmer is the "debtor", the dealer is the "secured party" and the tractor is the type of "collateral" defined in Section 9-109 as "equipment". But now the dealer transfers the contract to his bank, either by outright sale or to secure a loan. Since the conditional sales contract is a security agreement relating to specific equipment, the conditional sales contract is now the type of collateral called "chattel paper". In this transaction between the dealer and his bank, the bank is the "secured party", the dealer is the "debtor", and the farmer is the "account debtor".

Under the definition of "security interest" in Section 1-201(37) a lease does not create a security interest unless intended as security. Whether or not the lease itself is a security agreement, it is chattel paper when transferred if it relates to specific goods. Thus, if the dealer enters into a straight lease of the tractor to the farmer (not intended as security), and then arranges to borrow money on the security of the lease, the lease is chattel paper.

Security agreements of the type formerly known as chattel mortgages and conditional sales contracts are frequently executed in connection with a negotiable note or a series of such notes. Under the definitions in Paragraphs (1) (b) and (1) (i) the rules applicable to chattel paper, rather than those relating to instruments, are applicable to the group of writings (contract plus note) taken together.

5. Miscellaneous definitions.

"Deposit account" is a type of collateral excluded from this article under Section 9-104(

l), except when it constitutes proceeds of other collateral under Section 9-306.

The terms "encumbrance" and "mortgage" are defined for use in the section on fixtures, Section 9-113.

The term "transmitting utility" is defined to designate a special class of debtors for whom separate filing rules are provided in Part 4, thus obviating all local filing and particularly the several local filings that would be necessary under the usual rules of Section 9-401 for the fixture collateral of a far-flung public utility debtor. See comments under Sections 9-401 and 9-403.

The term "pursuant to commitment" is defined for use in the rules relating to priority of future advances in Sections 9-301(4), 9-307(3) and 9-312(7).

6. Comments to the definitions indexed in Subsections (2) and (3) follow the sections in which the definitions are contained.

Cross references.Point 2: Sections 9-104(f) and 9-112.

Point 3: Sections 2-105, 2-107, 9-106, 9-109, 9-303 and 9-313.

Definitional cross references."Account". Section 9-106.

"Agreement". Section 1-201.

"Document of title". Sections 1-201, 7-201.

"General intangibles". Section 9-106.

"Holder". Section 1-201.

"Money". Section 1-201.

"Negotiable instrument". Section 3-104.

"Person". Section 1-201.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Security". Section 8-102.

"Security interest". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, substituted "certificated security" for "security" in Subsection (1)(i) and substituted NMSA citations for UCC citations throughout the section.

Remedies of Subsection (2) of 55-9-505 are accessible to all secured parties including pawnbrokers dealing in Indian pawn with Indian debtors, and they may avail themselves of the remedies provided by the code., Begay v. Foutz & Tanner, Inc., 95 N.M. 106, 619 P.2d 551 (Ct. App. 1979), rev'd on other grounds sub nom. Reeves v. Foutz & Tanner, Inc., 94 N.M. 760, 617 P.2d 149 (1980).

Under this section the old form "chattel mortgage" meets the definition of "security agreement." Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967).

Law reviews. - For comment on Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), see 4 Nat. Resources J. 175 (1964).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 4 to 9, 15, 33, 39, 42, 43, 58, 59, 67, 141, 150, 163 to 166, 186; 69 Am. Jur. 2d Secured Transactions §§ 269, 273 to 275, 315, 338, 364, 441 to 445, 585, 589, 613.
Effect of U.C.C. Article 9 upon conflict, as to funds in debtor's bank account, between secured creditor and bank claiming right of setoff, 3 A.L.R.4th 998.
82 C.J.S. Statutes § 315.

§ 55-9-106. Definitions: "account"; "general intangibles".

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

History: 1953 Comp., § 50A-9-106, enacted by Laws 1961, ch. 96, § 9-106; 1985, ch. 193, § 10.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The terms defined in this section round out the classification of intangibles: see the definitions of "document", "chattel paper" and "instrument" in Section 9-105. Those three terms cover the various categories of commercial paper which are either negotiable or to a greater or less extent dealt with as if negotiable. The term "account" covers most choses in action which may be the subject of commercial financing transactions but which are not evidenced by an indispensable writing. The term "general intangibles" brings under this article miscellaneous types of contractual rights and other personal property which are used or may become customarily used as commercial security. Examples are goodwill, literary rights and rights to performance. Other examples are copyrights, trademarks and patents, except to the extent that they may be excluded by Section 9-104(a). This article solves the problems of filing of security interests in these types of intangibles (Sections 9-103(3) and 9-401). Note that this catchall definition does not apply to money or to types of intangibles which are specifically excluded from the coverage of the article (Section 9-104) and note also that under Section 9-302 filing under a federal statute may satisfy the filing requirements of this article.

A right to the payment of money is frequently buttressed by ancillary covenants to insure the preservation of collateral, such as covenants in a purchase agreement, note or mortgage requiring insurance on the collateral or forbidding removal of the collateral; or covenants to preserve credit-worthiness of the promisor, such as covenants restricting dividends, etc. While these miscellaneous ancillary rights might conceivably be thought to fall within the definition of "general intangibles", it is not the intention of the code to treat them separately and require the perfection of assignment thereof by filing in the manner required for perfection of an assignment of general intangibles. Whatever perfection is required for the perfection of an assignment of the right to the payment of money will also carry these ancillary rights.

Similarly, when the right to the payment of money is not yet earned by performance, there are frequently ancillary rights designed to assure that an assignee may complete

the performance and crystalize the right to payment of money. Such rights are frequently present in a "maintenance" lease where the lessor has continuing duties to perform, or in a ship charter. These ancillary rights, if considered in the abstract, might be thought to be "general intangibles", since they do not themselves involve the payment of money; but it is not the intent of the code to split up the rights to the payment of money and its ancillary supports, and thereby multiply the problem of perfection of assignments. Therefore, all rights of the lessor in a lease are to be perfected as "chattel paper", and all rights of the owner in a ship charter are to be perfected as "accounts".

"Account" is defined as a right to payment for goods sold or leased or services rendered; the ordinary commercial account receivable. In some special cases a right to receive money not yet earned by performance crystalizes not into an account but into a general intangible, for it is a right to payment of money that is not "for goods sold or leased or for services rendered." Examples of such rights are the right to receive payment of a loan not evidenced by an instrument or chattel paper; a right to receive partial refund of purchase prices paid by reason of retroactive volume discounts; rights to receive payment under licenses of patents and copyrights, exhibition contracts, etc.

This article rejects any lingering common law notion that only rights already earned can be assigned. In the triangular arrangement following assignment, there is reason to allow the original parties - assignor and account debtor - more flexibility in modifying the underlying contract before performance than after performance (see Section 9-318). It will, however, be found that in most situations the same rules apply to accounts both before and after performance.

Cross references.Sections 9-103(2), 9-104, 9-302(3), 9-318 and 9-401.

Definitional cross references."Chattel paper". Section 9-105.

"Contract". Section 1-201.

"Document". Section 9-105.

"Goods". Section 9-105.

"Instrument". Section 9-105.

ANNOTATION

"General intangibles". - Real estate contract assignments from a debtor to a bank are "general intangibles" under this section and are perfected by filing. Simpson v. First Nat'l Bank, 56 Bankr. 586 (Bankr. D.N.M. 1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 37; 68 Am. Jur. 2d Secured Transactions §§ 4, 31, 43, 48, 137, 170 to 176, 187; 69 Am. Jur.

2d Secured Transactions §§ 370, 454.
What constitutes "accounts receivable" under contract selling, assigning, pledging or reserving such items, 41 A.L.R.2d 1395.
Security interests in liquor licenses, 56 A.L.R.4th 1131.
82 C.J.S. Statutes § 315.

§ 55-9-107. Definitions: "purchase money security interest."

A security interest is a "purchase money security interest" to the extent that it is:

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

History: 1953 Comp., § 50A-9-107, enacted by Laws 1961, ch. 96, § 9-107.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Under existing rules of law and under this article purchase money obligations often have priority over other obligations. Thus a purchase money obligation has priority over an interest acquired under an after-acquired property clause (Section 9-312(3) and (4)); where filing is required a grace period of ten days is allowed against creditors and transferees in bulk (Section 9-301(2)); and in some instances filing may not be necessary (Section 9-302(1) (d)).

Under this section a seller has a purchase money security interest if he retains a security interest in the goods; a financing agency has a purchase money security interest when it advances money to the seller, taking back an assignment of chattel paper, and also when it makes advances to the buyer (e. g., on chattel mortgage) to enable him to buy, and he uses the money for that purpose.

2. When a purchase money interest is claimed by a secured party who is not a seller, he must of course have given present consideration. This section therefore provides that the purchase money party must be one who gives value "by making advances or incurring an obligation": the quoted language excludes from the purchase money category any security interest taken as security for or in satisfaction of a preexisting claim or antecedent debt.

Cross references.Point 1: Sections 9-301, 9-302 and 9-312.

Point 2: Section 9-108.

Definitional cross references."Collateral". Section 9-105.

"Debtor". Section 9-105.

"Person". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Timing of attachment of purchase money security interest. - When defendant agreed to buy equipment from pump company, company agreed to furnish the equipment, and lessee of the equipment agreed that defendant would have an interest in the equipment, security interest attached immediately, not upon actual payment by defendant of purchase price. Therefore, whatever interest lessee acquired in the equipment came impressed with defendant's purchase money security interest therein. Honea v. Laco Auto Leasing, Inc., 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

Law reviews. - For comment on Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), see 4 Nat. Resources J. 175 (1964).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 4, 86, 88, 99, 103, 108; 69 Am. Jur. 2d Secured Transactions §§ 280, 308, 361, 489.
Priority as between seller or conditional seller of personalty and claimant under after acquired property clause of mortgage or other instrument, 86 A.L.R.2d 1152.
What constitutes "security interest" as to which financing statement must be filed under U.C.C. § 9-302, 11 A.L.R.3d 1231.
82 C.J.S. Statutes § 315.

§ 55-9-108. When after-acquired collateral not security for antecedent debt.

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest or otherwise gives new value which is to be secured in whole or in part by after-acquired property, his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business

or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

History: 1953 Comp., § 50A-9-108, enacted by Laws 1961, ch. 96, § 9-108.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Many financing transactions contemplate that the collateral will include both the debtor's existing assets and also assets thereafter acquired by him in the operation of his business. This article generally validates such after-acquired property interests (see Section 9-204 and comment) although they may be subordinated to later purchase money interests under Section 9-312(3) and (4).

Interests in after-acquired property have never been considered as involving transfers of property for antecedent debt merely because of the after-acquired feature, nor should they be so considered. The section makes explicit what has been true under the case law: an after-acquired property interest is not, by virtue of that fact alone, security for a preexisting claim. This rule is of importance principally in insolvency proceedings under the federal Bankruptcy Act or state statutes which make certain transfers for antecedent debt voidable as preferences. The determination of when a transfer is for antecedent debt is largely left by the Bankruptcy Act to state law.

Two tests must be met under this section for an interest in after-acquired property to be one not taken for an antecedent debt.

First: the secured party must, at the inception of the transaction, have given new value in some form.

2. The term "value" is defined in Section 1-201(44) and discussed in the accompanying comment. In this section and in other sections of this article the term "new value" is used but is left without statutory definition. The several illustrations of "new value" given in the text of this section (making an advance, incurring an obligation, releasing a perfected security interest) as well as the "purchase money security interest" definition in Section 9-107 indicate the nature of the concept. In other situations it is left to the courts to distinguish between "new" and "old" value, between present considerations and antecedent debt.

Cross references.Point 1: Sections 9-204 and 9-312.

Point 2: Section 9-107.

Definitional cross references."Collateral". Section 9-105.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 134, 179, 184; 69 Am. Jur. 2d Secured Transactions §§ 280, 281, 315, 338, 340, 521, 524.
Chattel mortgage on fruit crops growing or to be grown, 54 A.L.R. 1532.
Accession to motor vehicle of accessories owned by conditional buyer or mortgagor of automobile, 43 A.L.R.2d 819.
8A C.J.S. Bankruptcy § 246 et seq.; 14 C.J.S. Chattel Mortgages §§ 26, 118; 72 C.J.S. Pledges § 19 et seq.; 78 C.J.S. Sales § 569.

§ 55-9-109. Classification of goods; "consumer goods"; "equipment"; "farm products"; "inventory."

Goods are:

(1) "consumer goods" if they are used or bought for use primarily for personal, family or household purposes;

(2) "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(3) "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

(4) "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

History: 1953 Comp., § 50A-9-109, enacted by Laws 1961, ch. 96, § 9-109.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This section classifies goods as consumer goods, equipment, farm products and inventory. The classification is important in many situations: it is relevant, for example, in determining the rights of persons who buy from a debtor goods subject to a security interest (Section 9-307), in certain questions of priority (Section 9-312), in determining the place of filing (Section 9-401) and in working out rights after default (Part 5). Comment 5 to Section 9-102 contains an index of the special rules applicable to different classes of collateral.

2. The classes of goods are mutually exclusive; the same property cannot at the same time and as to the same person be both equipment and inventory, for example. In borderline cases - a physician's car or a farmer's jeep which might be either consumer goods or equipment - the principal use to which the property is put should be considered as determinative. Goods can fall into different classes at different times; a radio is inventory in the hands of a dealer and consumer goods in the hands of a householder.

3. The principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale. Implicit in the definition is the criterion that the prospective sale is in the ordinary course of business. Machinery used in manufacturing, for example, is equipment and not inventory even though it is the continuing policy of the enterprise to sell machinery when it becomes obsolete. Goods to be furnished under a contract of service are inventory even though the arrangement under which they are furnished is not technically a sale. When an enterprise is engaged in the business of leasing a stock of products to users (for example, the fleet of cars owned by a car rental agency), that stock is also included within the definition of "inventory". It should be noted that one class of goods which is not held for disposition to a purchaser or user is included in inventory: "Materials used or consumed in a business". Examples of this class of inventory are fuel to be used in operations, scrap metal produced in the course of manufacture, and containers to be used to package the goods. In general it may be said that goods used in a business are equipment when they are fixed assets or have, as identifiable units, a relatively long period of use; but are inventory, even though not held for sale, if they are used up or consumed in a short period of time in the production of some end product.

4. Goods are "farm products" only if they are in the possession of a debtor engaged in

farming operations. Animals in a herd of livestock are covered whether they are acquired by purchase or result from natural increase. Products of crops or livestock remain farm products so long as they are in the possession of a debtor engaged in farming operations and have not been subjected to a manufacturing process. The terms "crops", "livestock" and "farming operations" are not defined; however, it is obvious from the text that "farming operations" includes raising livestock as well as crops; similarly, since eggs are products of livestock, livestock includes fowl.

When crops or livestock or their products come into the possession of a person not engaged in farming operations they cease to be "farm products". If they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory.

Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not determined by this article. At one end of the scale some processes are so closely connected with farming - such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar - that they would not rank as manufacturing. On the other hand an extensive canning operation would be manufacturing. The line is one for the courts to draw. After farm products have been subjected to a manufacturing operation, they become inventory if held for sale.

Note that the buyer in ordinary course who under Section 9-307 takes free of a security interest in goods held for sale does not include one who buys farm products from a person engaged in farming operations.

5. The principal definition of equipment is a negative one: goods used in a business (including farming or a profession) which are not inventory and not farm products. Trucks, rolling stock, tools, machinery are typical. It will be noted furthermore that any goods which are not covered by one of the other definitions in this section are to be treated as equipment.

Cross references.Point 1: Sections 9-102, 9-307, 9-312, 9-401 and Part 5.

Point 3: Section 9-307.

Point 4: Section 9-307.

Definitional cross references."Contract". Section 1-201.

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Organization". Section 1-201.

"Person". Section 1-201.

"Sale". Sections 2-106 and 9-105.

ANNOTATION

Agricultural mortgagees retain special position. - By excluding "farm products" from the classifications of "equipment" and "inventory," in this section and by expressly providing in 55-9-307 NMSA 1978 that a buyer in the ordinary course of business of farm products from a person engaged in farming operations does not take free of a security interest created by the seller, the draftsmen of the code apparently intended to retain the agricultural mortgagee in the special position he achieved under the pre-code case law. Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967).

Law reviews. - For article, "Breach of the Peace and New Mexico's Uniform Commercial Code," see 4 Nat. Resources J. 85 (1964).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For comment on Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), see 8 Nat. Resources J. 183 (1968).

For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 37 Am. Jur. 2d Fraudulent Conveyances § 253; 68 Am. Jur. 2d Secured Transactions §§ 4, 8, 12, 43, 123, 137, 146, 149, 150, 154, 161; 69 Am. Jur. 2d Secured Transactions §§ 209, 491.
Conveyance of land as including mature but unharvested crops, 51 A.L.R.4th 1263.
14 C.J.S. Chattel Mortgages §§ 21, 116; 72 C.J.S. Pledges § 8; 78 C.J.S. Sales § 569.

§ 55-9-110. Sufficiency of description.

For the purposes of this article any description of personal property or, except as otherwise required by Subsection (5) of Section 9-402 [55-9-402 NMSA 1978] relating to the contents of a financing statement, real estate is sufficient whether or not it is specific if it reasonably identifies what is described.

History: 1953 Comp., § 50A-9-110, enacted by Laws 1961, ch. 96, § 9-110; 1967, ch. 186, § 24; 1985, ch. 193, § 11.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The requirement of description of collateral (see Section 9-203 and comment thereto) is evidentiary. The test of sufficiency of a description laid down by this section is that the description do the job assigned to it - that it make possible the identification of the thing described. Under this rule courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called "serial number" test. The same test of reasonable identification applies where a description of real estate is required in a financing statement. See Section 9-402.

Cross references.Sections 9-203 and 9-402.

ANNOTATION

Filing of instrument with accurate description safeguards lien. - Since under former law the legislature provided that the filing of a chattel mortgage, assignment thereof, or affidavit in lieu of an assignment, would have the force and effect given by law to the recording of instruments affecting real estate, and since when an instrument with an accurate description of realty is filed in the county wherein the realty is situate, all persons are placed on constructive notice where the personal property subject to the chattel mortgage was accurately and completely described in the recorded instruments, and the filing of a copy of the instrument in the county into which the property was moved safeguarded the mortgage lien. Reconstruction Fin. Corp. v. Stephens, 118 F. Supp. 565 (D.N.M. 1954).

And description in security agreement may prevail over contrary financing statement. - In a conflict between the unsigned financing statement and the language of the security agreement the latter prevails for the reason that no security interest can exist in the absence of a security agreement, and therefore a financing statement which goes beyond the scope of the agreement has no effect to that extent. Jones & Laughlin Supply v. Dugan Prod. Corp., 85 N.M. 51, 508 P.2d 1348 (Ct. App. 1973).

Security agreement on mobile home did not secure appliances installed therein. - A security agreement which listed the year, model name and number and serial number of a mobile home in the description of collateral did not create a security interest in a washer, dryer and refrigerator installed in that mobile home. State v. Woodward, 100 N.M. 708, 675 P.2d 1007 (Ct. App. 1983).

Law reviews. - For article, "New Mexico's Uniform Commercial Code: Who is the Beneficiary of Stop Payment Provisions of Article 4?" see 4 Nat. Resources J. 69

(1964).

For comment on Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), see 8 Nat. Resources J. 183 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 9; 68 Am. Jur. 2d Secured Transactions § 184; 69 Am. Jur. 2d Secured Transactions §§ 273, 292, 293, 295, 299 to 305, 393 to 399, 438, 495.
Sufficiency of description of property in conditional sales contract, 65 A.L.R. 714.
Sufficiency of description of property in mortgage on animals, 124 A.L.R. 944.
Defect in written record as ground for avoiding sale of contractual rights, 10 A.L.R.2d 728.
Sufficiency of description of property, as against third persons, in chattel mortgage on farm equipment, machinery, implements and the like, 32 A.L.R.2d 929.
Sufficiency of description in chattel mortgage as covering all property of a particular kind, 2 A.L.R.3d 839.
Sufficiency of description of collateral in financing statement under UCC §§ 9-110 and 9-402, 100 A.L.R.3d 10.
Sufficiency of description of collateral in security agreement under UCC §§ 9-110 and 9-203, 100 A.L.R.3d 940.
14 C.J.S. Chattel Mortgages § 57; 72 C.J.S. Pledges § 10; 78 C.J.S. Sales § 562.

§ 55-9-111. Applicability of bulk transfer laws.

The creation of a security interest is not a bulk transfer under Article 6 (see Section 6-103 [55-6-103 NMSA 1978]).

History: 1953 Comp., § 50A-9-111, enacted by Laws 1961, ch. 96, § 9-111.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The bulk transfer laws, which have been almost everywhere enacted, were designed to prevent a once prevalent type of fraud which seems to have flourished particularly in the retail field: the owner of a debt-burdened enterprise would sell it to an unwary purchaser and then remove himself, with the purchase price and his other assets, beyond the reach of process. The creditors would find themselves with no recourse unless they could establish that the purchaser assumed existing debts. The bulk transfer laws, which require advance notice of sale to all known creditors, seem to have been successful in preventing such frauds.

There has been disagreement whether the bulk transfer laws should be applied to security as well as to sale transactions. In most states security transactions have not been covered; in a few states the opposite result has been reached either by judicial

construction or by express statutory provision. Whatever the reasons may be, it seems to be true that the bulk transfer type of fraud has not often made its appearance in the security field: it may be that lenders of money are more inclined to investigate a potential borrower than are purchasers of retail stores to determine the true state of their vendor's affairs. Since compliance with the bulk transfer laws is onerous and expensive, legitimate financing transactions should not be required to comply when there is no reason to believe that other creditors will be prejudiced.

This section merely reiterates the provisions of Article 6 on bulk transfers which provides in Section 6-103(1) that transfers "made to give security for the performance of an obligation" are not subject to that article.

Cross reference.Section 6-103(1).

Definitional cross reference."Security interest". Section 1-201.

ANNOTATION

Law reviews. - For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 12, 33.
37 C.J.S. Fraudulent Conveyances § 481.

§ 55-9-112. Where collateral is not owned by debtor.

Unless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under Section 9-502 (2) [55-9-502 (2) NMSA 1978] or under Section 9-504 (1) [55-9-504 (1) NMSA 1978], and is not liable for the debt or for any deficiency after resale, and he has the same right as the debtor:

(a) to receive statements under Section 9-208 [55-9-208 NMSA 1978];

(b) to receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under Section 9-505 [55-9-505 NMSA 1978];

(c) to redeem the collateral under Section 9-506 [55-9-506 NMSA 1978];

(d) to obtain injunctive or other relief under Section 9-507 (1) [55-9-507 (1) NMSA 1978];

(e) to recover losses caused to him under Section 9-208 (2) [55-9-208 (2) NMSA 1978].

History: 1953 Comp., § 50A-9-112, enacted by Laws 1961, ch. 96, § 9-112.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.Under the definition of Section 9-105, in any provisions of the article dealing with the collateral the term "debtor" means the owner of the collateral even though he is not the person who owes payment or performance of the obligation secured. The section covers several situations in which the implications of this definition are specifically set out.

The duties which this section imposes on a secured party toward such an owner of collateral are conditioned on the secured party's knowledge of the true state of facts. Short of such knowledge he may continue to deal exclusively with the person who owes the obligation. Nor does the section suggest that the secured party is under any duty of inquiry. It does not purport to cut across the law of conversion or of ultra vires. Whether a person who does not own property has authority to encumber it for his own debts and whether a person is free to encumber his property as collateral for the debts of another, are matters to be decided under other rules of law and are not covered by this section.

The section does not purport to be an exhaustive treatment of the subject. It isolates certain problems which may be expected to arise and states rules as to them. Others will no doubt arise: their solution is left to the courts.

Cross references.Sections 9-105, 9-208 and Part 5.

Definitional cross references."Collateral". Section 9-105.

"Debtor". Section 9-105.

"Notice". Section 1-201.

"Person". Section 1-201.

"Receive notice". Section 1-201.

"Right". Section 1-201.

"Secured party". Section 9-105.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 40, 52, 57, 61, 67, 138; 69 Am. Jur. 2d Secured Transactions §§ 219, 292, 438, 439, 632, 636, 637, 641, 647, 649.

Validity of chattel mortgage on stock of goods which mortgagor has right to sell, where mortgagee takes possession of goods before third person's rights attach, 71 A.L.R.2d 1416.
9 C.J.S. Banks and Banking § 389; 72 C.J.S. Pledges §§ 49, 50.

§ 55-9-113. Security interests arising under article on sales.

A security interest arising solely under the article on sales (Article 2) is subject to the provisions of this article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods:

(a) no security agreement is necessary to make the security interest enforceable; and

(b) no filing is required to perfect the security interest; and

(c) the rights of the secured party on default by the debtor are governed by the article on sales (Article 2).

History: 1953 Comp., § 50A-9-113, enacted by Laws 1961, ch. 96, § 9-113.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Under the provisions of Article 2 on sales, a seller of goods may reserve a security interest (see, e. g., Sections 2-401 and 2-505); and in certain circumstances, whether or not a security interest is reserved, the seller has rights of resale and stoppage under Sections 2-703, 2-705 and 2-706 which are similar to the rights of a secured party. Similarly, under such sections as Sections 2-506, 2-707 and 2-711, a financing agency, an agent, a buyer or another person may have a security interest or other right in goods similar to that of a seller. The use of the term "security interest" in the sales article is meant to bring the interests so designated within this article. This section makes it clear, however, that such security interests are exempted from certain provisions of this article. Compare Section 4-208(3), making similar special provisions for security interests arising in the bank collection process.

2. The security interests to which this section applies commonly arise by operation of law in the course of a sales transaction. Since the circumstances under which they arise are defined in the sales article, there is no need for the "security agreement" defined in Section 9-105(1) (

l) and required by Section 9-203(1) and Paragraph (a) dispenses with such requirements. The requirement of filing may be inapplicable under Sections 9-302(1) (a) and (b), 9-304 and 9-305, where the goods are in the possession of the secured party or of a bailee other than the debtor. To avoid difficulty in the residual cases, as for

example where a bailee does not receive notification of the secured party's interest until after the security interest arises, Paragraph (b) dispenses with any filing requirement. Finally, Paragraph (c) makes inapplicable the default provisions of Part 5 of this article, since the sales article contains detailed provisions governing stoppage of delivery and resale after breach. See Sections 2-705, 2-706, 2-707(2) and 2-711(3).

3. These limitations on the applicability of this article to security interests arising under the sales article are appropriate only so long as the debtor does not have or lawfully obtain possession of the goods. Compare Section 56(b) of the Uniform Sales Act. A secured party who wishes to retain a security interest after the debtor lawfully obtains possession must comply fully with all the provisions of this article and ordinarily must file a financing statement to perfect his interest. This is the effect of the "except" clause in the preamble to this section. Note that in the case of a buyer who has a security interest in rejected goods under Section 2-711(3), the buyer is the "secured party" and the seller is the "debtor".

4. This section applies only to a "security interest". The definition of "security interest" in Section 1-201(37) expressly excludes the special property interest of a buyer of goods on identification under Section 2-401(1). The seller's interest after identification and before delivery may be more than a security interest by virtue of explicit agreement under Section 2-401(1) or 2-501(1), by virtue of the provisions of Section 2-401(2), (3) or (4), or by virtue of substitution pursuant to Section 2-501(2). In such cases, Article 9 is inapplicable by the terms of Section 9-102(1) (a).

5. Where there is a "security interest", this section applies only if the security interest arises "solely" under the sales article. Thus Section 1-201(37) permits a buyer to acquire by agreement a security interest in goods not in his possession or control; such a security interest does not impair his rights under the sales article, but any rights based on the security agreement are fully subject to this article without regard to the limitations of this section. Similarly, a seller who reserves a security interest by agreement does not lose his rights under the sales article, but rights other than those conferred by the sales article depend on full compliance with this article.

Cross references.Point 1: Sections 2-401, 2-505, 2-506, 2-705, 2-706, 2-707, 2-711(3) and 4-208(3).

Point 2: Sections 2-705, 2-706, 2-707(2), 2-711(3), 9-203(1), 9-302(1) (a) and (b), 9-304, 9-305 and Part 5.

Point 3: Section 2-711(3).

Point 4: Sections 2-401, 2-501 and 9-102(1) (a).

Definitional cross references."Debtor". Section 9-105.

"Goods". Section 9-105.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

Oral title-retention contract. - Cattle seller's alleged oral title-retention contract with a buyer did not create a security interest within the provisions of this section, where it was not evidenced by a written agreement and filed so that it could take priority over a bank's perfected security interest. O'Brien v. Chandler, N.M. , 765 P.2d 1165 (1988).

Law reviews. - For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 8, 33; 69 Am. Jur. 2d Secured Transactions §§ 270, 271, 351, 554.
Bill of sale, absolute on its face, as a chattel mortgage, 33 A.L.R.2d 364.
78 C.J.S. Sales §§ 390, 488.

§ 55-9-114. Consignment.

(1) A person who delivers goods under a consignment which is not a security interest and who would be required to file under this article by Paragraph (3)(c) of Section 2-326 [55-2-326 NMSA 1978] has priority over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were the property of the consignee, and also has priority with respect to identifiable cash proceeds received on or before the delivery of the goods to a buyer, if

(a) the consignor complies with the filing provision of the article on sales with respect to consignments (Paragraph (3)(c) of Section 2-326 [55-2-326 NMSA 1978]) before the consignee receives possession of the goods; and

(b) the consignor gives notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and

(c) the holder of the security interest receives the notification within five years before the

consignee receives possession of the goods; and

(d) the notification states that the consignor expects to deliver goods on consignment to the consignee, describing the goods by item or type.

(2) In the case of a consignment which is not a security interest and in which the requirements of the preceding subsection have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor.

History: 1978 Comp., § 55-9-114, enacted by Laws 1985, ch. 193, § 12.

OFFICIAL COMMENT

Prior uniform statutory provisions. None.

Purposes.1. This section requires that where goods are furnished to a merchant under the arrangement known as consignment rather than in a security transaction, the consignor must, in order to protect his position as against an inventory secured party of the consignee, give to that party the same notice and at the same time that he would give to that party if that party had filed first with respect to inventory and if the consignor were furnishing the goods under an inventory security agreement instead of under a consignment.

For the distinction between true consignment and security arrangements, see Section 1-201(37). For the assimilation of consignments under certain circumstances to goods on sale or return and the requirement of filing in the case of consignments, see Section 2-326.

The requirements of notice in this section conform closely to the concepts and the language of Section 9-312(3), which should be consulted together with the relevant Comments.

Except in the limited cases of identifiable cash proceeds received on or before delivery of the goods to a buyer, no attempt has been made to provide rules as to perfection of a claim to proceeds of consignments (compare Section 9-306) or the priority thereof (compare Section 9-312). It is believed that under many true consignments the consignor acquires a claim for an agreed amount against the consignee at the moment of sale, and does not look to the proceeds of sale. In contrast to the assumption of this article that rights to proceeds of security interests under Section 9-306 represent the presumed intent of the parties (compare Section 9-203(3)), the article goes on the assumption that if consignors intend to claim the proceeds of sale, they will do so by expressly contracting for them and will perfect their security interests therein.

Cross reference:Sections 2-326 and 9-312(3).

Definitional cross references:"Consignment". Section 1-201(37).

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Notification". Section 1-201(26).

"Proceeds". Section 9-306.

"Security interest". Section 1-201(37).

Part 2

VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERETO

§ 55-9-201. General validity of security agreement.

Except as otherwise provided by this act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto.

History: 1953 Comp., § 50A-9-201, enacted by Laws 1961, ch. 96, § 9-201.

OFFICIAL COMMENT

Prior uniform statutory provisions. Section 4, Uniform Conditional Sales Act; Section 3, Uniform Trust Receipts Act.

Purposes.This section states the general validity of a security agreement. In general the security agreement is effective between the parties; it is likewise effective against third parties. Exceptions to this general rule arise where there is a specific provision in any article of this act, for example, where article 1 invalidates a disclaimer of the obligations of good faith, etc. (Section 1-102(3)), or this article subordinates the security interest because it has not been perfected (Section 9-301) or for other reasons (see Section 9-312 on priorities) or defeats the security interest where certain types of claimants are involved (for example Section 9-307 on buyers of goods). As pointed out in the note to Section 9-102, there is no intention that the enactment of this article should repeal retail installment selling acts or small loan acts. Nor of course are the usury laws of any state repealed. These are mentioned in the text of Section 9-201 as examples of applicable laws, outside this code entirely, which might invalidate the terms of a security agreement.

Cross references.Sections 1-102(3), 9-301, 9-307 and 9-312.

Definitional cross references."Collateral". Section 9-105.

"Creditor". Section 1-201.

"Party". Section 1-201.

"Purchaser". Section 1-201.

"Security agreement". Section 9-105.

ANNOTATION

Law reviews. - For comment on Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), see 8 Nat. Resources J. 183 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 34, 67, 68, 71, 88, 101, 103, 131, 145, 159; 69 Am. Jur. 2d Secured Transactions §§ 201, 208, 213, 215, 216, 274, 276, 278, 284, 287, 290, 306, 311, 312, 318, 321, 379, 384, 402, 459, 460, 465, 503, 529, 587, 598, 608, 609, 647, 652, 657.
Violation of statute as to form of, or terms to be included in, conditional sales contract as invalidating entire transaction or merely its effect to reserve title in vendor, 144 A.L.R. 1103.
Validity and nature of trust receipts, 168 A.L.R. 359.
Rights of seller of motor vehicle with respect to purchase price or security on failure to comply with law governing transfer of title, 58 A.L.R.2d 1351.
Attorney's liability for negligence in preparing or recording security document, 87 A.L.R.2d 991.
"Unconscionability" as ground for refusing enforcement of contract for sale of goods or agreement collateral thereto, 18 A.L.R.3d 1305.
Leaving part of loan on deposit with lender as usury, 92 A.L.R.3d 769.
Sufficiency of description of collateral in security agreement under UCC §§ 9-110 and 9-203, 100 A.L.R.3d 940.
Modern status and application of rule that only voluntary transfer or assignment of claim against United States is within Assignment of Claims Act (31 U.S.C.S. § 203, 41 U.S.C.S. § 15), 44 A.L.R. Fed. 775.
14 C.J.S. Chattel Mortgages §§ 104, 136, 189, 258; 72 C.J.S. Pledges §§ 19, 31; 78 C.J.S. Sales § 569.

§ 55-9-202. Title to collateral immaterial.

Each provision of this article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

History: 1953 Comp., § 50A-9-202, enacted by Laws 1961, ch. 96, § 9-202.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The rights and duties of the parties to a security transaction and of third parties are stated in this article without reference to the location of "title" to the collateral. Thus the incidents of a security interest which secures the purchase price of goods are the same under this article whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed it or a lien to the secured party. This article in no way determines which line of interpretation (title theory v. lien theory or retained title v. conveyed title) should be followed in cases where the applicability of some other rule of law depends upon who has title. Thus if a revenue law imposes a tax on the "legal" owner of goods or if a corporation law makes a vote of the stockholders prerequisite to a corporation "giving" a security interest but not if it acquires property "subject" to a security interest, this article does not attempt to define whether the secured party is a "legal" owner or whether the transaction "gives" a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determine the location of "title" for such purposes.

Petitions for reclamation brought by a secured party in his debtor's insolvency proceedings have often been granted or denied on a title theory: where the secured party has title, reclamation will be granted; where he has "merely a lien", reclamation may be denied. For the treatment of such petitions under this article, see Point 1 of comment to Section 9-507.

Cross references.Sections 2-401 and 2-507.

Definitional cross references."Collateral". Section 9-105.

"Debtor". Section 9-105.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

ANNOTATION

Law reviews. - For comment on Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), see 4 Nat. Resources J. 175 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 5, 52, 62, 86, 88, 99, 125, 192, 193, 197, 198, 200; 69 Am. Jur. 2d Secured Transactions §§ 253, 254, 271, 301, 445, 447, 506, 536, 540, 619.
14 C.J.S. Chattel Mortgages §§ 175, 176; 72 C.J.S. Pledges § 21; 78 C.J.S. Sales § 572.

§ 55-9-203. Attachment and enforceability of security interest; proceeds; formal requisites.

(1) Subject to the provisions of Section 55-4-208 NMSA 1978 on the security interest of a collecting bank, Section 55-8-321 NMSA 1978 on security interests in securities and Section 55-9-113 NMSA 1978 on a security interest arising under the article on sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when 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; and

(c) the debtor has rights in the collateral.

(2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in Subsection (1) of this section have taken place unless explicit agreement postpones the time of attaching.

(3) Unless otherwise agreed, a security agreement gives the secured party the rights to proceeds provided by Section 55-9-306 NMSA 1978.

(4) A transaction, although subject to Chapter 55, Article 9 NMSA 1978, is also subject to the Oil and Gas Products Lien Act [48-9-1 to 48-9-8 NMSA 1978]; Sections 56-1-1 through 56-1-15 NMSA 1978 (pertaining to retail installment sales); Sections 56-8-15 through 56-8-20 NMSA 1978 [repealed] (pertaining to credit extended by pawnbrokers, traders and others); the New Mexico Bank Installment Loan Act of 1959 [58-7-1 to 58-7-9 NMSA 1978]; the New Mexico Small Loan Act of 1955 [Chapter 58, Article 15 NMSA 1978]; and the Motor Vehicle Sales Finance Act [58-19-1 to 58-19-12 NMSA 1978]. In the case of conflict between the provisions of Chapter 55, Article 9 NMSA 1978 and any such statute, the provisions of such statute control. Failure to comply with any applicable statute has only the effect which is specified therein.

History: 1953 Comp., § 50A-9-203, enacted by Laws 1961, ch. 96, § 9-203; 1985, ch. 193, § 13; 1987, ch. 248, § 49.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 2, Uniform Trust Receipts Act.

Purposes.1. Subsection (1) states three basic prerequisites to the existence of a security interest: agreement, value, and collateral. In addition, the agreement must be in writing unless the collateral is in the possession of the secured party (including an agent on his behalf - see Comment 2 to Section 9-305). When all of these elements exist, the security agreement becomes enforceable between the parties and is said to "attach". Perfection of a security interest (see Section 9-303) will in many cases depend on the additional step of filing a financing statement (see Section 9-302) or possession of the collateral (Sections 9-304(1) and 9-305). Section 9-301 states who will take priority over a security interest which has attached but which has not been perfected. Subsection (2) states a rule of construction under which the security interest, unless postponed by explicit agreement, attaches automatically when the stated events have occurred.

2. As to the type of description of collateral in a written security agreement which will satisfy the requirements of this section, see Section 9-110 and Comment thereto.

In the case of crops growing or to be grown or timber to be cut the best identification is by describing the land, and Subsection (1) (a) requires such a description.

3. One purpose of the formal requisites stated in Subsection (1) (a) is evidentiary. The requirement of written record minimizes the possibility of future dispute as to the terms of a security agreement and as to what property stands as collateral for the obligation secured. Where the collateral is in the possession of the secured party, the evidentiary need for a written record is much less than where the collateral is in the debtor's possession; customarily, of course, as a matter of business practice the written record will be kept, but, in this article as at common law, the writing is not a formal requisite. Subsection (1) (a), therefore, dispenses with the written agreement - and thus with signature and description - if the collateral is in the secured party's possession.

4. The definition of "security agreement" (Section 9-105) is "an agreement which creates or provides for a security interest". Under that definition the requirement of this section that the debtor sign a security agreement is not intended to reject, and does not reject, the deeply rooted doctrine that a bill of sale although absolute in form may be shown to have been in fact given as security. Under this article as under prior law a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security and may then, on payment of the debt, assert his fundamental right to return of the collateral and execution of an acknowledgment of satisfaction.

5. The formal requisite of a writing stated in this section is not only a condition to the enforceability of a security interest against third parties, it is in the nature of a statute of frauds. Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies Paragraph (1) (a), is not enforceable even against the debtor, and cannot be made so on any theory of equitable mortgage or the like. If he

has advanced money, he is of course a creditor and, like any creditor, is entitled after judgment to appropriate process to enforce his claim against his debtor's assets; he will not, however, have against his debtor the rights given a secured party by Part 5 of this article on default. The theory of equitable mortgage, insofar as it has operated to allow creditors to enforce informal security agreements against debtors, may well have developed as a necessary escape from the elaborate requirements of execution, acknowledgment and the like which the nineteenth-century chattel mortgage acts vainly relied on as a deterrent to fraud. Since this article reduces formal requisites to a minimum, the doctrine is no longer necessary or useful. More harm than good would result from allowing creditors to establish a secured status by parol evidence after they have neglected the simple formality of obtaining a signed writing.

6. Subsection (4) states that the provisions of regulatory statutes covering the field of consumer finance prevail over the provisions of this article in case of conflict. The second sentence of the subsection is added to make clear that no doctrine of total voidness for illegality is intended: failure to comply with the applicable regulatory statute has whatever effect may be specified in that statute, but no more.

Cross references.Sections 4-208 and 9-113.

Point 1: Section 9-110.

Point 5: Part 5.

Definitional cross references."Collateral". Section 9-105.

"Debtor". Section 9-105.

"Party". Section 1-201.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Signed". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, inserted "Section 55-8-321 NMSA 1978 on security interests in securities" in the introductory paragraph of Subsection (1) and made minor stylistic changes throughout the section.

Compiler's notes. - Sections 56-8-15 through 56-8-20 NMSA 1978, referred to in Subsection (4) were repealed by Laws 1983, ch. 44, § 1, effective July 1, 1983. For present comparable provisions, see 56-12-1 NMSA 1978 et seq.

Use of traditional security agreements may continue. - The traditional forms of security agreements in use before the enactment of this section may continue to be used after its enactment. Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967).

But security interest not enforceable until debtor signs written agreement. - Purchase money security interest of defendant was not enforceable under this section until after the written security agreements had been signed by owner of equipment paid for by defendant. Honea v. Laco Auto Leasing, Inc., 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

And agreement effective only as to collateral described therein. - A security interest is not effective against third parties unless the debtor has signed a security agreement which contains a description of the collateral, and the disputed items cannot be included within the security agreement by the "outside evidence" relied on by plaintiff because the disputed items are not described in the security agreement. Jones & Laughlin Supply v. Dugan Prod. Corp., 85 N.M. 51, 508 P.2d 1348 (Ct. App. 1973).

Omission of collateral from security agreement creates no security interest. - Where the collateral is described on a financing statement but omitted from the security agreement, there is no enforceable security interest. First Nat'l Bank v. Niccum, 649 F.2d 763 (10th Cir. 1981).

And parol evidence cannot be offered to establish a valid security agreement. First Nat'l Bank v. Niccum, 649 F.2d 763 (10th Cir. 1981).

Law reviews. - For comment on Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), see 8 Nat. Resources J. 183 (1968).

For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Liens § 23; 68 Am. Jur. 2d Secured Transactions §§ 8, 10, 33, 34, 42, 51, 52, 54, 55, 83, 88, 89, 92, 98, 101, 103, 107, 131, 134, 145, 150, 153, 158, 163, 164, 170, 174, 182, 188; 69 Am. Jur. 2d Secured Transactions §§ 269 to 278, 280, 282, 290, 292, 295, 296, 303, 305, 311, 333, 334, 362, 397, 402, 465, 529, 587, 598, 608, 609, 652, 657.

Sufficiency of description of collateral in security agreement under UCC §§ 9-110 and 9-203, 100 A.L.R.3d 940.
Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402, 3 A.L.R.4th 502.
Right of secured creditor to have set aside fraudulent transfer of other property by his debtor, 8 A.L.R.4th 1123.
Conveyance of land as including mature but unharvested crops, 51 A.L.R.4th 1263.
Avoidance under 11 USCS § 522(f)(2) of the Bankruptcy Code of 1978 of nonpossessory, nonpurchase-money security interest in debtor's exempt personal property, 55 A.L.R. Fed. 353.
14 C.J.S. Chattel Mortgages § 46; 72 C.J.S. Pledges § 10; 78 C.J.S. Sales § 559.

§ 55-9-204. After-acquired property; future advances.

(1) Except as provided in Subsection (2), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.

(2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (Section 9-314) [55-9-314 NMSA 1978] when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.

(3) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (Subsection (1) of Section 9-105 [55-9-105 NMSA 1978]).

History: 1953 Comp., § 50A-9-204, enacted by Laws 1961, ch. 96, § 9-204; 1985, ch. 193, § 14.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) makes clear that a security interest arising by virtue of an after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement. That is to say: the security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party - such as the taking of a supplemental agreement covering the new collateral - is required. This does not however mean that the interest is proof against subordination or defeat: Section 9-108 should be consulted on when a security interest in after-acquired collateral is not security for antecedent debt, and Section 9-312(3) and (4) on when such a security interest may be subordinated to a conflicting purchase money security interest in the same collateral.

2. This article accepts the principle of a "continuing general lien". It rejects the doctrine - of which the judicial attitude toward after-acquired property interests was one expression - that there is reason to invalidate as a matter of law what has been variously called the floating charge, the free-handed mortgage and the lien on a shifting stock. This article validates a security interest in the debtor's existing and future assets, even though (see Section 9-205) the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral. (See further, however, Section 9-306 on proceeds and comment thereto.)

The widespread nineteenth-century prejudice against the floating charge was based on a feeling, often inarticulate in the opinions, that a commercial borrower should not be allowed to encumber all his assets present and future, and that for the protection not only of the borrower but of his other creditors a cushion of free assets should be preserved. That inarticulate premise has much to recommend it. This article decisively rejects it not on the ground that it was wrong in policy but on the ground that it was not effective. In pre-code law there was a multiplication of security devices designed to avoid the policy: field warehousing, trust receipts, factor's lien acts and so on. The cushion of free assets was not preserved. In almost every state it was possible before the code for the borrower to give a lien on everything he held or would have. There have no doubt been sufficient economic reasons for the change. This article, in expressly validating the floating charge, merely recognizes an existing state of things. The substantive rules of law set forth in the balance of the article are designed to achieve the protection of the debtor and the equitable resolution of the conflicting claims of creditors which the old rules no longer give.

Notice that the question of assignment of future accounts is treated like any other case of after-acquired property: no periodic list of accounts is required by this act. Where less than all accounts are assigned such a list may of course be necessary to permit identification of the particular accounts assigned.

3. Subsection (1) has been already referred to in connection with after-acquired property. It also serves to validate the so-called "cross-security" clause under which collateral acquired at any time may secure advances whenever made.

4. Subsection (2) limits the operation of the after-acquired property clause against consumers. No such interest can be claimed as additional security in consumer goods (defined in Section 9-109), except accessions (see Section 9-314), acquired more than ten days after the giving of value.

5. Under Subsection (3) collateral may secure future as well as present advances when the security agreement so provides. At common law and under chattel mortgage statutes there seems to have been a vaguely articulated prejudice against future advance agreements comparable to the prejudice against after-acquired property interests. Although only a very few jurisdictions went to the length of invalidating interests claimed by virtue of future advances, judicial limitations severely restricted the

usefulness of such arrangements. A common limitation was that an interest claimed in collateral existing at the time the security transaction was entered into for advances made thereafter was good only to the extent that the original security agreement specified the amount of such later advances and even the times at which they should be made. In line with the policy of this article toward after-acquired property interests this subsection validates the future advance interest, provided only that the obligation be covered by the security agreement.

The effect of after-acquired property and future advance clauses in the security agreement should not be confused with the use of financing statements in notice filing. The references to after-acquired property clauses and future advance clauses in Section 9-204 are limited to security agreements. This section follows Section 9-203, the section requiring a written security agreement, and its purpose is to make clear that confirmatory agreements are not necessary where the basic agreement has the clauses mentioned. This section has no reference to the operation of financing statements. The filing of a financing statement is effective to perfect security interests as to which the other required elements for perfection exist, whether the security agreement involved is one existing at the date of filing with an after-acquired property clause or a future advance clause, or whether the applicable security agreement is executed later. Indeed, Section 9-402(1) expressly contemplates that a financing statement may be filed when there is no security agreement. There is no need to refer to after-acquired property or future advances in the financing statement.

As in the case of interests in after-acquired collateral, a security interest based on future advances may be subordinated to conflicting interests in the same collateral. See Sections 9-301(4); 9-307(3); 9-312(3), (4) and (7).

Cross references.Point 1: Sections 9-108 and 9-312.

Point 2: Sections 9-205 and 9-306.

Point 4: Sections 9-109 and 9-314.

Point 5: Sections 9-301(4); 9-307(3); 9-312(3), (4), and (7).

Definitional cross references."Account". Section 9-106.

"Agreement". Section 1-201.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Purchase". Section 1-201.

"Pursuant to commitment". Section 9-105.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

ANNOTATION

I. General Consideration.

Steps necessary to create security interest may be taken in any order. - If a financing statement is filed, value is extended, and a security agreement is executed, then there is a security interest in the described collateral. These steps can be taken in any order and priority is given to the security interest which is filed first, even if that security interest has not attached at the time of filing. Waterfield v. Burnett, 21 Bankr. 752 (Bankr. D.N.M. 1982).

Effect of security agreement is to immediately transfer property interest in collateral. Hernandez v. S.I.C. Fin. Co., 79 N.M. 673, 448 P.2d 474 (1968).

Effect of future advance clause with respect to third persons. - With respect to third persons, future advances do not come within the protection of the future advance clause of the security agreement unless the future advance is of the same general class of debt as the original debt and was within the contemplation of the parties where the security agreement was made. AG-Chem Farm Servs., Inc. v. Coberly, 105 N.M. 384, 733 P.2d 15 (Ct. App. 1987).

Debt consolidation loan did not cause lapse of prior security agreement. - A loan consolidating a debtor's preceding debts was, in effect, a renewal of his previous loans, including a 1979 loan covered by a security agreement, so that the security agreement did not lapse as a result of the consolidation, since the security agreement provided that the agreement would secure "the payment of all extensions and renewals," and it was the parties' intent that the agreement secure the amount owing under the 1979 loan as well as future advances. Bond Enters., Inc. v. Western Bank, 54 Bankr. 366 (Bankr. D.N.M. 1985).

Protection of unsold collateral. - A party having a prior security interest, who receives proceeds from a sale of part of the collateral with actual or constructive notice of subordinate security interests in the collateral, must apply all of such proceeds to the debt secured by his security interest so as to protect the remaining collateral for the benefit of parties having such subordinate security interests. AG-Chem Farm Servs., Inc. v. Coberly, 105 N.M. 384, 733 P.2d 15 (Ct. App. 1987).

Law reviews. - For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 130, 134, 145, 153, 163, 164, 174, 179, 180 to 184; 69 Am. Jur. 2d Secured Transactions §§ 270, 280, 332 to 338, 340, 342, 343, 490, 491.
Term "increase" in description in chattel mortgage on animals, as including increase other than by generation, 1 A.L.R. 554.
Chattel mortgage on livestock as including increase, 39 A.L.R. 153.
Chattel mortgage on fruit crops growing or to be grown, 54 A.L.R. 1532.
Filing of chattel mortgage on crops as constructive notice, 77 A.L.R. 572.
Chattel mortgage on livestock as covering animals subsequently acquired by means other than increase of generation, 129 A.L.R. 899.
Chattel mortgage lien attaching to subsequently born offspring as surviving period of suitable nurture, 144 A.L.R. 330.
Priority as between seller or conditional seller of personalty and claimant under after acquired property clause of mortgage or other instrument, 86 A.L.R.2d 1152.
Sufficiency of description of collateral in security agreement under UCC §§ 9-110 and 9-203, 100 A.L.R.3d 940.
Avoidance under 11 USCS § 522(f)(2) of the Bankruptcy Code of 1978 of nonpossessory, nonpurchase-money security interest in debtor's exempt personal property, 55 A.L.R. Fed. 353.
14 C.J.S. Chattel Mortgages § 290; 72 C.J.S. Pledges § 22; 78 C.J.S. Sales § 572.

II. Agreement to Attach.

Agreement not payment key to attachment. - When defendant agreed to buy equipment from pump company, company agreed to furnish the equipment, and lessee of the equipment agreed that defendant would have an interest in the equipment, security interest attached immediately, not upon actual payment by defendant of purchase price. Honea v. Laco Auto Leasing, Inc., 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

And where value previously given. - Having previously given value for security interest, secured party acquired this interest (the security interest attached) by the equipment lease agreement. Transamerica Leasing Corp. v. Bureau of Revenue, 80 N.M. 48, 450 P.2d 934 (Ct. App. 1969).

No security interest created where collateral omitted from security agreement. - Where the collateral is described on a financing statement but omitted from the security agreement, there is no enforceable security interest. First Nat'l Bank v. Niccum, 649 F.2d 763 (10th Cir. 1981).

III. Value Given.

Binding commitment to extend credit deemed sufficient value. - The fact that equipment leases were not signed until after the installation of the equipment, and thus not enforceable at the time of the installations, did not prevent the attachment of defendant's security interest at the time of installation where defendant gave a binding commitment to extend credit, and this commitment was acted upon. Honea v. Laco Auto Leasing, Inc., 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

IV. Debtor Rights in Collateral.

Rights acquired and security interests attach upon delivery to debtor. - Where vendor from whom business owner purchased inventory provided delivery of the items in its own trucks and at its own risk, and all sales were for cash on delivery, business owner acquired rights in the collateral when it was delivered, and the bank's security interest in his inventory "now owned or hereafter acquired" attached at that point and was perfected. National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975).

No rights acquired. - Where landlord agreed to buy restaurant and equipment and to then sell them to borrowers of a loan secured by a mortgage on real estate and by a security agreement and financing statement on the restaurant equipment which one of the borrowers intended to buy from lessee, the mortgagors never obtained rights in the collateral so as to allow the bank's security interest to attach, since the mortgagors failed to comply with the initial requirements of the contract with the landlord. First Nat'l Bank v. Quintana, 105 N.M. 410, 733 P.2d 858 (1987).

§ 55-9-205. Use or disposition of collateral without accounting permissible.

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts or chattel paper, or to accept the return of goods to make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.

History: 1953 Comp., § 50A-9-205, enacted by Laws 1961, ch. 96, § 9-205; 1985, ch. 193, § 15.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. This article expressly validates the floating charge or lien on a shifting stock. (See Sections 9-201, 9-204 and comment to Section 9-204.) This section provides that a security interest is not invalid or fraudulent by reason of liberty in the debtor to dispose of the collateral without being required to account for proceeds or substitute new collateral. It repeals the rule of Benedict v. Ratner, 268 U.S. 353, 45 S.Ct. 566, 69 L.Ed. 991 (1925), and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over the collateral. The principal effect of the Benedict rule has been, not to discourage or eliminate security transactions in inventory and accounts receivable - on the contrary such transactions have vastly increased in volume - but rather to force financing arrangements in this field toward a self-liquidating basis. Furthermore, several lower court cases drew implications from Justice Brandeis' opinion in Benedict v. Ratner which required lenders operating in this field to observe a number of needless and costly formalities: for example it was thought necessary for the debtor to make daily remittances to the lender of all collections received, even though the amount remitted is immediately returned to the debtor in order to keep the loan at an agreed level.

2. The Benedict rule was, in the accounts receivable field, repealed in many of the state accounts receivable statutes enacted after 1943, and, in the inventory field, by some of the factor's lien statutes. (Benedict v. Ratner purported to state the law of New York and not a rule of federal bankruptcy law. Since its acceptance is a matter of state law, it can of course be rejected by state statute.)

3. The requirement of "policing" is the substance of the Benedict rule. While this section repeals Benedict in matters of form, the filing requirements (Section 9-302) give other creditors the opportunity to ascertain from public sources whether property of their

debtor or prospective debtor is subject to secured claims, and the provisions about proceeds (Section 9-306(4)) enable creditors to claim collections which were made by the debtor more than 10 days before insolvency proceedings and commingled or deposited in a bank account before institution of the insolvency proceedings. The repeal of the Benedict rule under this section must be read in the light of these provisions.

4. Other decisions reaching results like that in the Benedict case, but relating to other aspects of dominion (of which Lee v. State Bank & Trust Co., 54 F.2d 518 (2d Cir. 1931), is an example) are likewise rejected.

5. Nothing in Section 9-205 prevents such "policing" or dominion as the secured party and the debtor may agree upon; business and not legal reasons will determine the extent to which strict accountability, segregation of collections, daily reports and the like will be employed.

6. The last sentence is added to make clear that the section does not mean that the holder of an unfiled security interest, whose perfection depends on possession of the collateral by the secured party or by a bailee (such as a field warehouseman), can allow the debtor access to and control over the goods without thereby losing his perfected interest. The common law rules on the degree and extent of possession which are necessary to perfect a pledge interest or to constitute a valid field warehouse are not relaxed by this or any other section of this article.

Cross references.Point 1: Sections 9-201 and 9-204.

Point 3: Sections 9-302 and 9-306(4).

Point 6: Sections 9-304 and 9-305.

Definitional cross references."Account". Section 9-106.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 78, 81, 83, 125, 128, 134, 156, 171, 174, 179, 188, 191, 197; 69 Am. Jur. 2d Secured Transactions §§ 201, 205 to 209, 215, 307, 317, 319, 320, 328, 340, 355, 456, 459, 465, 472, 473, 502; 78 Am. Jur. 2d Warehouses §§ 96, 99.
Forfeiture by innocent vendor of articles sold conditionally and used by vendee in violation of law, 2 A.L.R. 1596.
Statutes relating specifically to selling personal property previously sold under conditional sale, 33 A.L.R. 853; 56 A.L.R. 1217.
Validity of chattel mortgage where mortgagor is given right to sell, 73 A.L.R. 236.
Chattel mortgagee's consent to sale of mortgaged property as waiver of lien, 97 A.L.R. 646.
Recovery by conditional seller or buyer, or person standing in his shoes, against third person for damage or destruction of property, 67 A.L.R.2d 582.
14 C.J.S. Chattel Mortgages § 202; 37 C.J.S. Fraudulent Conveyances § 224.

§ 55-9-206. Agreement not to assert defenses against assignee; modification of sales warranties where security agreement exists.

(1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the article on commercial paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

(2) When a seller retains a purchase money security interest in goods the article on sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties.

History: 1953 Comp., § 50A-9-206, enacted by Laws 1961, ch. 96, § 9-206; 1967, ch. 186, § 25.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 2, Uniform Conditional Sales Act.

Purposes.1. Clauses are frequently inserted in installment purchase contracts under which the conditional vendee agrees not to assert defenses against an assignee of the

contract. These clauses have led to litigation and their present status under the case law is in confusion. In some jurisdictions they have been held void as attempts to create negotiable instruments outside the framework of Article 3 or on grounds of public policy; in others they have been allowed to operate to cut off at least defenses based on breach of warranty. Under Subsection (1) such clauses in a security agreement are validated outside the consumer field, but only as to defenses which could be cut off if a negotiable instrument were used. This limitation is important since if the clauses were allowed to have full effect as typically drafted, they would operate to cut off real as well as personal defenses. The execution of a negotiable note in connection with a security agreement is given like effect as the execution of an agreement containing a waiver of defense clause. The same rules are made applicable to leases as to security agreements, whether or not the lease is intended as security.

2. This article takes no position on the controversial question whether a buyer of consumer goods may effectively waive defenses by contractual clause or by execution of a negotiable note. In some states such waivers have been invalidated by statute. In other states the course of judicial decision has rendered them ineffective or unreliable - courts have found that the assignee is not protected against the buyer's defense by a clause in the contract or that the holder of a note, by reason of his too close connection with the underlying transaction, does not have the rights of a holder in due course. This article neither adopts nor rejects the approach taken in such statutes and decisions, except that the validation of waivers in Subsection (1) is expressly made "subject to any statute or decision" which may restrict the waiver's effectiveness in the case of a buyer of consumer goods.

3. Subsection (2) makes clear, as did Section 2 of the Uniform Conditional Sales Act, that purchase money security transactions are sales, and warranty rules for sales are applicable. It also prevents a buyer from inadvertently abandoning his warranties by a "no warranties" term in the security agreement when warranties have already been created under the sales arrangement. Where the sales arrangement and the purchase money security transaction are evidenced by only one writing, that writing may disclaim, limit or modify warranties to the extent permitted by Article 2.

Cross references.Point 1: Section 3-305.

Point 2: Section 9-203(2).

Point 3: Sections 2-102 and 2-316.

Definitional cross references."Agreement". Section 1-201.

"Consumer goods". Section 9-109.

"Good faith". Section 1-201.

"Goods". Section 9-105.

"Holder". Section 1-201.

"Holder in due course". Sections 3-302 and 9-105.

"Negotiable instrument". Section 3-104.

"Notice". Section 1-201.

"Purchase money security interest". Section 9-107.

"Sale". Sections 2-106 and 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Public policy encourages freedom between competent parties of the right to contract, and requires the enforcement of contracts, unless they clearly contravene some positive law or rule of public morals. GECC v. Tidenberg, 78 N.M. 59, 428 P.2d 33, 40 A.L.R.3d 1151 (1967).

Thus legislature allows limitations on claims against assignees of sellers. - By adopting this section, the New Mexico legislature has established a policy favoring the validity of an agreement not to assert against an assignee any claim or defense which the buyer may have against the seller, and especially when the transaction involves both a negotiable note and a security agreement, so long as the assignee takes for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument. GECC v. Tidenberg, 78 N.M. 59, 428 P.2d 33, 40 A.L.R.3d 1151 (1967).

Law reviews. - For comment, "Assignments - Maker's Defenses Cut Off - Uniform Commercial Code § 9-206," see 5 Nat. Resources J. 408 (1965).

For article, "Essential Attributes of Commercial Paper-Part I," see 1 N.M. L. Rev. 479 (1971).

For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Assignments § 103; 69 Am. Jur. 2d Secured Transactions § 261.

Conditional buyer's right to maintain action for conversion and damages recoverable as affected by defendant's recognition of conditional seller's title or rights, 116 A.L.R. 904.
Rights of parties to conditional sale as affected by breach of warranty, 130 A.L.R. 753.
Warranty of title by seller, 132 A.L.R. 338.
Construction and application of provision in conditional sale contract regarding implied warranties, 139 A.L.R. 1276.
Constitutionality, construction and application of statute respecting sale, assignment or transfer of retail installment contracts, 10 A.L.R.2d 447.
Estoppel of obligor to assert against transferee of conditional sales contract, installment improvement or repair contract or related commercial paper, defenses or equities available against transferor, 44 A.L.R.2d 196.
Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller, 39 A.L.R.3d 518.
78 C.J.S. Sales § 641.

§ 55-9-207. Rights and duties when collateral is in secured party's possession.

(1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(2) Unless otherwise agreed, when collateral is in the secured party's possession:

(a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(b) the risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;

(c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;

(d) the secured party must keep the collateral identifiable but fungible collateral may be commingled;

(e) the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.

(3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.

(4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

History: 1953 Comp., § 50A-9-207, enacted by Laws 1961, ch. 96, § 9-207.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) states the duty to preserve collateral imposed on a pledge at common law. See Restatement of Security, §§ 17, 18. In many cases a secured party having collateral in his possession may satisfy this duty by notifying the debtor of any act which must be taken and allowing the debtor to perform such act himself. If the secured party himself takes action, his reasonable expenses may be added to the secured obligation.

Under Section 1-102(3) the duty to exercise reasonable care may not be disclaimed by agreement, although under that section the parties remain free to determine by agreement, in any manner not manifestly unreasonable, what shall constitute reasonable care in a particular case.

2. Subsection (2) states rules, which follow common law precedents, and which apply, unless there is agreement otherwise, in typical situations during the period while the secured party is in possession of the collateral.

3. The right of a secured party holding instruments or documents to have them indorsed or transferred to him or his order is dealt with in the relevant sections of Articles 3 (Commercial Paper), 7 (Warehouse Receipts, Bills of Lading and Other Documents) and 8 (Investment Securities). (Sections 3-201, 7-506 and 8-307.)

4. This section applies when the secured party has possession of the collateral before default, as a pledgee, and also when he has taken possession of the collateral after default. See Section 9-501(1) and (2). Subsection (4) permits operation of the collateral in the circumstances stated, and Subsection (2) (a) authorizes payment of or provision for expenses of such operation. Agreements providing for such operation are common in trust indentures securing corporate bonds and are particularly important when the collateral is a going business. Such an agreement cannot of course disclaim the duty of care established by Subsection (1), nor can it waive or modify the rights of the debtor contrary to Section 9-501(3).

Cross references.Point 1: Section 1-102(3).

Point 3: Sections 3-201, 7-506 and 8-307.

Point 4: Section 9-501(2) and Part 5.

Definitional cross references."Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Instrument". Section 9-105.

"Money". Section 1-201.

"Party". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

Proof of claim of loss. - In order to establish a right to claim any loss under this section, a debtor must show: (1) that he suffered a loss; and (2) that he was willing and able to make a tender, thereby regaining a possessory interest in the collateral. Cordova v. Lee Galles Oldsmobile, Inc., 100 N.M. 204, 668 P.2d 320 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 11 Am. Jur. 2d Bills and Notes § 939; 68 Am. Jur. 2d Secured Transactions §§ 33, 49, 52, 61; 69 Am. Jur. 2d Secured Transactions §§ 219 to 223, 317, 517, 548, 549, 551, 583, 592, 648.
Effect of repledge by one who at time holds property under tentative agreement for pledge which is subsequently consummated, 24 A.L.R. 433.
Right of pledgee to allowance for expenses in connection with pledge, 40 A.L.R. 258.
Junior chattel mortgagee's liability to senior chattel mortgagee for conversion, 43 A.L.R. 388.
Personal liability of mortgagor as affected by chattel mortgagee's failure to pursue proper course after taking possession, 47 A.L.R. 582.
Sale of mortgaged chattels for unduly low price as conversion, 73 A.L.R. 839.
Duty of stockbroker, in performance of obligation to deliver, security of stock or other security, to tender identical certificate or security, 75 A.L.R. 746.
Extinguishment of pledgor's entire indebtedness to pledgee by conversion by pledgee of subject of pledge, 87 A.L.R. 586.
Interest on damages for pledgee's refusal to return pledge property, 96 A.L.R. 18; 36 A.L.R.2d 337.
Bailee's express agreement to return property, or to return it in specified condition, as enlarging his common-law liability; where property is pledged or given as security, 150 A.L.R. 269.

Purchase by pledgee as subject of pledge, 37 A.L.R.2d 1381.
Punitive or exemplary damages for conversion of personalty by one other than chattel mortgagee or conditional seller, 54 A.L.R.2d 1361.
Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property, 68 A.L.R.2d 1254.
Secured party's duty under UCC § 9-207(2)(c) to reduce secured obligation by increase or profits received from collateral, 45 A.L.R.4th 394.
14 C.J.S. Chattel Mortgages §§ 114, 115, 177; 72 C.J.S. Pledges § 25 et seq.; 78 C.J.S. Sales § 567.

§ 55-9-208. Request for statement of account or list of collateral.

(1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.

(2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.

(3) A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding $10 for each additional statement furnished.

History: 1953 Comp., § 50A-9-208, enacted by Laws 1961, ch. 96, § 9-208.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. To provide a procedure whereby a debtor may obtain from the secured party a statement of the amount due on the obligation and in some cases a statement of

the collateral.

2. The financing statement required to be filed under this article (see Section 9-402) may disclose only that a secured party may have a security interest in specified types of collateral owned by the debtor. Unless a copy of the security agreement itself is filed as the financing statement third parties are told neither the amount of the obligation secured nor which particular assets are covered. Since subsequent creditors and purchasers may legitimately need more detailed information, it is necessary to provide a procedure under which the secured party will be required to make disclosure. On the other hand, the secured party should not be under a duty to disclose details of business operations to any casual inquirer or competitor who asks for them. This section gives the right to demand disclosure only to the debtor, who will typically request a statement in connection with negotiations with subsequent creditors and purchasers, or for the purpose of establishing his credit standing and proving which of his assets are free of the security interest. The secured party is further protected against onerous requests by the provisions that he need furnish a statement of collateral only when his own records identify the collateral and that if he claims all of a particular type of collateral owned by the debtor he is not required to approve an itemized list.

Cross reference.Point 2: Section 9-402.

Definitional cross references."Collateral". Section 9-105.

"Debtor". Section 9-105.

"Good faith". Section 1-201.

"Know". Section 1-201.

"Person". Section 1-201.

"Receive". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Written". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 61, 138; 69 Am. Jur. 2d Secured Transactions §§ 219, 284, 377, 386, 391, 435, 438, 439, 647.
14 C.J.S. Chattel Mortgages §§ 108, 116, 218, 267; 72 C.J.S. Pledges §§ 20, 22, 36; 78 C.J.S. Sales §§ 569, 597.

Part 3

RIGHTS OF THIRD PARTIES; PERFECTED AND =NL UNPERFECTED SECURITY INTERESTS; =NL RULES OF PRIORITY

§ 55-9-301. Persons who take priority over unperfected security interests; right of "lien creditor".

(1) Except as otherwise provided in Subsection (2) of this section, an unperfected security interest is subordinate to the rights of:

(a) persons entitled to priority under Section 55-9-312 NMSA 1978;

(b) a person who becomes a lien creditor before the security interest is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business, or is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected; and

(d) in the case of accounts and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within twenty days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

(4) A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within forty-five days thereafter or made without

knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

History: 1953 Comp., § 8-50A-301, enacted by Laws 1961, ch. 96, § 9-301; 1985, ch. 193, § 16; 1989, ch. 64, § 1.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 8(2) and 9(2) (b), Uniform Trust Receipts Act; Section 5, Uniform Conditional Sales Act.

Purposes.1. This section lists the classes of persons who take priority over an unperfected security interest. As in Section 60 of the Federal Bankruptcy Act, the term "perfected" is used to describe a security interest in personal property which cannot be defeated in insolvency proceedings or in general by creditors. A security interest is "perfected" when the secured party has taken whatever steps are necessary to give him such an interest. These steps are explained in the five following sections (9-302 through 9-306).

2. Section 9-312 states general rules for the determination of priorities among conflicting security interests and in addition refers to other sections which state special rules of priority in a variety of situations. The interests given priority under Section 9-312 and the other sections therein cited take such priority in general even over a perfected security interest.

A fortiori they take priority over an unperfected security interest, and Paragraph (1) (a) of this section so states.

3. Paragraph (1) (b) provides that an unperfected security interest is subordinate to the rights of lien creditors. The section rejects the rule applied in many jurisdictions in pre-code law that an unperfected security interest is subordinated to all creditors, but requires the lien obtained by legal proceedings to attach to the collateral before the security interest is perfected. The section subordinates the unperfected security interest but does not subordinate the secured debt to the lien.

4. Paragraphs (1) (c) and (1) (d) deal with purchasers (other than secured parties) of collateral who would take subject to a perfected security interest but who are by these subsections given priority over an unperfected security interest. In the cases of goods and of intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (instruments, documents and chattel paper) the purchaser who takes priority must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection (Paragraph (1) (c)). Thus even if the purchaser gave value without knowledge and before perfection, he would take subject to the security interest if perfection occurred before physical delivery of the collateral to him. The Paragraph (1) (c) rule is obviously not appropriate where the collateral consists of intangibles and there is no representative piece of paper

whose physical delivery is the only or the customary method of transfer. Therefore with respect to such intangibles (accounts and general intangibles), Paragraph (1) (d) gives priority to any transferee who has given value without knowledge and before perfection of the security interest.

The term "buyer in ordinary course of business" referred to in Paragraph (1) (c) is defined in Section 1-201(9).

Other secured parties are excluded from Paragraphs (1) (c) and (1) (d) because their priorities are covered in Section 9-312 (see point 2 of this comment).

5. Except to the extent provided in Subsection (2), this article does not permit a secured party to file or take possession after another interest has received priority under Subsection (1) and thereby protect himself against the intervening interest.

A few chattel mortgage statutes did have grace periods, i.e., a filing within x days after the mortgage was given related back to the day the mortgage was given. The Uniform Conditional Sales Act had a ten-day period which cut off all intervening interests. The Uniform Trust Receipts Act had a thirty-day period but did not cut off the interest of a purchaser who took delivery before the filing.

Subsection (2) gives a grace period for perfection by filing as to purchase money security interests only (that term is defined in Section 9-107). The grace period runs for ten [now twenty] days after the debtor receives possession of the collateral but operates to cut off only the interests of intervening lien creditors or bulk purchasers.

6. Subsection (3) defines "lien creditor", following in substance the provisions of the Uniform Trust Receipts Act.

7. Subsection (4) deals with the question whether advances under an existing security interest in collateral, made after rights of lien creditors have attached to that collateral, will take precedence over rights of lien creditors. See related problems in Sections 9-307(3) and 9-312(7). In this section, because of the impact of the rule chosen on the question whether the security interest for future advances is "protected" under Sections 6323(c) (2) and (d) of the Internal Revenue Code as amended by the Federal Tax Lien Act of 1966, the priority of the security interest for future advances over a judgment lien is made absolute for 45 days regardless of knowledge of the secured party concerning the judgment lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien obtained by legal proceedings. The importance of the rule chosen for actual conflicts between secured parties making subsequent advances and judgment lien creditors may not be great; but the rule chosen for the first 45 days is important in effectuating the intent of the Federal Tax Lien Act of 1966.

Cross references.Section 9-312.

Point 1: Sections 9-302 to 9-306.

Point 7: Sections 9-204, 9-307(3) and 9-312(7).

Definitional cross references."Account". Section 9-106.

"Buyer in ordinary course of business". Section 1-201.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 9-105.

"General intangibles". Section 9-106.

"Goods". Section 9-105.

"Instrument". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Purchase money security interest". Section 9-107.

"Pursuant to commitment". Section 9-105.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

ANNOTATION

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in Subsections (1) and (4), and substituted "twenty days" for "ten days" in Subsection (2).

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 37, 115, 116; 69 Am. Jur. 2d Secured Transactions §§ 306, 332, 345, 379, 380, 384, 422, 425, 458, 460, 466, 467, 477, 479, 489, 515, 541, 565, 592.
Constructive notice by record, 63 A.L.R. 1456.
Conditional sale contract as affected by seller's acceptance of a chattel mortgage from the buyer covering the same property, priorities, 95 A.L.R. 350.
Chattel mortgagee's consent to sale of mortgaged property as waiver of lien, 97 A.L.R. 646.
Constitutionality, construction and application of statute respecting sale, assignment or transfer of retail installment contracts, 10 A.L.R.2d 447.
Coverage of "nonrecording" or "nonfiling" insurance against loss from failure to record chattel mortgage, conditional sale or other security instrument, 51 A.L.R.2d 325.
Priority, as between holder of unfiled or unrecorded chattel mortgage who secures possession of goods or chattels, and subsequent purchaser or encumbrancer, 53 A.L.R.2d 936.
Priority as between mechanic's lien and purchase money mortgage, 73 A.L.R.2d 1407.
Priority as between seller or conditional seller of personalty and claimant under after-acquired property clause of mortgage or other instrument, 86 A.L.R.2d 1152.
Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment, 34 A.L.R.4th 665.
Construction and effect of UCC § 9-311 giving debtor right to transfer his interest in collateral, 45 A.L.R.4th 411.
14 C.J.S. Chattel Mortgages § 292; 72 C.J.S. Pledges § 23; 78 C.J.S. Sales § 573.

§ 55-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply.

(1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under Section 55-9-305 NMSA 1978;

(b) a security interest temporarily perfected in instruments or documents without delivery under Section 55-9-304 NMSA 1978 or in proceeds for a 10-day period under Section 55-9-306 NMSA 1978;

(c) a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;

(d) a purchase money security interest in consumer goods; but filing is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in Section 55-9-313 NMSA 1978;

(e) an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor;

(f) a security interest of a collecting bank, (Section 55-4-208 NMSA 1978) or in securities (Section 55-8-321 NMSA 1978), or arising under the article on sales, (see Section 55-9-113 NMSA 1978) or covered in Subsection (3) of this section; or

(g) an assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing of a financing statement otherwise required by Chapter 55, Article 9 NMSA 1978 is not necessary or effective to perfect a security interest in property subject to:

(a) a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this article for filing of the security interest; or

(b) the following statutes of this state: Sections 66-3-201 through 66-3-204 of the Motor Vehicle Code and any other certificate of title statute covering automobiles, trailers, mobile homes, boats, farm tractors or the like; but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of Chapter 55, Article 9 NMSA 1978 apply to a security interest in that collateral created by him asdebtor; or

(c) a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection (Subsection (2) of Section 55-9-103 NMSA 1978).

(4) Compliance with a statute or treaty described in Subsection (3) of this section is equivalent to the filing of a financing statement under Chapter 55, Article 9 NMSA 1978, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in Section 55-9-103 NMSA 1978 on multiple state transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the provisions of the

statute or treaty; in other respects the security interest is subject to Chapter 55, Article 9 NMSA 1978.

History: 1953 Comp., § 50A-9-302, enacted by Laws 1961, ch. 96, § 9-302; 1966, ch. 31, § 1; 1967, ch. 300, § 1; 1985, ch. 193, § 17; 1987, ch. 247, § 3; 1987, ch. 248, § 50.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 5, Uniform Conditional Sales Act; Section 8, Uniform Trust Receipts Act.

Purposes.1. Subsection (1) states the general rule that to perfect a security interest under this article a financing statement must be filed. Paragraphs (1) (a) to (1) (g) exempt from the filing requirement the transactions described. Subsection (3) further sets out certain transactions to which the filing provisions of this article do not apply, but it does not defer to another state statute on the filing of inventory security interests. The cases recognized are those where suitable alternative systems for giving public notice of a security interest are available. Subsection (4) states the consequences of such other form of notice.

Section 9-303 states the time when a security interest is perfected by filing or otherwise. Part 4 of the article deals with the mechanics of filing: place of filing, form of financing statement and so on.

2. As at common law, there is no requirement of filing when the secured party has possession of the collateral in a pledge transaction (Paragraph (1) (a)), Section 9-305 should be consulted on what collateral may be pledged and on the requirements of possession.

3. Under this article, as under the Uniform Trust Receipts Act, filing is not effective to perfect a security interest in instruments. See Section 9-304(1).

4. Where goods subject to a security interest are left in the debtor's possession, the only permanent exception from the general filing requirement is that stated in Paragraph (1) (d): purchase money security interests in consumer goods. For temporary exceptions, see Sections 9-304(5) (a) and 9-306.

In many jurisdictions under prior law security interests in consumer goods under conditional sale or bailment leases were not subject to filing requirements. Paragraph (1) (d) follows the policy of those jurisdictions. The paragraph changes prior law in jurisdictions where all conditional sales and bailment leases were subject to a filing requirement, except that filing is required for purchase money security interests in consumer fixtures to attain priority under Section 9-313 against real estate interests.

Although the security interests described in Paragraph (1) (d) are perfected without filing, Section 9-307(2) provides that unless a financing statement is filed certain buyers

may take free of the security interest even though perfected. See that section and the comment thereto.

On filing for security interests in motor vehicles under certificate of title laws see Subsection (3) of this section.

5. A financing statement must be filed to perfect a security interest in accounts except for the transactions described in Paragraphs (1) (e) and (g). It should be noted that this article applies to sales of accounts and chattel paper as well as to transfers thereof for security (Section 9-102(1) (b)); the filing requirement of this section applies both to sales and to transfers thereof for security. In this respect this article follows many of the pre-code statutes regulating assignments of accounts receivable.

Over forty jurisdictions had enacted accounts receivable statutes. About half of these statutes required filing to protect or perfect assignments; of the remainder, one was a so-called "book-marking" statute and the others validated assignments without filing. This article adopts the filing requirement, on the theory that there is no valid reason why public notice is less appropriate for assignments of accounts than for any other type of nonpossessory interest. Section 9-305, furthermore, excludes accounts from the types of collateral which may be the subject of a possessory security interest: filing is thus the only means of perfection contemplated by this article. See Section 9-306 on accounts as proceeds.

The purpose of the Subsection (1) (e) exemption is to save from

ex post facto invalidation casual or isolated assignments: some accounts receivable statutes were so broadly drafted that all assignments, whatever their character or purpose, fell within their filing provisions. Under such statutes many assignments which no one would think of filing might have been subject to invalidation. The Paragraph (1) (e) exemption goes to that type of assignment. Any person who regularly takes assignments of any debtor's accounts should file. In this connection Section 9-104 (f) which excludes certain transfers of accounts from the article should be consulted.

Assignments of interests in trusts and estates are not required to be filed because they are often not thought of as collateral comparable to the types dealt with by this article. Assignments for the benefit of creditors are not required to be filed because they are not financing transactions and the debtor will not ordinarily be engaging in further credit transactions.

6. With respect to the Paragraph (1) (f) exemptions, see the sections cited therein and comments thereto.

7. The following example will explain the operation of Subsection (2): Buyer buys goods from seller who retains a security interest in them which he perfects. Seller assigns the perfected security interest to X. The security interest, in X's hands and without further steps on his part, continues perfected against

Buyer's transferees and creditors. If, however, the assignment from Seller to X was itself intended for security (or was a sale of accounts or chattel paper), X must take whatever steps may be required for perfection in order to be protected against

8. Subsection (3) exempts from the filing provisions of this article transactions as to which an adequate system of filing, state or federal, has been set up outside this article and Subsection (4) makes clear that when such a system exists perfection of a relevant security interest can be had only through compliance with that system (i.e., filing under this article is not a permissible alternative).

Examples of the type of federal statute referred to in Paragraph (3) (a) are the provisions of 17 U.S.C. §§ 28, 30 (copyrights), 49 U.S.C. § 1403 (aircraft), 49 U.S.C. § 20(c) (railroads). The Assignment of Claims Act of 1940, as amended, provides for notice to contracting and disbursing officers and to sureties on bonds but does not establish a national filing system and therefore is not within the scope of Paragraph (3) (a). An assignee of a claim against the United States, who must of course comply with the Assignment of Claims Act, must also file under this article in order to perfect his security interest against creditors and transferees of his assignor.

Some states have enacted central filing statutes with respect to security transactions in kinds of property which are of special importance in the local economy. Subsection (3) adopts such statutes as the appropriate filing system for such property.

In addition to such central filing statutes many states have enacted certificate of title laws covering motor vehicles and the like. Subsection (3) exempts transactions covered by such laws from the filing requirements of this article.

For a discussion of the operation of state motor vehicle certificate of title laws in interstate contexts, see Comment 4 to Section 9-103.

9. Perfection of a security interest under a state or federal statute of the type referred to in Subsection (3) has all the consequences of perfection under the provisions of this article, Subsection (4).

Cross references.Point 1: Section 9-303 and Part 4.

Point 2: Section 9-305.

Point 3: Section 9-304(1).

Point 4: Section 9-307(2).

Point 5: Sections 9-102(1) (b), 9-104(f) and 9-305.

Point 6: Sections 4-208 and 9-113.

Definitional cross references."Account". Section 9-106.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Delivery". Section 1-201.

"Document". Section 9-105.

"Equipment". Section 9-109.

"Fixture". Section 9-313.

"Fixture filing". Section 9-313.

"Instrument". Section 9-105.

"Inventory". Section 9-109.

"Proceeds". Section 9-306.

"Purchase". Section 1-201.

"Purchase money security interest". Section 9-107.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

I. General Consideration.

The 1987 amendment. - Laws 1987, ch. 247, § 3, effective July 1, 1987, inserting "or boat" in Subsection (1)(d) and making minor stylistic changes including the substitution of NMSA citations for UCC citations throughout the section, was approved on April 9, 1987. However, Laws 1987, ch. 248, § 50, effective June 19, 1987, inserting "or in securities (Section 55-8-321 NMSA 1978)" in Subsection (1)(f) and making minor stylistic changes throughout the section, was approved later on April 9, 1987. The section is set out as amended by Laws 1987, ch. 248, § 50. See 12-1-8 NMSA 1978.

Purpose to inform others of lien on property. - Generally, to have constructive notice in regard to personalty or realty, it is essential that the persons against whom such notice is operative, had they wished to have inquired, could readily have learned that another possessed a lien on the property of interest. Reconstruction Fin. Corp. v. Stephens, 118 F. Supp. 565 (D.N.M. 1954) (decided under former law).

Effect of failure to record. - Failure to acknowledge and record conditional sales contract renders it void as to subsequent mortgagees in good faith and purchasers for value without notice. Loomis Mach. Co. v. Proctor, 41 N.M. 519, 71 P.2d 1029 (1936) (decided under former law).

But assignment need not be recorded. - Chapter 74 of Laws 1917, requiring recordation of conditional sales contracts, did not provide for recordation of assignment of such contract. Beebe v. Fouse, 27 N.M. 194, 199 P. 364 (1921) (decided under former law).

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 35 Am. Jur. 2d Fixtures § 72; 68 Am. Jur. 2d Secured Transactions §§ 31, 36, 38, 92, 95, 98, 125, 128, 130, 134, 162, 177; 69 Am. Jur. 2d Secured Transactions §§ 345, 346, 351, 357, 360, 362, 364, 376, 407, 595.
Creditor levying upon subject of unfiled conditional sales contract under prior judgment, 55 A.L.R. 1137.
Right of receiver of conditional vendee to avail himself of defects in filing contract, 61 A.L.R. 975.
Refiling when goods are removed from district where contract is filed, 68 A.L.R. 554.
Trust receipts as conditional sale within filing statute, 168 A.L.R. 379.
Registration of mortgages or other liens on personal property in case of residents of

other states, 10 A.L.R.2d 764.
Necessity that mortgage covering oil and gas lease be recorded as real estate mortgage, and/or filed or recorded as chattel mortgage, 34 A.L.R.2d 902.
Filing or recording as factor in determining relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like, 72 A.L.R.2d 351.
What constitutes "security interest" as to which financing statement must be filed under U.C.C. § 9-302, 11 A.L.R.3d 1231.
6A C.J.S. Assignments § 91; 14 C.J.S. Chattel Mortgages § 295; 72 C.J.S. Pledges § 23; 78 C.J.S. Sales § 576.

II. Motor Vehicles.

When filing not necessary to perfect security interest. - Under the wording of this section, it is not necessary to file a financing statement pursuant to the code in order to perfect a security interest in a motor vehicle required to be registered and having a certificate of title issued by this state. 1961-62 Op. Att'y Gen. No. 62-30.

§ 55-9-303. When security interest is perfected; continuity of perfection.

(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in Sections 9-302 [55-9-302 NMSA 1978], 9-304 [55-9-304 NMSA 1978], 9-305 [55-9-305 NMSA 1978] and 9-306 [55-9-306 NMSA 1978]. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

(2) If a security interest is originally perfected in any way permitted under this article and is subsequently perfected in some other way under this article, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this article.

History: 1953 Comp., § 50A-9-303, enacted by Laws 1961, ch. 96, § 9-303.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The term "attach" is used in this article to describe the point at which property becomes subject to a security interest. The requisites for attachment are stated in Section 9-203. When it attaches a security interest may be either perfected or unperfected: "Perfected" means that the secured party has taken all the steps required by this article as specified in the several sections listed in Subsection (1). A perfected

security interest may still be or become subordinate to other interests (see Section 9-312) but in general after perfection the secured party is protected against creditors and transferees of the debtor and in particular against any representative of creditors in insolvency proceedings instituted by or against the debtor. Subsection (1) states the truism that the time of perfection is when the security interest has attached and any necessary steps for perfection (such as taking possession or filing) have been taken. If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches.

2. The following example will illustrate the operation of Subsection (2): A bank which has issued a letter of credit honors drafts drawn under the credit and receives possession of the negotiable bill of lading covering the goods shipped. Under Sections 9-304(2) and 9-305 the bank now has a perfected security interest in the document and the goods. The bank releases the bill of lading to the debtor for the purpose of procuring the goods from the carrier and selling them. Under Section 9-304(5) the bank continues to have a perfected security interest in the document and goods for 21 days. The bank files before the expiration of the 21 day period. Its security interest now continues perfected for as long as the filing is good. The goods are sold by the debtor. The bank continues to have a security interest in the proceeds of the sale to the extent stated in Section 9-306.

If the successive stages of the bank's security interest succeed each other without an intervening gap, the security interest is "continuously perfected" and the date of perfection is when the interest first became perfected (i. e., in the example given, when the bank received possession of the bill of lading against honor of the drafts). If, however, there is a gap between stages - for example, if the bank does not file until after the expiration of the 21-day period specified in Section 9-304(5), the collateral still being in the debtor's possession - then, the chain being broken, the perfection is no longer continuous. The date of perfection would now be the date of filing (after expiration of the 21-day period); the bank's interest might now become subject to attack under Section 60 of the Federal Bankruptcy Act and would be subject to any interests arising during the gap period which under Section 9-301 take priority over an unperfected security interest.

The rule of Subsection (2) would also apply to the case of collateral brought into this state subject to a security interest which became perfected in another state or jurisdiction. See Section 9-103(1) (d).

Cross references.Sections 9-302, 9-304, 9-305 and 9-306.

Point 1: Sections 9-204 and 9-312.

Point 2: Sections 9-103(1) (d) and 9-301.

Definitional cross references."Attach". Section 9-203.

"Security interest". Section 1-201.

ANNOTATION

Steps required for perfection may be taken in any order. - If a financing statement is filed, value is extended, and a security agreement is executed, then there is a security interest in the described collateral. These steps can be taken in any order and priority is given to the security interest which is filed first, even if that security interest has not attached at the time of filing. Waterfield v. Burnett, 21 Bankr. 752 (Bankr. D.N.M. 1982).

Attachment and perfection upon delivery of goods to debtor. - Where vendor from whom business owner purchased inventory provided delivery of the items in its own trucks and at its own risk, and all sales were for cash on delivery, business owner acquired rights in the collateral when it was delivered, and the bank's security interest in his inventory "now owned or hereafter acquired" attached at that point and was perfected. National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975).

Law reviews. - For comment on Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), see 8 Nat. Resources J. 183 (1968).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions § 38; 69 Am. Jur. 2d Secured Transactions §§ 345, 357, 358, 380, 406, 421, 422, 517, 542, 543.
6A C.J.S. Assignments § 91; 14 C.J.S. Chattel Mortgages § 290; 72 C.J.S. Pledges § 22; 78 C.J.S. Sales § 572.

§ 55-9-304. Perfection of security interest in instruments, documents and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession.

(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than certificated securities or instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in Subsections (4) and (5) of this section and Subsections (2) and (3) of Section 55-9-306 NMSA 1978 on proceeds.

(2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected

during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments (other than certificated securities) or negotiable documents is perfected without filing or the taking of possession for a period of twenty-one days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of twenty-one days without filing where a secured party having a perfected security interest in an instrument (other than a certificated security), a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor:

(a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transhipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to Subsection (3) of Section 55-9-312 NMSA 1978; or

(b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

(6) After the twenty-one-day period in Subsections (4) and (5) of this section, perfection depends upon compliance with applicable provisions of Chapter 55, Article 9 NMSA 1978.

History: 1953 Comp., § 50A-9-304, enacted by Laws 1961, ch. 96, § 9-304; 1985, ch. 193, § 18; 1987, ch. 248, § 51.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 3 and 8(1), Uniform Trust Receipts Act.

Purposes.1. For most types of property, filing and taking possession are alternative methods of perfection. For some types of intangibles (i. e., accounts and general intangibles) filing is the only available method (see Section 9-305 and Point 1 of comment thereto). With respect to instruments Subsection (1) provides that, except for the cases of "temporary perfection" covered in Subsections (4) and (5), taking possession is the only available method; this provision follows the Uniform Trust Receipts Act. The rule is based on the thought that where the collateral consists of instruments, it is universal practice for the secured party to take possession of them in

pledge; any surrender of possession to the debtor is for a short time; therefore it would be unwise to provide the alternative of perfection for a long period by filing which, since it in no way corresponds with commercial practice, would serve no useful purpose.

For similar reasons, filing is not permitted as to money.

Subsection (1) further provides that filing is available as a method of perfection for security interests in chattel paper and negotiable documents, which also come within Section 9-305 on perfection by possession. Chattel paper is sometimes delivered to the assignee, sometimes left in the hands of the assignor for collection; Subsection (1) allows the assignee to perfect his interest by filing in the latter case. Negotiable documents may be, and usually are, delivered to the secured party; Subsection (1) follows the Uniform Trust Receipts Act in allowing filing as an alternative method of perfection. Perfection of an interest in goods through a nonnegotiable document is covered in Subsection (3).

2. Subsection (2), following prior law and consistently with the provisions of Article 7, takes the position that, so long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document and the proper way of dealing with such goods is through the document. Perfection therefore is to be made with respect to the document and, when made, automatically carries over to the goods. Any interest perfected directly in the goods while the document is outstanding (for example, a chattel mortgage type of security interest on goods in a warehouse) is subordinated to an outstanding negotiable document.

3. Subsection (3) takes a different approach to the problem of goods covered by a nonnegotiable document or otherwise in the possession of a bailee who has not issued a negotiable document. Here title to the goods is not looked on as being locked up in the document and the secured party may perfect his interest directly in the goods by filing as to them. The subsection states two other methods of perfection: issuance of the document in the secured party's name (as consignee of a straight bill of lading or the person to whom delivery would be made under a nonnegotiable warehouse receipt) and receipt of notification of the secured party's interest by the bailee which, under Section 9-305, is looked on as equivalent to taking possession by the secured party.

4. Subsections (4) and (5) follow the Uniform Trust Receipts Act in giving perfected status to security interests in instruments and documents for a short period although there has been no filing and the collateral is in the debtor's possession. The period of 21 days is chosen to conform to the provisions of Section 60 of the Federal Bankruptcy Act. There are a variety of legitimate reasons - some of them are described in Subsections (5) (a) and (5) (b) - why such collateral has to be temporarily released to a debtor and no useful purpose would be served by cluttering the files with records of such exceedingly short term transactions. Under Subsection (4) the 21 day perfection runs from the date of attachment; there is no limitation on the purpose for which the debtor is in possession but the secured party must have given new value under a written security agreement. Under Subsection (5) the 21 day perfection runs from the

date a secured party who already has a perfected security interest turns over the collateral to the debtor (an example is a bank which has acquired a bill of lading by honoring drafts drawn under a letter of credit and subsequently turns over the bill of lading to its customer); there is no new value requirement but the turnover must be for one or more of the purposes stated in Subsections (5) (a) and (5) (b). Note that while Subsection (4) is restricted to instruments and

negotiable documents, Subsection (5) extends to goods covered by nonnegotiable documents as well. Thus the letter of credit bank referred to in the example could make a subsection (5) turnover without regard to the form of the bill of lading, provided that, in the case of a nonnegotiable document, it had previously perfected its interest under one of the methods stated in Subsection (3). But note that the discussion of Subsection (5) in this comment deals only with perfection. Priority of a security interest in inventory after surrender of the document depends on compliance with the requirements of Section 9-312(3) on notice to prior inventory financer.

Finally, it should be noted that the 21 days applies only to the documents and to the goods obtained by surrender thereof. If the goods are sold, the security interest will continue in proceeds for only 10 days under Section 9-306, unless a further perfection occurs as to the security interest in proceeds.

Cross references.Article 7 and Sections 9-303, 9-305 and 9-312(3).

Definitional cross references."Chattel paper". Section 9-105.

"Debtor". Section 9-105.

"Document". Section 9-105.

"Goods". Section 9-105.

"Instrument". Section 9-105.

"Receives" notification. Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

"Written". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, inserted "certificated securities or" in the second sentence of Subsection (1), inserted "(other than certificated securities)" in Subsection (4), inserted "(other than a certificated security)" in Subsection (5), and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 107; 68 Am. Jur. 2d Secured Transactions §§ 14, 38, 169; 69 Am. Jur. 2d Secured Transactions §§ 345, 357, 368, 376, 477, 504.
Trust receipts, 101 A.L.R. 453; 168 A.L.R. 359.
6A C.J.S. Assignments § 91; 14 C.J.S. Chattel Mortgages § 290; 72 C.J.S. Pledges § 22; 78 C.J.S. Sales § 572.

§ 55-9-305. When possession by secured party perfects security interest without filing.

A security interest in letters of credit and advices of credit (Paragraph (a) of Subsection 2 of Section 55-5-116 NMSA 1978), goods, instruments (other than certificated securities), money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in Chapter 55, Article 9 NMSA 1978. The security interest may be otherwise perfected as provided in that article before or after the period of possession by the secured party.

History: 1953 Comp., § 50A-9-305, enacted by Laws 1961, ch. 96, § 9-305; 1985, ch. 193, § 19; 1987, ch. 248, § 52.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. As under the common law of pledge, no filing is required by this article to perfect a security interest where the secured party has possession of the collateral. Compare Section 9-302(1) (a). This section permits a security interest to be perfected by transfer of possession only when the collateral is goods, instruments, documents or chattel paper: that is to say, accounts and general intangibles are excluded. See Section 5-116 for the special case of assignments of letters and advices of credit. A security interest in accounts and general intangibles - property not ordinarily represented by any writing whose delivery operates to transfer the claim - may under this article be perfected only by filing, and this rule would not be affected by the fact that

a security agreement or other writing described the assignment of such collateral as a "pledge". Section 9-302(1) (e) exempts from filing certain assignments of accounts which are out of the ordinary course of financing: such exempted assignments are perfected when they attach under Section 9-303(1); they do not fall within this section.

2. Possession may be by the secured party himself or by an agent on his behalf: it is of course clear, however, that the debtor or a person controlled by him cannot qualify as such an agent for the secured party. See also the last sentence of Section 9-205. Where the collateral (except for goods covered by a negotiable document) is held by a bailee, the time of perfection of the security interest, under the second sentence of the section, is when the bailee receives notification of the secured party's interest: this rule rejects the common law doctrine that it is necessary for the bailee to attorn to the secured party or acknowledge that he now holds on his behalf.

3. The third sentence of the section rejects the "equitable pledge" theory of relation back, under which the taking possession was deemed to relate back to the date of the original security agreement. The relation back theory has had little vitality since the 1938 revision of the Federal Bankruptcy Act, which introduced in Section 60a provisions designed to make such interests voidable as preferences in bankruptcy proceedings. This section now brings state law into conformity with the overriding federal policy: where a pledge transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected, before that under the rules stated in Section 9-204. The only exception to this rule is the short twenty-one day period of perfection provided in Section 9-304(4) and (5) during which a debtor may have possession of specified collateral in which there is a perfected security interest.

Cross references.Sections 5-116, 9-204, 9-302, 9-303 and 9-304.

Definitional cross references."Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Documents". Section 9-105.

"Goods". Section 9-105.

"Instruments". Section 9-105.

"Receives" notification. Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, inserted "(other than certificated securities)" in the first sentence and made minor stylistic changes throughout the section.

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 107; 68 Am. Jur. 2d Secured Transactions §§ 11, 13, 14, 31, 38, 49, 50, 52, 53, 55, 58 to 60, 65, 72 to 78, 83, 98, 125, 147, 148, 153, 156, 165 to 174, 177; 69 Am. Jur. 2d Secured Transactions §§ 201, 243, 256, 285, 345 to 351, 357, 359, 365, 368 to 377, 380, 445, 473, 517, 592.
Priority, as between holder of unfiled or unrecorded chattel mortgage who secures possession of goods or chattels, and subsequent purchaser or encumbrancer, 53 A.L.R.2d 936.
6A C.J.S. Assignments § 91; 14 C.J.S. Chattel Mortgages §§ 144, 290; 72 C.J.S. Pledges § 22; 78 C.J.S. Sales § 572.

§ 55-9-306. "Proceeds"; secured party's rights on disposition of collateral.

(1) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds". All other proceeds are "non-cash proceeds".

(2) Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds, including collections, received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless:

(a) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or

(b) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or

(c) the security interest in the proceeds is perfected before the expiration of the ten-day period.

Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this article for original collateral of the same type.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:

(a) in identifiable non-cash proceeds and in separate deposit accounts containing only proceeds;

(b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and

(d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is:

(i) subject to any right of set-off; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under Paragraphs (a) through (c) of this Subsection (4).

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

(a) if the goods were collateral at the time of sale, for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must

file;

(b) an unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under Section 9-308 [55-9-308 NMSA 1978];

(c) an unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under Paragraph (a);

(d) a security interest of an unpaid transferee asserted under Paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

History: 1953 Comp., § 50A-9-306, enacted by Laws 1961, ch. 96, § 9-306; 1968, ch. 12, § 2; 1985, ch. 193, § 20.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 10, Uniform Trust Receipts Act.

Purposes.1. This section states a secured party's right to the proceeds received by a debtor on disposition of collateral and states when his interest in such proceeds is perfected.

It makes clear that insurance proceeds from casualty loss of collateral are proceeds within the meaning of this section.

As to the proceeds of consigned goods, see Section 9-114 and the comment thereto.

2. (a) Whether a debtor's sale of collateral was authorized or unauthorized, prior law generally gave the secured party a claim to the proceeds. Sometimes it was said that the security interest attached to the "property" received in substitution; sometimes it was said the debtor held the proceeds as "trustee" or "agent" for the secured party. Whatever the formulation of the rule, the secured party, if he could identify the proceeds, could reclaim them or their equivalent from the debtor or his trustee in bankruptcy. This section provides new rules for insolvency proceedings. Paragraphs 4(a) to (c) substitute specific rules of identification for general principles of tracing. Paragraph 4(d) limits the security interest in proceeds not within these rules to an amount of the debtor's cash and deposit accounts not greater than cash proceeds received within ten days of insolvency proceedings less the cash proceeds during this period already paid over and less the amounts for which the security interest is recognized under Paragraphs 4(a) to (c).

(b) Subsections (2) and (3) make clear that the four-month period for calculating a

voidable preference in bankruptcy begins with the date of the secured party's obtaining the security interest in the original collateral and not with the date of his obtaining control of the proceeds. The interest in the proceeds "continues" as a perfected interest if the original interest was perfected; but the interest ceases to be perfected after the expiration of ten days unless a filed financing statement covered the original collateral and the proceeds are collateral of a type as to which a security interest could be perfected by a filing in the same office or unless the secured party perfects his interest in the proceeds themselves - i.e., by filing a financing statement covering them or by taking possession. See Section 9-312(6) and comment thereto for priority of rights in proceeds perfected by a filing as to original collateral.

(c) Where cash proceeds are covered into the debtor's checking account and paid out in the operation of the debtor's business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds. What has been said relates to payments and transfers in ordinary course. The law of fraudulent conveyances would no doubt in appropriate cases support recovery of proceeds by a secured party from a transferee out of ordinary course or otherwise in collusion with the debtor to defraud the secured party.

3. In most cases when a debtor makes an unauthorized disposition of collateral, the security interest, under prior law and under this article, continues in the original collateral in the hands of the purchaser or other transferee. That is to say, since the transferee takes subject to the security interest, the secured party may repossess the collateral from him or in an appropriate case maintain an action for conversion. Subsection (2) codifies this rule. The secured party may claim both proceeds and collateral, but may of course have only one satisfaction.

In many cases a purchaser or other transferee of collateral will take free of a security interest: in such cases the secured party's only right will be to proceeds. The transferee will take free whenever the disposition was authorized; the authorization may be contained in the security agreement or otherwise given. The right to proceeds, either under the rules of this section or under specific mention thereof in a security agreement or financing statement does not in itself constitute an authorization of sale.

Section 9-301 states when transferees take free of unperfected security interests. Sections 9-307 on goods, 9-308 on chattel paper and instruments and 9-309 on negotiable instruments, negotiable documents and securities state when purchasers of such collateral take free of a security interest even though perfected and even though the disposition was not authorized.

4. Subsection (5) states rules to determine priorities when collateral which has been sold is returned to the debtor: for example goods returned to a department store by a dissatisfied customer. The most typical problems involve sale and return of inventory, but the subsection can also apply to equipment. Under the rule of Benedict v. Ratner, failure to segregate such returned goods sometimes led to invalidation of the entire security arrangement. This article rejects the Benedict v. Ratner line of cases (see

Section 9-205 and comment). Subsection (5) (a) of this section reinforces the rule of Section 9-205: as between secured party and debtor (and debtor's trustee in bankruptcy) the original security interest continues on the returned goods. Whether or not the security interest in the returned goods is perfected depends upon factors stated in the text.

Paragraphs (5) (b), (c) and (d) deal with a different aspect of the returned goods situation. Assume that a dealer has sold an automobile and transferred the chattel paper or the account arising on the sale to Bank X (which had not previously financed the car as inventory). Thereafter the buyer of the automobile rightfully rescinds the sale, say for breach of warranty, and the car is returned to the dealer. Paragraph (5) (b) gives the bank as transferee of the chattel paper or the account a security interest in the car against the dealer. For protection against dealer's creditors or purchasers from him (other than buyers in the ordinary course of business, see Section 9-307), Bank X as the transferee, under Paragraph (5) (d), must perfect its interest by taking possession of the car or by filing as to it. Perfection of his original interest in the chattel paper or the account does not automatically carry over to the returned car, as it does under Paragraph (5) (a) where the secured party originally financed the dealer's inventory.

In the situation covered by (5) (b) and (5) (c) a secured party who financed the inventory and a secured party to whom the chattel paper or the account was transferred may both claim the returned goods - the inventory financer under Paragraph (5) (a), the transferee under Paragraphs (5) (b) and (5) (c). With respect to chattel paper, Section 9-308 regulates the priorities. With respect to an account, Paragraph (5) (c) subordinates the security interest of the transferee of the account to that of the inventory financer. However, if the inventory security interest was unperfected, the transferee's interest could become entitled to priority under the rules stated in Section 9-312(5).

In cases of repossession by the dealer and also in cases where the chattel was returned to the dealer by the voluntary act of the account debtor, the dealer's position may be that of a mere custodian; he may be an agent for resale, but without any other obligation to the holder of the chattel paper; he may be obligated to repurchase the chattel, the chattel paper or the account from the secured party or to hold it as collateral for a loan secured by a transferor of the chattel paper or the account.

If the dealer thereafter sells the chattel to a buyer in ordinary course of business in any of the foregoing cases, the buyer is fully protected under Section 2-403(2) as well as under Section 9-307(1), whichever is technically applicable.

Cross references.Sections 9-307, 9-308 and 9-309.

Point 3: Sections 1-205 and 9-301.

Point 4: Sections 2-403(2), 9-205 and 9-312.

Definitional cross references."Account". Section 9-106.

"Bank". Section 1-201.

"Chattel paper". Section 9-105.

"Check". Sections 3-104 and 9-105.

"Collateral". Section 9-105.

"Creditors". Section 1-201.

"Debtor". Section 9-105.

"Deposit account". Section 9-105.

"Goods". Section 9-105.

"Insolvency proceedings". Section 1-201.

"Money". Section 1-201.

"Purchaser". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

I. General Consideration.

Federal law applicable when federal government holds security interest. - Federal law applies instead of state law to determine whether a defendant is liable for conversion of livestock in which the government holds a perfected security interest and whether the

government has an interest in the proceeds. A uniform federal rule is essential to protect the security interests of the United States and to prevent such interests from being detrimentally affected through the uncertainty that would arise from the application of disparate state rules. United States v. Bunker Livestock Comm'n, Inc. 437 F. Supp. 1079 (D.N.M. 1977).

Law reviews. - For comment on Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), see 8 Nat. Resources J. 183 (1968).

For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 29, 33, 38, 61, 130, 170, 171, 184, 186, 188; 69 Am. Jur. 2d Secured Transactions §§ 296, 306, 345, 355, 357, 368, 372, 373, 376, 388, 504, 580.
Validity as to creditors of the buyer or consignee of reservation of title to goods delivered under implied or express authority to resell, 63 A.L.R. 355.
Liability of mortgagor as affected by transaction between chattel mortgagee and purchaser of mortgaged chattel, 93 A.L.R. 1203.
Chattel mortgagee's consent to sale of mortgaged property as waiver of lien, 97 A.L.R. 646.
Personal liability of purchaser of property subject to chattel mortgage, to the mortgagee, 100 A.L.R. 1038.
Rights in proceeds of vehicle collision policy, under "loss-payable" clause, of conditional seller, chattel mortgagee, or the like, of vehicle where there has been improper repossession or foreclosure after damage, 46 A.L.R.2d 992.
Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 A.L.R.3d 1194.
Effect of UCC Article 9 upon conflict, as to funds in debtor's bank account, between secured creditor and bank claiming right of setoff, 3 A.L.R.4th 998.
What constitutes secured party's authorization to transfer collateral free of lien under U.C.C. § 9-306(2), 37 A.L.R.4th 787.
Construction and effect of UCC § 9-311 giving debtor right to transfer his interest in collateral, 45 A.L.R.4th 411.
14 C.J.S. Chattel Mortgages §§ 186, 218, 266; 72 C.J.S. Pledges §§ 28, 36; 78 C.J.S. Sales § 597.

II. Continuity of Security Interest in Collateral and Proceeds.

Ability to transfer collateral does not destroy perfected security interest. - The fact that collateral may be transferred voluntarily or involuntarily does not destroy or adversely

affect a prior perfected security interest. Brummund v. First Nat'l Bank, 99 N.M. 221, 656 P.2d 884 (1983).

When new financing statement not necessary after transfer of property. - Where creditor had no notice or knowledge of a transfer of the property covered by the security agreement by the debtor to the debtor's corporation, it was not necessary for creditor to file a new financing statement, showing the transferee as a new debtor, to preserve their lien under the security agreement. Ryan v. Rolland, 434 F.2d 353 (10th Cir. 1970).

Identifiable proceeds might be goods purchased with money received from sale of original collateral. Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967).

§ 55-9-307. Protection of buyers of goods. (Effective until July 1, 1992.)

(1) A buyer in ordinary course of business (Subsection (9) of Section 55-1-201 NMSA 1978) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence. A buyer of farm products may be subject to a security interest under the provisions of Sections 1 through 14 [56-13-1 to 56-13-14 NMSA 1978] of the Farm Products Secured Interest Act.

(2) In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods.

(3) A buyer other than a buyer in ordinary course of business (Subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than forty-five days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the forty-five-day period.

History: 1953 Comp., § 50A-9-307, enacted by Laws 1961, ch. 96, § 9-307; 1985, ch. 193, § 21; 1987, ch. 177, § 15.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 9, Uniform Conditional Sales Act; Section 9(2), Uniform Trust Receipts Act.

Purposes.1. This section states when buyers of goods take free of a security interest even though perfected. A buyer who takes free of a perfected security interest of course

takes free of an unperfected one. Section 9-301 should be consulted to determine what purchasers, in addition to the buyers covered in this section, take free of an unperfected security interest.

Article 2 (Sales) states general rules on purchase of goods from a seller with defective or voidable title (Section 2-403).

2. The definition of "buyer in ordinary course of business" in Section 1-201(9) restricts the application of Subsection (1) to buyers (except pawnbrokers) "from a person in the business of selling goods of that kind": thus the subsection applies, in the terminology of this article, primarily to inventory. Subsection (1) further excludes from its operation buyers of "farm products", defined in Section 9-109(3), from a person engaged in farming operations. The buyer in ordinary course of business is defined as one who buys "in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party." This section provides that such a buyer takes free of a security interest, even though perfected, and although he knows the security interest exists. Reading the two provisions together, it results that the buyer takes free if he merely knows that there is a security interest which covers the goods but takes subject if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party.

The limitations which this section imposes on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party has authorized the sale in the security agreement or otherwise, the buyer takes free without regard to the limitations of this section. Section 9-306 states the right of a secured party to the proceeds of a sale, authorized or unauthorized.

3. Subsection (2) deals with buyers of "consumer goods" (defined in Section 9-109). Under Section 9-301(1) (d) no filing is required to perfect a purchase money interest in consumer goods subject to this subsection except motor vehicles required to be registered; filing is required to perfect security interests in such goods other than purchase money interests and, for motor vehicles, even in the case of purchase money interests. (The special case of fixtures has added complications that are apart from the point of this discussion.)

Under Subsection (2) a buyer of consumer goods takes free of a security interest even though perfected a) if he buys without knowledge of the security interest, b) for value, c) for his own personal, family, or household purposes and d) before a financing statement is filed.

<u>As to purchase money security interests which are perfected without filing under Section 9-302(1) (d):</u> A secured party may file a financing statement (although filing is not required for perfection). If he does file, all buyers take subject to the security interest. If he does not file, a buyer who meets the qualifications stated in the preceding paragraph takes free of the security interest.

As to security interests which can be perfected only by filing under Section 9-302: This category includes all nonpurchase money interests, and all interests, whether or not purchase money, in motor vehicles, as well as interests which may be and are filed, though filing was not required for perfection under Section 9-302. (Note that under Section 9-302(3) the filing provisions of this article do not apply when a state has enacted a certificate of title law. Thus where motor vehicles are concerned, in a state having such a certificate of title law, perfection will be under that law.) So long as the security interest remains unperfected, not only the buyers described in Subsection (2) but the purchasers described in Section 9-301 will take free of the interest. After a financing statement has been filed or after compliance with the certificate of title law all subsequent buyers, under the rule of Subsection (2), are subject to the security interest.

4. Although a buyer is of course subject to the Code's system of notice from filing or possession, Subsection (3) makes clear that he will not be subject to future advances under a security interest after the secured party has knowledge that the buyer has purchased the collateral and in any event after 45 days after the purchase unless the advances were made pursuant to a commitment entered into before the expiration of the 45 days and without knowledge of the purchase. Of course, a buyer in ordinary course who takes free of the security interest under Subsection (1) is not subject to any future advances. Compare Sections 9-301(4) and 9-312(7).

Cross references.Point 1: Sections 2-403 and 9-301.

Point 2: Section 9-306.

Point 3: Sections 9-301 and 9-302.

Point 4: Sections 9-301(4) and 9-312(7).

Definitional cross references."Buyer in ordinary course of business". Section 1-201.

"Consumer goods". Section 9-109.

"Goods". Section 9-105.

"Knows" and "Knowledge". Section 1-201.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Pursuant to commitment". Section 9-105.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective January 1, 1988, in Subsection (1), substituted "Section 55-1-201 NMSA 1978" for "Section 1-201", added the second sentence and made minor stylistic changes in Subsection (3).

Compiler's notes. - Laws 1987, ch. 177, § 16 provides for repeal of the act on July 1, 1992, at which time this section will revert to the way it read as amended by Laws 1985, ch. 193, § 21.

Agricultural mortgagees retain special position. - By excluding "farm products" from the classifications of "equipment" and "inventory," in 55-9-103 NMSA 1978, and by expressly providing in this section that a buyer in the ordinary course of business of farm products from a person engaged in farming operations does not take free of a security interest created by the seller, the draftsmen of the code apparently intended to retain the agricultural mortgagee in the special position he achieved under the pre-code case law. Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967).

Law reviews. - For comment on Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), see 8 Nat. Resources J. 183 (1968).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Commercial Code § 67; 68 Am. Jur. 2d Secured Transactions §§ 13, 137, 186, 188; 69 Am. Jur. 2d Secured Transactions §§ 306, 328, 373, 460, 466, 468, 472, 541.
Rights of holder of "trust receipt" and purchaser of goods from one who gave it, 31 A.L.R. 937.
Validity as to creditors of reservation of title to goods delivered under implied or express authority to resell, 63 A.L.R. 355.
Right of conditional vendor against one to whom property has been transferred by an infant, 63 A.L.R. 1371.
Liability for conversion of one claiming under purchaser under conditional sale contract, 73 A.L.R. 799.
Effect of recording right of purchaser from party to conditional sale as affected by actual or apparent authority in party to sell property, 88 A.L.R. 112.
Personal liability of purchaser of property subject to chattel mortgage to the mortgagee, 100 A.L.R. 1038.
Trust receipts, rights and liabilities with respect to purchasers from receiptor or other parties, 101 A.L.R. 460; 168 A.L.R. 359.
Purchaser's right to protection under factor's act where transaction involves exchange of goods, 132 A.L.R. 525.

Construction and effect of UCC § 9-311 giving debtor right to transfer his interest in collateral, 45 A.L.R.4th 411.
Avoidance under 11 USCS § 522(f)(2) of the Bankruptcy Code of 1978 of nonpossessory, nonpurchase-money security interest in debtor's exempt personal property, 55 A.L.R. Fed. 353.
14 C.J.S. Chattel Mortgages §§ 142, 263; 72 C.J.S. Pledges § 45; 77 C.J.S. Sales § 295; 78 C.J.S. Sales § 574.

§ 55-9-307. Protection of buyers of goods. (Effective July 1, 1992.)

(1) A buyer in ordinary course of business (Subsection (9) of Section 1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

(2) In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods.

(3) A buyer other than a buyer in ordinary course of business (Subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45 day period.

History: Laws 1985, ch. 193, § 21.

§ 55-9-308. Purchase of chattel paper and instruments.

A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument:

(a) which is perfected under Section 9-304 [55-9-304 NMSA 1978] (permissive filing and temporary perfection) or under Section 9-306 [55-9-306 NMSA 1978] (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or

(b) which is claimed merely as proceeds of inventory subject to a security interest (Section 9-306 [55-9-306 NMSA 1978]) even though he knows that the specific paper or instrument is subject to the security interest.

History: 1953 Comp., § 50A-9-308, enacted by Laws 1961, ch. 96, § 9-308; 1985, ch. 193, § 22.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 9(a) and 10 of Uniform Trust Receipts Act.

Purposes.1. Chattel paper is defined (Section 9-105) as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods". Such paper has become an important class of collateral in financing arrangements, which may - as in the automobile and some other fields - follow an earlier financing arrangement covering inventory or which may begin with the chattel paper itself.

Arrangements where the chattel paper is delivered to the secured party who then makes collections, as well as arrangements where the debtor, whether or not he is left in possession of the paper, makes the collections, are both widely used, and are known respectively as notification (or "direct collection") and nonnotification (or "indirect collection") arrangements. In the automobile field, for example, when a car is sold to a consumer buyer under an installment purchase agreement and the resulting chattel paper is assigned, the assignee usually takes possession, the obligor is notified of the assignment and is directed to make payments to the assignee. In the furniture field, for an example on the other hand, the chattel paper may be left in the dealer's hands or delivered to the assignee; in either case the obligor may not be notified, and payments are made to the dealer-assignor who receives them under a duty to remit to his assignee. The widespread use of both methods of dealing with chattel paper is recognized by the provisions of this article, which permit perfection of a chattel paper security interest either by filing or by taking possession.

2. Although perfection by filing is permitted as to chattel paper, certain purchasers of chattel paper allowed to remain in the debtor's possession take free of the security interest despite the filing.

Clause (b) of the section deals with the case where the security interest in the chattel paper is claimed merely as proceeds - i. e., on behalf of an inventory financer who has not by some new transaction with the debtor acquired a specific interest in the chattel paper. In that case a purchaser, even though he knows of the inventory financer's proceeds interest, takes priority provided he gives new value and takes possession of the paper in the ordinary course of his business.

The same basic rule applies in favor of a purchaser of other instruments who claims priority against a proceeds interest therein of which he has knowledge. Thus a purchaser of a negotiable instrument might prevail under Clause (b) even though his knowledge of the conflicting proceeds claim precluded his having holder in due course status under Section 9-309.

3. Clause (a) deals with the case where the nonpossessory security interest in the chattel paper is more than a mere claim to proceeds - i. e., exists in favor of a secured party who has given value against the paper, whether or not he financed the inventory whose sale gave rise to it. In this case the purchaser, to take priority, must not only give new value and take possession in the ordinary course of his business; he must also take without knowledge of the existing security interest. Thus a secured party, who has a specific interest in the chattel paper and not merely a claim to proceeds, and who wishes to leave the paper in the debtor's possession can, because of the knowledge requirement, protect himself against purchasers by stamping or noting on the paper the fact that it has been assigned to him.

4. It should be noted that under Section 9-304(1) a security interest in an instrument, negotiable or nonnegotiable, cannot be perfected by filing (except where the instrument constitutes part of chattel paper). Thus the only types of perfected nonpossessory security interest that can arise in an instrument are the temporary 21 day perfection provided for in Section 9-304(4) and (5) or the 10 day perfection in proceeds of Section 9-306. Where such a perfected interest exists in a nonnegotiable instrument, purchasers will take free if they qualify under Clause (a) of the section.

Cross references.Point 1: Sections 9-304(1) and 9-305.

Point 2: Section 9-306.

Point 4: Sections 9-304 and 9-306.

Definitional cross references."Chattel paper". Section 9-105.

"Instrument". Section 9-105.

"Inventory". Section 9-109.

"Knowledge". Section 1-201.

"Proceeds". Section 9-306.

"Purchaser". Section 1-201.

"Security interest". Section 1-201.

"Value". Section 1-201.

ANNOTATION

Notice sufficient to make account debtor liable to assignee. - Here the assignment said that all right, title and interest of contractor to funds due from account debtor were to be assigned to bank, and this assignment was accepted by agent of account debtor. This

was not a case of indirect collection. The account debtor could readily determine that assignee had purchased assignor's right, title and interest in the proceeds. There was no need for the assignee to instruct the account debtor not to pay the assignor. The unconditional language of the assignment was sufficient notice that the assignee was to be paid. First Nat'l Bank v. Mountain States Tel. & Tel. Co., 91 N.M. 126, 571 P.2d 118 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 61, 169 to 171, 186, 188, 191; 69 Am. Jur. 2d Secured Transactions §§ 280, 306, 349, 369, 373, 383, 445, 458, 460, 466, 473, 480, 504, 541.
Bona fides of purchaser of bill or note on an executory consideration, cases where bills or notes are executed on conditional agreements, 3 A.L.R. 987; 100 A.L.R. 1357.
Finance company as holder in due course of paper which it purchases from dealer, 128 A.L.R. 729; 44 A.L.R.2d 8.
Constitutionality, construction and application of statute respecting sale, assignment or transfer of retail installment contracts, 10 A.L.R.2d 447.
Transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title or chattel mortgage, as subject to defenses which chattel purchaser could assert against seller, 44 A.L.R.2d 8.
6A C.J.S. Assignments § 91; 14 C.J.S. Chattel Mortgages § 311; 72 C.J.S. Pledges § 41; 78 C.J.S. Sales § 638.

§ 55-9-309. Protection of purchasers of instruments and documents and securities.

Nothing in this article limits the rights of a holder in due course of a negotiable instrument (Section 55-3-302 NMSA 1978) or a holder to whom a negotiable document of title has been duly negotiated (Section 55-7-501 NMSA 1978) or a bona fide purchaser of a security (Section 55-8-302 NMSA 1978) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this article does not constitute notice of the security interest to such holders or purchasers.

History: 1953 Comp., § 50A-9-309, enacted by Laws 1961, ch. 96, § 9-309; 1987, ch. 248, § 53.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 9(a), Uniform Trust Receipts Act.

Purposes.1. Under this article as at common law and under prior statutes the rights of purchasers of negotiable paper, including negotiable documents of title and investment securities, are determined by the rules of holding in due course and the like which are applicable to the type of paper concerned. (Articles 3, 7, and 8.) This section, as did Section 9(a) of the Uniform Trust Receipts Act, makes explicit the rule which was implicitly but universally recognized under the earlier statutes.

2. Under Section 9-304(1) filing is ineffective to perfect a security interest in instruments (including securities) except those instruments which are part of chattel paper, and of course is ineffective to constitute notice to subsequent purchasers. Although filing is permissible as a method of perfection for a security interest in documents, this section follows the policy of the Uniform Trust Receipts Act in providing that the filing does not constitute notice to purchasers.

Cross references.Articles 3, 7, and 8 and Sections 9-304(1) and 9-308.

Definitional cross references."Bona fide purchaser". Section 8-302.

"Document of title". Section 1-201.

"Duly negotiated". Section 7-501.

"Holder". Section 1-201.

"Holder in due course". Sections 3-302 and 9-105.

"Negotiable instrument". Sections 3-104 and 9-105.

"Notice". Section 1-201.

"Purchaser". Section 1-201.

"Security". Sections 8-102 and 9-105.

"Security interest". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, added "and securities" in the catchline, and in the first sentence substituted NMSA citations for UCC citations and "Section 55-8-302 NMSA 1978" for "Section 8-301".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 9, 13, 14, 61, 79, 167, 169, 186, 188, 199; 69 Am. Jur. 2d Secured Transactions §§ 306, 349, 355, 369, 373, 383, 458, 460, 466, 474, 480, 541, 560.
Constructive notice by record, 63 A.L.R. 1456.
Construction and effect of UCC § 9-311 giving debtor right to transfer his interest in collateral, 45 A.L.R.4th 411.
6A C.J.S. Assignments § 118; 72 C.J.S. Pledges § 43; 78 C.J.S. Sales § 574.

§ 55-9-310. Priority of certain liens arising by operation of law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

History: 1953 Comp., § 50A-9-310, enacted by Laws 1961, ch. 96, § 9-310.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 11, Uniform Trust Receipts Act.

Purposes.1. To provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected.

2. Apart from the Uniform Trust Receipts Act which had a section similar to this one, there was generally no specific statutory rule as to priority between security devices and liens for services or materials. Under chattel mortgage or conditional sales law many decisions made the priority of such liens turn on whether the secured party did or did not have "title". This section changes such rules and makes the lien for services or materials prior in all cases where they are furnished in the ordinary course of the lienor's business and the goods involved are in the lienor's possession. Some of the statutes creating such liens expressly make the lien subordinate to a prior security interest. This section does not repeal such statutory provisions. If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this section provides a rule of interpretation that the lien should take priority over the security interest.

Cross references.Sections 9-102(2), 9-104(c) and 9-312(1).

Definitional cross references."Goods". Section 9-105.

"Person". Section 1-201.

"Security interest". Section 1-201.

ANNOTATION

Prior to the code, prior recorded chattel mortgage was superior to mechanic's lien. Owen v. Waukesha Engine & Equip. Co., 74 N.M. 59, 390 P.2d 439 (1964).

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 6, 13, 29, 32, 116, 131; 69 Am. Jur. 2d Secured Transactions §§ 271, 306, 476, 477, 506, 508 to 513.
Lien for repairs to or services in connection with automobile, 62 A.L.R. 1485.
Priority of statutory lien for storage or repairs as against rights of purchasers, attaching creditors or trustees in bankruptcy which arose while car was in possession of owner after accrual of storage or completion of repairs, 100 A.L.R. 80.
Priority as between lien for repairs and the like, and right of seller under conditional sales contract, 36 A.L.R.2d 198.
Priority as between artisan's lien and chattel mortgage, 36 A.L.R.2d 229.
Lien for storage of automobile, 48 A.L.R.2d 894.
Priority as between mechanic's lien and purchase money mortgage, 73 A.L.R.2d 1407.
8 C.J.S. Bailments § 80 et seq.; 14 C.J.S. Chattel Mortgages §§ 300, 303; 57 C.J.S. Mechanics' Liens § 197; 61A C.J.S. Motor Vehicles § 754; 72 C.J.S. Pledges § 23; 78 C.J.S. Sales § 573.

§ 55-9-311. Alienability of debtor's rights; judicial process.

The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.

History: 1953 Comp., § 50A-9-311, enacted by Laws 1961, ch. 96, § 9-311.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. To make clear that in all security transactions under this article, the debtor has an interest (whether legal title or an equity) which he can dispose of and which his creditors can reach.

2. Some jurisdictions have held that when a mortgagee or conditional seller has "title" to the collateral, creditors may not proceed against the mortgagor's or vendee's interest by levy, attachment or other judicial process. This section changes those rules by providing that in all security interests the debtor's interest in the collateral remains subject to claims of creditors who take appropriate action. It is left to the law of each state to determine the form of "appropriate process".

3. Where the security interest is in inventory, difficult problems arise with reference to attachment and levy. Assume that a debt of $100,000 is secured by inventory worth twice that amount. If by attachment or levy certain units of the inventory are seized, the determination of the debtor's equity in the units seized is not a simple matter. The

section leaves the solution of this problem to the courts. Procedures such as marshalling may be appropriate.

Cross references.Sections 9-301(4), 9-307(3) and 9-312(7).

Definitional cross references."Collateral". Section 9-105.

"Debtor". Section 9-105.

"Rights". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

Debtor may transfer property covered by the security agreement without notifying the creditor or securing his or its consent to such a transfer. Ryan v. Rolland, 434 F.2d 353 (10th Cir. 1970).

Ability to transfer collateral does not affect security interest. - The fact that collateral may be transferred voluntarily or involuntarily does not destroy or adversely affect a prior perfected security interest. Brummond v. First Nat'l Bank, 99 N.M. 221, 656 P.2d 884 (1983).

Security agreement may make transfer an event of default. - A provision in a security agreement may forbid transfer of collateral without prior consent or make such a transfer a default. Once the parties have agreed to such a security agreement provision, and that a violation thereof constitutes a default, the security agreement provision will be enforced to the extent that it makes a transfer an event of default. Brummond v. First Nat'l Bank, 99 N.M. 221, 656 P.2d 884 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment § 144; 30 Am. Jur. 2d Executions § 177; 68 Am. Jur. 2d Secured Transactions § 198; 69 Am. Jur. 2d Secured Transactions §§ 211 to 213, 253, 254, 261, 271, 276, 306, 459, 460, 641, 649.
Interest of vendee under conditional sales contract as subject to attachment, garnishment or execution, 61 A.L.R. 781.
Interest of mortgagor or pledgor in property in possession of mortgagee or pledgee as subject of garnishment, 83 A.L.R. 1383.
Validity of anti-assignment clause in contract, 37 A.L.R.2d 1251.
Construction and effect of UCC § 9-311 giving debtor right to transfer his interest in collateral, 45 A.L.R.4th 411.

14 C.J.S. Chattel Mortgages § 260; 72 C.J.S. Pledges § 43; 78 C.J.S. Sales §§ 575, 635.

§ 55-9-312. Priorities among conflicting security interests in the same collateral.

(1) The rules of priority stated in other sections of this Part and in the following sections shall govern when applicable: Section 55-4-208 NMSA 1978 with respect to the security interests of collecting banks in items being collected, accompanying documents and proceeds; Section 55-9-103 NMSA 1978 on security interests related to other jurisdictions; Section 55-9-114 NMSA 1978 on consignments.

(2) A perfected security interest in crops, for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise, takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

(3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if:

(a) the purchase money security interest is perfected at the time the debtor receives possession of the inventory;

(b) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party, or (ii) before the beginning of the twenty-one-day period where the purchase money security interest is temporarily perfected without filing or possession (Subsection (5) of Section 55-9-304 NMSA 1978);

(c) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(d) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

(4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within twenty days thereafter.

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in Subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

(a) conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection; and

(b) so long as conflicting security interests are unperfected, the first to attach has priority.

(6) For the purposes of Subsection (5) of this section, a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

(7) If future advances are made while a security interest is perfected by filing, the taking of possession, or under Section 55-8-321 on securities, the security interest has the same priority for the purposes of Subsection (5) of this section with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made.

History: 1953 Comp., § 50A-9-312, enacted by Laws 1961, ch. 96, § 9-312; 1985, ch. 193, § 23; 1987, ch. 248, § 54; 1989, ch. 64, § 2.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. In a variety of situations two or more people may claim an interest in the same property. The several sections specified in Subsection (1) contain rules for determining priorities between security interests and such other claims in the situations covered in those sections. For cases not covered in those sections this section states general rules of priority between conflicting security interests.

2. Subsection (2) gives priority to a new value security interest in crops based on a current crop production loan over an earlier security interest in the crop which secured obligations (such as rent, interest or mortgage principal amortization) due more than six months before the crops become growing crops. This priority is not affected by the fact that the person making the crop loan knew of the earlier security interest.

3. Subsections (3) and (4) give priority to a purchase money security interest (defined in Section 9-107) under certain conditions over nonpurchase money interests, which in

this context will usually be interests asserted under after-acquired property clauses. See Section 9-204 on the extent to which after-acquired property interests are validated and Section 9-108 on when a security interest in after-acquired property is deemed taken for new value.

Prior law, under one or another theory, usually contrived to protect purchase money interests over after-acquired property interests (to the extent to which the after-acquired property interest was recognized at all). For example, in the field of industrial equipment financing it was possible, by manipulation of title theory, for the purchase money financer of new equipment (under conditional sale or equipment trust) to protect himself against the claims of prior mortgagees or bondholders under an after-acquired clause in the mortgage or trust indenture: the result was arrived at on the theory that since "title" to the equipment was never in the vendee or lessee there was nothing for the lien of the mortgage to attach to. While this article broadly validates the after-acquired property interest, it also recognizes as sound the preference which prior law gave to the purchase money interest. That policy is carried out in Subsections (3) and (4).

Subsection (4) states a general rule applicable to all types of collateral except inventory: the purchase money interest takes priority if it is perfected when the debtor receives possession of the collateral or within ten [now twenty] days thereafter. As to the ten [now twenty] day grace period, compare Section 9-301(2). The perfection requirement means that the purchase money secured party either has filed a financing statement before that time or has a temporarily perfected interest in goods covered by documents under Section 9-304(4) and (5) (which is continued in a perfected status by filing before the expiration of the 21 day period specified in that section). There is no requirement that the purchase money secured party be without notice or knowledge of the other interest; he takes priority although he knows of it or it has been filed.

Under Subsection (3) the same rule of priority, but without the ten [now twenty] day grace period for filing, applies to a purchase money security interest in inventory, with the additional requirement that the purchase money secured party give notification, as stated in Subsection (3), to any other secured party who filed earlier for the same item or type of inventory. The reason for the additional requirement of notification is that typically the arrangement between an inventory secured party and his debtor will require the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though he has already given a security interest in the inventory to another secured party. The notification requirement protects the inventory financer in such a situation: if he has received notification, he will presumably not make an advance; if he has not received notification (or if the other interest does not qualify as a purchase money interest), any advance he may make will have priority. Since an arrangement for periodic advances against incoming property is unusual outside the inventory field, no notification requirement is included in Subsection (4).

Where the purchase money inventory financing began by possession of a negotiable document of title by the secured party, he must in order to retain priority give the notice

required by Subsection (3) at or before the usual time, i. e., when the debtor gets possession of the inventory, even though his security interest remains perfected for 21 days under Section 9-304(5).

When under these rules the purchase money secured party has priority over another secured party, the question arises whether this priority extends to the proceeds of the original collateral. Under Subsection (4) which deals with non-inventory collateral and where there was no ordinary expectation that the goods would be sold, the section gives an affirmative answer. In the case of inventory collateral under Subsection (3), where it was expected that the goods would be sold and where financing frequently is based on the resulting accounts, chattel paper or other proceeds, the subsection gives an answer limited to the preservation of the purchase money priority only in so far as the proceeds are cash received on or before the delivery of the inventory to a buyer, that is, without the creation of an intervening account to which conflicting rights might attach. The conflicting rights to proceeds consisting of accounts are governed by Subsection (5). See Comment 8.

The foregoing rules applicable to purchase money security interests in inventory apply also to the rights in consigned merchandise. See Section 9-114.

4. Subsection (5) states a rule for determining priority between conflicting security interests in cases not covered in the sections referred to in Subsection (1) or in Subsections (2), (3) and (4) of this section. Note that Subsection (5) applies to cases of purchase money security interests which do not qualify for the special priorities set forth in Subsections (3) and (4).

There is a single priority rule based on precedence in the time as of which the competing parties either filed their security interests or perfected their security interests. The form of the claim to priority, i. e., filing or perfection, may shift from time to time, and the rank will be based on the first filing or perfection so long as there is no intervening period without filing or perfection. Filing may occur as to particular collateral before the collateral comes into existence. Under the standards of Section 9-203 perfection cannot occur as to particular collateral until the collateral itself (and not prior collateral) comes into existence and the debtor has rights therein; but under Subsection (6) of this section the secured party's priority may date from his time of perfection as to the prior collateral, if perfection or filing has been continuously maintained. Subsection (6) provides that a date of filing or perfection as to original collateral is also a date of filing or perfection as to proceeds. This rule should also be read with Section 9-306, which makes it unnecessary to claim proceeds expressly in a financing statement and provides in effect that a filing as to original collateral is also a filing as to proceeds (with exceptions therein stated). Thus, if a financing statement is filed covering inventory, then (subject to the exception involving multistate problems) this filing is also a filing as to the resulting accounts and constitutes the date of filing as to the accounts.

The party who may have had a prior security interest in inventory or may have had the only such security interest does not automatically for that reason have priority as to the

accounts. His claim to accounts may or may not have priority over competing filed claims to accounts. The priority is based on precedence as to the accounts under the rules stated in the preceding paragraph.

5. The operation of this section is illustrated by the examples set forth under this and the succeeding points.

Example 1. A files against X (debtor) on February 1. B files against X on March 1. B makes a nonpurchase money advance against certain collateral on April 1. A makes an advance against the same collateral on May 1. A has priority even though B's advance was made earlier and was perfected when made. It makes no difference whether or not A knew of B's interest when he made his advance.

The problem stated in the example is peculiar to a notice filing system under which filing may be made before the security interest attaches (see Section 9-402). The Uniform Trust Receipts Act, which first introduced such a filing system, contained no hint of a solution and case law under it was unpredictable. This article follows several of the accounts receivable statutes in determining priority by order of filing. The justification for the rule lies in the necessity of protecting the filing system - that is, of allowing the secured party who has first filed to make subsequent advances without each time having, as a condition of protection, to check for filings later than his. Note, however, that his protection is not absolute: if, in the example, B's advance creates a purchase money security interest, he has priority under Subsection (4), or, in the case of inventory, under Subsection (3) provided he has properly notified A. (See further Example 3 below.)

Example 2. A and B make nonpurchase money advances against the same collateral. The collateral is in the debtor's possession and neither interest is perfected when the second advance is made. Whichever secured party first perfects his interest (by taking possession of the collateral or by filing) takes priority and it makes no difference whether or not he knows of the other interest at the time he perfects his own.

This result may be regarded as an adoption, in this type of situation, of the idea, deeply rooted at common law, of a race of diligence among creditors. Subsection (5) (b) adds the thought that so long as neither of the interests is perfected, the one which first attached (i. e., under the advance first made) has priority. The last mentioned rule may be thought to be of merely theoretical interest, since it is hard to imagine a situation where the case would come into litigation without either A or B having perfected his interest. If neither interest had been perfected at the time of the filing of a petition in bankruptcy, of course neither would be good against the trustee in bankruptcy.

Example 3. A has a temporarily perfected (21 day) security interest, unfiled, in a negotiable document in the debtor's possession under Section 9-304(4) or (5). On the fifth day B files and thus perfects a security interest in the same document. On the tenth day A files. A has priority, whether or not he knows of B's interest when he files, because he perfected first and has maintained continuous perfection or filing.

6. The application of the priority rules to after-acquired property must be considered separately for each item of collateral. Priority does not depend only on time of perfection, but may also be based on priority in filing before perfection.

Example 4. On February 1 A makes advances to X under a security agreement which covers "all the machinery in X's plant" and contains an after-acquired property clause. A promptly files his financing statement. On March 1 X acquires a new machine, B makes an advance against it and files his financing statement. On April 1 A, under the original security agreement, makes an advance against the machine acquired March 1. If B's advance creates a purchase money security interest, he has priority under Subsection (4) (provided he filed before X received possession of the machine or within ten days thereafter). If B's advance, although he gave new value, did not create a purchase money interest, A has priority as to both of his advances by virtue of his priority in filing, although the parties perfected simultaneously on March 1 as to the new machine.

The application of the priority rules to proceeds presents special features discussed in Comment 8.

7. The application of the priority rules to future advances is complicated. In general, since any secured party must operate in reference to the code's system of notice, he takes subject to future advances under a priority security interest while it is perfected through filing or possession, whether the advances are committed or noncommitted, and to any advances subsequently made "pursuant to commitment" (Section 9-105) during that period. In the rare case when a future advance is made without commitment while the security interest is perfected temporarily without either filing or possession, the future advance has priority from the date it is made. These rules are more liberal toward the priority of future advances than the corresponding rules applicable to an intervening buyer (Section 9-307(3)) because of the different characteristics of the intervening party. Compare the corresponding rule applicable to an intervening judgment creditor. (Section 9-301(4)).

Example 5. On February 1 A makes an advance against machinery in the debtor's possession and files his financing statement. On March 1 B makes an advance against the same machinery and files his financing statement. On April 1 A makes a further advance, under the original security agreement, against the same machinery (which is covered by the original financing statement and thus perfected when made). A has

priority over B both as to the February 1 and as to the April 1 advance and it makes no difference whether or not A knows of B's intervening advance when he makes his second advance.

A wins, as to the April 1 advance, because he first filed even though B's interest attached, and indeed was perfected, before the April 1 advance. The same rule would apply if either A or B had perfected through possession. Section 9-204(3) and the comment thereto should be consulted for the validation of future advances.

The same result would be reached even though A's April 1 advance was not under the original security agreement, but was under a new security agreement under A's same financing statement or during the continuation of A's possession.

8. The application of the priority rules of Subsections (5) and (6) to proceeds is shown by the following examples:

Example 6. A files a financing statement covering a described type of inventory then owned or thereafter acquired. B subsequently takes a purchase money security interest in certain inventory described in A's financing statement and achieves priority over A under Subsection (3) as to this inventory. This inventory is then sold, producing proceeds.

If the proceeds of the inventory are instruments or chattel paper, the rights of A and B on the one hand and any adverse claimant to these proceeds on the other are governed by Sections 9-308 and 9-309. If the proceeds are cash, Subsection (3) indicates that B's priority as to the inventory carries over to the cash. Proceeds which are accounts constitute different collateral and the priorities as to the original collateral do not control the priority as to the accounts. Under Sections 9-306 and 9-312(6), A's first filing as to the inventory constitutes a first filing as to the accounts, provided that the same filing office would be appropriate for filing as to accounts under the rules of Section 9-306(3). Therefore, A has priority as to the accounts.

Many parties financing inventory are quite content to protect their first security interest in the inventory itself, realizing that when inventory is sold, someone else will be financing the accounts and the priority for inventory will not run forward to the accounts. Indeed, the cash supplied by the accounts financer will be used to pay the inventory financing. In some situations, the party financing the inventory on a purchase money basis makes contractual arrangements that the proceeds of accounts financing by another be devoted to paying off the first inventory security interest.

Example 7. In the foregoing case, if B had filed directly as to accounts, the date of that filing as to accounts would be compared with the date of A's first filing as to the

inventory, and the first-to-file rule would prevail.

Subsection (6) provides that a filing as to original collateral determines the date of a filing as to the proceeds thereof. This rule implies, of course, that the filing as to the original collateral is effective as to proceeds under the rule of Section 9-306(3).

Example 8. If C had filed as to accounts in Example 6 above before either A or B had filed as to inventory, C's first filing as to accounts would have priority over the filings of A and B, which would also constitute filings as to accounts under the rule just mentioned. A's and B's position as to the inventory gives them no automatic claim to the proceeds of the inventory consisting of accounts against someone who has filed earlier as to accounts. If, on the other hand, either A's or B's filings as to the inventory constituted good filings as to accounts and these filings preceded C's direct filings as to accounts, A or B would outrank C as to the accounts.

If the filings as to inventory were not effective under Subsection (6) for filing as to accounts because a filing for accounts would have to be in a different filing office under Section 9-103(3), these inventory filings would nevertheless be effective for 10 days as to accounts. If the perfection of the security interest in accounts was continued within the 10 days by appropriate filings, then A and B's interests in the accounts would date from the date of filing as to inventory.

Cross references.Sections 9-204(1) and 9-303.

Point 1: Sections 4-208, 9-114, 9-301, 9-304, 9-306, 9-307, 9-308, 9-309, 9-310, 9-313, 9-314, 9-315 and 9-316.

Point 3: Sections 9-108, 9-204, 9-304(4) and (5).

Points 4 to 7: Sections 9-204, 9-301(4), 9-304(4) and (5), 9-306, 9-307(3) and 9-402(1).

Point 8: Sections 9-103(6) and 9-306(3).

Definitional cross references."Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Collecting bank". Section 4-105.

"Debtor". Section 9-105.

"Documents". Section 9-105.

"Give notice". Section 1-201.

"Goods". Section 9-105.

"Instruments". Section 9-105.

"Inventory". Section 9-109.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Proceeds". Section 9-306.

"Purchase money security interest". Section 9-107.

"Pursuant to commitment". Section 9-105.

"Receives notification". Section 1-201.

"Secured party". Section 9-105.

"Security". Sections 8-102 and 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

ANNOTATION

The 1987 amendment, effective June 19, 1987, inserted "or under Section 55-8-321 on securities" in the first sentence of Subsection (7) and made minor stylistic changes throughout the section.

The 1989 amendment, effective June 16, 1989, substituted "twenty days" for "ten days" in Subsection (4).

Priority between landlord's lien and perfected security interest not covered. - Since there is no statutory provision to cover the priority between a statutory landlord's lien and a perfected security interest, the court must rely on existing New Mexico case law to determine the priority between the interests. National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975).

Law reviews. - For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 29, 116, 137, 139, 184, 187; 69 Am. Jur. 2d Secured Transactions §§ 211, 306, 383, 422, 476, 479, 480, 486, 487, 592.
Rights and liabilities of junior chattel mortgagee with respect to mortgaged property, 43 A.L.R. 388.
Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment, 34 A.L.R.4th 665.
14 C.J.S. Chattel Mortgages § 293; 72 C.J.S. Pledges § 23; 78 C.J.S. Sales § 573.

§ 55-9-313. Priority of security interests in fixtures.

(1) In this section and in the provisions of Part 4 of this article referring to fixture filing, unless the context otherwise requires:

(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 filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of Subsection (5) of Section 9-402 [55-9-402 NMSA 1978];

(c) a mortgage is a "construction mortgage" to the extent that 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.

(2) A security interest under this article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this article in ordinary building materials incorporated into an improvement on land.

(3) This article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where:

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days

thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this article; or

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where:

(a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding Paragraph (a) of Subsection (4) but otherwise subject to Subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor 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 secured party gives adequate security for the performance of this obligation.

History: 1953 Comp., § 50A-9-313, enacted by Laws 1961, ch. 96, § 9-313; 1985, ch. 193, § 24.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 7, Uniform Conditional Sales Act.

Purposes.1. Section 9-313 deals with the problem that certain goods which are the subject of chattel financing become so affixed or otherwise so related to real estate that they become part of the real estate, and that chattel interests would be subordinate to real estate interests except as protected by the priorities regulated by the section. These goods are called "fixtures". Some fixtures also retain their chattel nature in that a chattel financing with respect to them may exist and may continue to be recognized, if notice thereof is given to real estate interests in accordance with this section. But this concept does not apply if the goods are integrally incorporated into the real estate.

The term "fixture filing" has been introduced and defined. It emphasizes that when a filing is intended to give the priority advantages herein discussed against real estate interests, the filing must (except as stated below) be for record in the real estate records and indexed therein, so that it will be found in a real estate search.

Since the determination in advance of judicial decision of the question whether goods have become fixtures is a difficult one, no inference may be drawn from a fixture filing that the secured party concedes that the goods are or will become fixtures. The fixture filing may be merely precautionary.

2. "Fixture" is defined to include any goods which become so related to particular real estate that an interest in them arises under real estate law and therefore, goods integrally incorporated into the real estate are clearly fixtures. But under Subsection (2) no security interest exists under Article 9 in ordinary building materials incorporated into an improvement on land.

Goods may be technically "ordinary building materials," e. g., window glass, but if they are incorporated into a structure which as a whole has not become an integral part of the real estate, the rules applicable to the ordinary building materials follow the rules applicable to the structure itself. The outstanding examples presenting this kind of problem are the modern "mobile homes" and the modern prefabricated steel buildings usable as warehouses, garages, factories, etc. In the case of the mobile homes, most of them are erected on leased land and the right of the debtor under a mobile home purchase contract to remove the goods as lessee will make clear that his secured party ordinarily has a similar right. See Paragraph (5) (b).

In cases where mobile homes or prefabricated steel buildings are erected by a person

having an ownership interest in the land, the question into which category the buildings fall is one determined by local law. In general, the governing local law will not be that applicable in determining whether goods have become real property between landlord and tenant, or between mortgagor and mortgagee, or between grantor and grantee, but rather that applicable in a three-party situation, determining whether chattel financing can survive as against parties who acquire rights through the affixation of the goods to the real estate.

The assertion that no security interest exists in ordinary building materials is only for the operation of the priority provisions of this section. It is without prejudice to any rights which the secured party may have against the debtor himself if he incorporated the goods into real estate or against any party guilty of wrongful incorporation thereof in violation of the secured party's rights.

3. Under these concepts the section recognizes three categories of goods: (1) those which retain their chattel character entirely and are not part of the real estate; (2) ordinary building materials which have become an integral part of the real estate and cannot retain their chattel character for purposes of finance and (3) an intermediate class which has become real estate for certain purposes, but as to which chattel financing may be preserved. This third and intermediate class is the primary subject of this section. The demarcation between these classifications is not delineated by this section.

4. In considering fixture priority problems, there will always first be a preliminary question whether real estate interests per se have an interest in the goods as part of real estate. If not, it is immaterial, so far as concerns real estate parties as such, whether a chattel security interest is perfected or unperfected. In no event does a real estate party acquire an interest in a "pure" chattel just because a security interest therein is unperfected. If on the other hand real estate law gives real estate parties an interest in the goods, a conflict arises and this section states the priorities.

(a) The principal exception to the general rule of priority stated in Comment 4(b) based on time of filing or recording is a priority given in Paragraph (4) (a) to purchase money security interests in fixtures as against

prior recorded real estate interests, provided that the purchase money security interest is filed as a fixture filing in the real estate records before the goods become fixtures or within 10 days thereafter. This priority corresponds to one given in Section 9-312(4), and the 10 days of grace represents a reduction of the purchase money priority as against prior interests in the real estate under the present Section 9-313, where the purchase money priority exists even though the security interest is

It should be emphasized that this purchase money priority with the 10-day grace period for filing is limited to rights against

prior real estate interests. There is no such priority with the 10-day grace period as against subsequent real estate interests. The fixture security interest can defeat subsequent real estate interests only if it is filed first and prevails under the usual conveyancing rule recognized in Paragraph (4) (b).

(b) The general principle of priority announced in this section is set forth in Paragraph (4) (b). It is basically that a fixture filing gives to the fixture security interest priority as against other real estate interests according to the usual priority rule of conveyancing, that is, the first to file or record prevails. An apparent limitation to this principle set forth in Paragraph (4) (b), namely that the secured party must have had priority over any interest of a predecessor in title of the conflicting encumbrancer or owner, is not really a limitation, but is an expression of the usual rule that a person must be entitled to transfer what he has. Thus, if the fixture security interest is subordinate to a mortgage, it is subordinate to an interest of an assignee of the mortgage even though the assignment is a later recorded instrument. Similarly if the fixture security interest is subordinate to the rights of an owner, it is subordinate to a subsequent grantee of the owner and likewise subordinate to a subsequent mortgagee of the owner.

(c) A qualification to the rule based on priority of filing or recording is Paragraph (4) (d), where priority based on precedence in filing or recording is preserved, but there is no requirement that as against a judgment lienor of the real estate, the prior filing of the fixture security interest must be in the real estate records. The fixture security interest if perfected first should prevail even though not filed or recorded in real estate records, because generally a judgment creditor is not a reliance creditor who would have searched records. Thus, even a prior filing in the chattel records protects the priority of a fixture security interest against a subsequent judgment lien.

It is hoped that this rule will have the effect of preserving a fixture security interest so filed against invalidation by a trustee in bankruptcy. That would, of course, be the result under Section 60a of the Bankruptcy Act if the time of perfection of the fixture security interest were measured by the judgment creditor test applicable to personal property. It would not be the result if the time of perfection were measured by the purchaser test applicable to real estate. Since the fixture security interest arises against the goods in their capacity as chattels, the bankruptcy courts should apply the judgment creditor test. The effectiveness of the drafting to achieve its purpose cannot be known certainly until the courts adjudicate the question or until it is settled by amendment to Section 60a of the Bankruptcy Act.

The phrase "lien by legal or equitable proceedings" is suggested by Section 70c of the Bankruptcy Act, and is intended to encompass all liens on real estate obtained by any of the creditor action therein described.

(d) A special exception to the usual rule of priority based on precedence in time is the one of Paragraph (4) (c) in favor of holders of security interests in factory and office machines, and in certain replacement domestic appliances, as discussed below. This is not as broad an exception as it might seem. To repeat, a fixture conflict is not reached if

the goods are held as a matter of local law not to have become part of the real estate, which will frequently be the holding for goods of these types. If the opposite is held, the rule of Paragraph (4) (c) operates only if the fixture security interest is perfected before the goods become fixtures. Having been perfected, it would of course have priority over subsequent real estate interests under the rule of Paragraph (4) (b). Since it would in almost all cases be a purchase money security interest, it would also have priority over other real estate interests under the purchase-money priority of Paragraph (4) (a), discussed in Paragraph (a) above. The rule is stated separately because the permitted perfection is by any method permitted by the article, and not exclusively by fixture filing in the real estate records. This rule is made necessary by the confusions of the law as to whether certain machinery and appliances become fixtures.

As an additional point, in the case of machinery, the separate statement of this rule makes clear that it is not overridden by the construction mortgage priority of Subsection (6) discussed in Comment 4(e) below, as would have been true if reliance had been solely on the purchase money priority. Factory and office machines are not always financed as part of a construction mortgage, and the mortgagee should be alert to conflicting chattel financing of these machines.

As to appliances, the rule stated is limited to readily removable replacements, not original installations, of appliances which are consumer goods in the hands of the debtor (Section 9-109). To facilitate financing of original appliances in new dwellings as part of the real estate financing of the dwellings, no special priority is given to chattel financing of original appliances. The section leaves to other law of the state the question whether original installations are fixtures to which the protection accorded by this section to construction mortgages would be applicable. Likewise, it is recognized that (when not supplied by tenants) appliances in commercial apartment buildings are intended as permanent improvements, and no special rule is stated for appliances in that case. The special priority rule here stated in favor of chattel financing is limited to situations where the installation of appliances may not be intended to be permanent, i. e., replacement appliances used by the debtor or his family (consumer goods). The principal effect of the rule is to make clear that a secured party financing occasional replacements of domestic appliances in noncommercial owner-occupied contexts need not concern himself with real estate descriptions or records; indeed, for a purchase money replacement of consumer goods, perfection without any filing will be possible. (The priority of the construction mortgage has no application to replacement appliances.)

(e) The purchase money priority presents a difficult problem in relation to construction mortgages. The latter will ordinarily have been recorded even before the commencement of delivery of materials to the job, and therefore would be prior in rank to the fixture security interests were it not for the problem of the purchase money priority. Subsection (6) expressly gives priority to the construction mortgage recorded before the filing of the fixture security interest, but this priority of a construction mortgage applies only during the construction period leading to the completion of the improvement. As to additions to the building made long after completion of the

improvement, the construction priority will not apply simply because the additions are financed by the real estate mortgagee under an open end clause of his construction mortgage. In such case, the applicable principles will be those of Paragraphs (4) (a) and (4) (b). A refinancing of a construction mortgage has the same priority as the mortgage itself.

The phrase "an obligation incurred for the construction of an improvement" covers both optional advances and advances pursuant to commitment, and both types of advances have the same priority under the section.

5. The section makes it impossible for a fixture supplier to retain a security interest against a contractor, to the possible surprise and deception of real estate interests, unless the debtor has an interest of record in the real estate. See Paragraphs (4) (a) and (b).

On the other hand, these paragraphs do recognize that fixture filing may be necessary when the debtor is in possession of the real estate (e. g., a lessee) even without an interest of record. This possibility of a filing against a debtor who is not in the real estate chain of title makes it necessary to require the furnishing of the name of a record owner in such cases. See Sections 9-402(3), item 3; 9-402(5) and 9-403(7).

6. The status of fixtures installed by tenants (as well as such persons as licensees and holders of easements) is defined by Paragraph (5) (b) to the effect that if the debtor (tenant or other interest mentioned) has the right to remove the fixture as against a real estate interest, the secured party has priority over that real estate interest.

7. Real estate lenders and title companies will have little difficulty in locating relevant fixture security interests applicable to particular parcels of real estate because of the provisions as to real estate description in fixture filings, the indexing thereof, and other related provisions in Part 4 of Article 9.

8. Real estate lending is typically long-term, and is usually done by institutional investors who can afford to take a long view of the matter rather than concentrating on the results of any particular case. It is apparent that the rule which permits and encourages purchase money fixture financing, which in contrast is typically short-term, will result in the modernization and improvement of real estate rather than in its deterioration and will on balance benefit long-term real estate lenders. Because of the short-term character of the chattel financing, it will rarely produce any conflict in fact with the real estate lender. The contrary rule would chill the availability of short-term credit for modernization of real estate by installation of new fixtures and in the long run could not help real estate lenders.

9. Subsection (8) is an important departure from Section 7 of the Uniform Conditional Sales Act and from much other conditional sales legislation. Under the Uniform Conditional Sales Act a conditional vendor could not sever and remove the affixed chattel if a "material injury to the freehold" would result. The courts of various

jurisdictions were in sharp disagreement on the meaning of "material injury"; some held that only physical injury was meant; others adopted the so-called "institutional theory" and denied removal whenever the "going value" of the structure would be materially diminished by the removal. Under these rules the conditional vendor either could not remove at all, or, if he could, could damage the structure on removal without becoming accountable to the real estate claimant. The situation was complicated by the fact that it became increasingly difficult to predict what types of goods the courts in a given jurisdiction would hold not subject to removal.

Subsection (8) abandons the "material injury to the freehold" rule. Instead a secured party entitled to priority may in all cases sever and remove his collateral, subject, however, to a duty to reimburse any real estate claimant (other than the debtor himself) for any physical injury caused by the removal. The right to reimbursement is implemented by the last sentence of Subsection (8) which gives the real estate claimant a statutory right to security or indemnity failing which he may refuse permission to remove. The Subsection (8) rule thus accomplishes two things: it puts an end to the uncertainty which has grown up under the "material injury" rule, while at the same time it protects the real estate claimant under the reimbursement provisions.

Cross references.Sections 2-107, 9-102(1), 9-104(j) and 9-312(1), and Parts 4 and 5.

Definitional cross references."Collateral". Section 9-105.

"Contract". Section 1-201.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Encumbrance". Section 9-105.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Mortgage". Section 9-105.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Purchaser". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Policy of this section is consistent with the majority rule under precode law, in that it gives priority to the fixture security interest over an antecedent interest in the real estate. Honea v. Laco Auto Leasing, Inc., 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

When secured party may remove fixtures. - Where defendant's purchase money security interests in pumping equipment installed by tenant on property leased by plaintiff attached before the equipment became fixtures on the property, such interest was given priority over plaintiff's antecedent interest in the property, and defendant was therefore justified in removing equipment from land when tenant was evicted from property by plaintiff for failure to pay rent. Honea v. Laco Auto Leasing, Inc., 80 N.M. 300, 454 P.2d 782 (Ct. App. 1969).

Law reviews. - For article, "Fixtures and the Uniform Commercial Code in New Mexico," see 4 Nat. Resources J. 109 (1964).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 35 Am. Jur. 2d Fixtures § 61; 55 Am. Jur. 2d Mortgages § 8; 68 Am. Jur. 2d Secured Transactions §§ 31, 157, 158; 69 Am. Jur. 2d Secured Transactions §§ 280, 362, 399, 471, 477, 491, 496, 600.
Right of conditional seller of chattels attached to realty to claim lien on the realty, 58 A.L.R. 1121.
Heating plant as a fixture, or as a part of or attached to realty as between mortgagor and mortgagee and their privies; as between conditional vendor and owner of realty, or purchasers or encumbrancers thereof, 126 A.L.R. 600.
Rights of seller of fixtures retaining title thereto, or a lien thereon, as against purchasers or encumbrancers of the realty, 141 A.L.R. 1283.
Refrigerator or refrigerating plant as fixture, 169 A.L.R. 478.
Sprinkler system as fixture, 19 A.L.R.2d 1300.
Amusement apparatus or device as fixture, 41 A.L.R.2d 664.
Air conditioning plant, equipment, apparatus or the like as fixture, 43 A.L.R.2d 1378.

Electric range as fixture as between mortgagor and mortgagee or successor in interest, 57 A.L.R.2d 1103.
Appliances, accessories, pipes or other articles connected with plumbing as fixtures, 52 A.L.R.2d 222.
36A C.J.S. Fixtures § 1.

§ 55-9-314. Accessions.

(1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accession") over the claims of all persons to the whole except as stated in Subsection (3) and subject to Section 9-315 (1) [55-9-315 (1) NMSA 1978].

(2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in Subsection (3) but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.

(3) The security interests described in Subsections (1) and (2) do not take priority over:

(a) a subsequent purchaser for value of any interest in the whole; or

(b) a creditor with a lien on the whole subsequently obtained by judicial proceedings; or

(c) a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale other than the holder of a perfected security interest purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(4) When under Subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of Part 5 remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor 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 secured party gives adequate security for the performance of this obligation.

History: 1953 Comp., § 50A-9-314, enacted by Laws 1961, ch. 96, § 9-314.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. To state when a secured party claiming an interest in goods installed in or affixed to other goods is entitled to priority over a party with a security interest in the whole.

2. This section changes prior law in that the secured party claiming an interest in a part (e. g., a new motor in an old car) is entitled to priority and has a right to remove even though under other rules of law the part now belongs to the whole.

3. This section does not apply to goods which, for example, are so commingled in a manufacturing process that their original identity is lost. That type of situation is covered in Section 9-315. Section 9-315 should also be consulted for the effect of a financing statement which claims both component parts and the resulting product.

Cross references.Sections 9-203(1), 9-303 and 9-312(1) and Part 5.

Point 3: Section 9-315.

Definitional cross references."Collateral". Section 9-105.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

"Writing". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 160, 161; 69 Am. Jur. 2d Secured Transactions §§ 299, 343, 477, 501, 509.
Accession to property which is the subject of a conditional sale or chattel mortgage, 68 A.L.R. 1242.
Reservation of title by conditional sale of material to manufacturer as affecting articles fabricated or in process of fabrication from the material, 111 A.L.R. 682.
Accession to motor vehicle, 43 A.L.R.2d 813.
1 C.J.S. Accession § 6.

§ 55-9-315. Priority when goods are commingled or processed.

(1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if:

(a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass; or

(b) a financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled.

In a case to which Paragraph (b) applies, no separate security interest in that part of the original goods which has been manufactured, processed or assembled into the product may be claimed under Section 9-314 [55-9-314 NMSA 1978].

(2) When under Subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

History: 1953 Comp., § 50A-9-315, enacted by Laws 1961, ch. 96, § 9-315.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. To state when a secured party whose collateral contributes to a product has priority over others who have conflicting claims in the same product.

2. This section changes the law in some jurisdictions where a security interest in goods (e.g., raw materials) was lost when the goods lost their identity by being commingled or processed. Under this section the security interest continues in the resulting mass or product in the cases stated in Subsection (1).

3. This section applies not only to cases where flour, sugar and eggs are commingled into cake mix or cake, but also to cases where components are assembled into a

machine. In the latter case a secured party is put to an election at the time of filing, by the last sentence of Subsection (1), whether to claim under this section or to claim a security interest in one component under Section 9-314.

4. Subsection (2) is new and is needed because under Subsection (1) it is possible to have more than one secured party claiming an interest in a product. The rule stated treats all such interests as being of equal priority entitled to share ratably in the product.

Cross references.Sections 9-203(1), 9-303, 9-312(1) and 9-314.

Definitional cross references."Goods". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Accession and Confusion § 23; 68 Am. Jur. 2d Secured Transactions § 161; 69 Am. Jur. 2d Secured Transactions §§ 499, 501.
Replevin for an undivided share of the mixed mass in case of confusion of goods, 26 A.L.R. 1015.
Commingling of goods subject to trust receipt, 101 A.L.R. 465; 168 A.L.R. 359.
Confusion of goods by accident, mistake or act of a third person, 39 A.L.R.2d 555.
15A C.J.S. Confusion of Goods §§ 3 to 9.

§ 55-9-316. Priority subject to subordination.

Nothing in this article prevents subordination by agreement by any person entitled to priority.

History: 1953 Comp., § 50A-9-316, enacted by Laws 1961, ch. 96, § 9-316.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.The several preceding sections deal elaborately with questions of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate his claim. Only the person entitled to priority may make such an agreement: his rights cannot be adversely affected by an agreement to which he is not a party.

Cross references.Sections 1-102 and 9-312 (1).

Definitional cross references."Agreement". Section 1-201.

"Person". Section 1-201.

ANNOTATION

A subordination agreement by implication is not recognized; it must be expressed. Western Bank v. Matherly, 106 N.M. 31, 738 P.2d 903 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 69 Am. Jur. 2d Secured Transactions §§ 274, 328, 476 to 478.
14 C.J.S. Chattel Mortgages § 296; 72 C.J.S. Pledges § 23; 78 C.J.S. Sales § 572.

§ 55-9-317. Secured party not obligated on contract of debtor.

The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions.

History: 1953 Comp., § 50A-9-317, enacted by Laws 1961, ch. 96, § 9-317.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 12, Uniform Trust Receipts Act.

Purposes.There were a few common law decisions, mostly in cases involving trust receipts, which suggested, if they did not hold, that a secured party who gave his debtor liberty of sale might be liable (for example, for breach of warranty) on the debtor's contracts of sale. The theory was grounded on the law of agency; the debtor being regarded as selling agent for the secured party as principal. This section rejects that theory. Section 12 of the Uniform Trust Receipts Act provided that the entruster was not subject to liability, merely because of his status as entruster, on sale of the goods subject to trust receipt. This section adopts the policy of the prior act and states it in general terms.

Cross reference.Section 2-210(4).

Definitional cross references."Collateral". Section 9-105.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - Liability of one financing importation of goods for reimbursement of third person who pays charges or duties, 27 A.L.R. 1526. 77 C.J.S. Sales § 359.

§ 55-9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment.

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 9-206 [55-9-206 NMSA 1978] the rights of an assignee are subject to:

(a) all the terms of the contract between the account debtor and assignor and any defense arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding right under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

(4) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

History: 1953 Comp., § 50A-9-318, enacted by Laws 1961, ch. 96, § 9-318; 1985, ch. 193, § 25.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 9(3), Uniform Trust Receipts Act.

Purposes.1. Subsection (1) makes no substantial change in prior law. An assignee has traditionally been subject to defenses or setoffs existing before an account debtor is notified of the assignment. When the account debtor's defenses on an assigned claim arise from the contract between him and the assignor, it makes no difference whether the breach giving rise to the defense occurs before or after the account debtor is notified of the assignment (Paragraph (1) (a)). The account debtor may also have claims against the assignor which arise independently of that contract: an assignee is subject to all such claims which accrue before, and free of all those which accrue after, the account debtor is notified (Paragraph (1) (b)). The account debtor may waive his right to assert claims or defenses against an assignee to the extent provided in Section 9-206.

2. Prior law was in confusion as to whether modification of an executory contract by account debtor and assignor without the assignee's consent was possible after notification of an assignment. Subsection (2) makes good faith modifications by assignor and account debtor without the assignee's consent effective against the assignee even after notification. This rule may do some violence to accepted doctrines of contract law. Nevertheless it is a sound and indeed a necessary rule in view of the realities of large scale procurement. When for example it becomes necessary for a government agency to cut back or modify existing contracts, comparable arrangements must be made promptly in hundreds and even thousands of subcontracts lying in many tiers below the prime contract. Typically the right to payments under these subcontracts will have been assigned. The government, as sovereign, might have the right to amend or terminate existing contracts apart from statute. This subsection gives the prime contractor (the account debtor) the right to make the required arrangements directly with his subcontractors without undertaking the task of procuring assents from the many banks to whom rights under the contracts may have been assigned. Assignees are protected by the provision which gives them automatically corresponding rights under the modified or substituted contract. Notice that Subsection (2) applies only so far as the right to payment has not been earned by performance, and therefore its application ends entirely when the work is done or the goods furnished.

3. Subsection (3) clarifies the right of an account debtor to make payment to his seller-assignor in an "indirect collection" situation (see comment to Section 9-308). So long as the assignee permits the assignor to collect claims or leaves him in possession of chattel paper which does not indicate that payment is to be made at some place other than the assignor's place of business, the account debtor may pay the assignor even though he may know of the assignment. In such a situation an assignee who wants to take over collections must notify the account debtor to make further payments to him.

4. Subsection (4) breaks sharply with the older contract doctrines by denying effectiveness to contractual terms prohibiting assignment of sums due and to become due under contracts of sale, construction contracts and the like. Under the rule as

stated, an assignment would be effective even if made to an assignee who took with full knowledge that the account debtor had sought to prohibit or restrict assignment of the claims.

It is only for the past hundred years that our law has recognized the possibility of assigning choses in action. The history of this development, at law and equity, is in broad outline well known. Lingering traces of the absolute common law prohibition have survived almost to our own day.

There can be no doubt that a term prohibiting assignment of proceeds was effective against an assignee with notice through the nineteenth century and well into the twentieth. Section 151 of the Restatement of Contracts (1932) so states the law without qualification, but the changing character of the law is shown in the proposed Section 154 of the Restatement, Second, Contracts.

The original rule of law has been progressively undermined by a process of erosion which began much earlier than the cited section of the Restatement of Contracts would suggest. The cases are legion in which courts have construed the heart out of prohibitory or restrictive terms and held the assignment good. The cases are not lacking where courts have flatly held assignments valid without bothering to construe away the prohibition. See 4 Corbin on Contracts (1951) §§ 872, 873. Such cases as Allhusen v. Caristo Const. Corp., 303 N.Y. 446, 103 N.E.2d 891 (1952), are rejected by this subsection.

This gradual and largely unacknowledged shift in legal doctrine has taken place in response to economic need: as accounts and other rights under contracts have become the collateral which secures an ever increasing number of financing transactions, it has been necessary to reshape the law so that these intangibles, like negotiable instruments and negotiable documents of title, can be freely assigned.

Subsection (4) thus states a rule of law which is widely recognized in the cases and which corresponds to current business practices. It can be regarded as a revolutionary departure only by those who still cherish the hope that we may yet return to the views entertained some two hundred years ago by the Court of King's Bench.

5. The Federal Assignment of Claims Act of 1940 - to which of course this section is subject - requires that assignments of claims against the United States be filed as provided in that act. Many large business enterprises, situated like the United States in that claims against them are held by hundreds or thousands of subcontractors or suppliers, often require in their contract or purchase order forms that assignments against them be filed in a prescribed way. Subsection (3) requires reasonable identification of the account assigned and recognizes the right of an account debtor to require reasonable proof of the making of the assignment and to that extent validates such requirements in contracts or purchase order forms. If the notification does not contain such reasonable identification or if such reasonable proof is not furnished on request, the account debtor may disregard the assignment and make payment to the

assignor. What is "reasonable" is not left to the arbitrary decision of the account debtor; if there is doubt as to the adequacy either of a notification or of proof submitted after request, the account debtor may not be safe in disregarding it unless he has notified the assignee with commercial promptness as to the respects in which identification or proof is considered defective.

6. If the thing to be assigned is the beneficiary's right under a letter of credit, Section 5-116 should be consulted.

Cross references.Point 1: Section 9-206.

Point 3: Sections 9-205 and 9-308.

Point 4: Section 2-210(2) and (3).

Point 6: Section 5-116.

Definitional cross references."Account". Section 9-106.

"Account debtor". Section 9-105.

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Good faith". Section 1-201.

"Party". Section 1-201.

"Receives" notification. Section 1-201.

"Rights". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Seasonably". Section 1-204.

"Term". Section 1-201.

ANNOTATION

Debtor may raise defenses against assignee of chose in action. - An assignee of a chose in action acquires by virtue of his assignment nothing more than the assignor had, and all equities and defense which could have been raised by the debtor against the assignor are available to the debtor against the assignee. Associates Loan Co. v. Walker, 76 N.M. 520, 416 P.2d 529 (1966).

Debtor not liable until notified of assignment. - In the absence of notice of assignment the debtor may, without incurring liability to the assignee, make payment as directed by the assignor. S & W Trucks, Inc. v. Nelson Auction Serv., Inc., 80 N.M. 423, 457 P.2d 220 (Ct. App. 1969).

And authorizing payment to another deemed insufficient notification. - Merely authorizing payment of a stated sum to a particular person cannot be considered as a notification that such sum had been assigned to the individual to whom payment is authorized. S & W Trucks, Inc. v. Nelson Auction Serv., Inc., 80 N.M. 423, 457 P.2d 220 (Ct. App. 1969).

But when sufficient notification. - Here the assignment said that all right, title and interest of contractor to funds due from account debtor were to be assigned to bank, and this assignment was accepted by agent of account debtor. This was not a case of indirect collection. The account debtor could readily determine that assignee had purchased assignor's right, title and interest in the proceeds. There was no need for the assignee to instruct the account debtor not to pay the assignor. The unconditional language of the assignment was sufficient notice that the assignee was to be paid. First Nat'l Bank v. Mountain States Tel. & Tel. Co., 91 N.M. 126, 571 P.2d 118 (1977).

Under the UCC, receipt and deposit of payments by an account seller were proper, as account debtors may continue making payments to the debtor unless notified of the assignment and of the fact that payments are to be sent to the assignee (creditor). GMA, Inc. v. Boerner, 70 Bankr. 77 (Bankr. D.N.M. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 41, 60, 130; 69 Am. Jur. 2d Secured Transactions §§ 261, 444, 446, 451 to 453, 456, 457.
Rights and duties in respect of property subject of conditional sale as between seller and seller's assignee, 65 A.L.R. 783.
Right as between surety on contractor's bond and assignee of money to become due on contract, 76 A.L.R. 917.
Priority as between assignee of rights of, and subsequent buyer from, conditional seller, 88 A.L.R. 109.
Notice to debtor as affecting priority as between different assignees of same chose in action, 110 A.L.R. 774.
Priority between assignee and surety of contractor who completes contract as to money earned by contractor but unpaid before default, 164 A.L.R. 613.
Constitutionality, construction and application of statute respecting sale, assignment or transfer of retail installment contracts, 10 A.L.R.2d 447.
Validity of anti-assignment clause in contract, 37 A.L.R.2d 1251.
"Insecurity" acceleration or repossession clause as affecting question whether transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title or chattel mortgage is subject to defenses which chattel purchaser could assert against seller, 44 A.L.R.2d 8.
Construction and operation of UCC § 9-318(3) providing that account debtor is

authorized to pay assignor until he receives notification to pay assignee, 100 A.L.R.3d 1218.
6A C.J.S. Assignments §§ 75, 114; 14 C.J.S. Chattel Mortgages § 322; 72 C.J.S. Pledges § 41; 78 C.J.S. Sales § 638.

Part 4

FILING

§ 55-9-401. Place of filing; removal of collateral.

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

(a) when collateral is equipment used in farming operations, or farm products, 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 county clerk 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 county clerk in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown, in the office of the county clerk in the county where the land is located;

(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 9-103 [55-9-103 NMSA 1978], or when the financing statement is filed as a fixture filing (Section 9-313 [55-9-313 NMSA 1978]) and the collateral is goods which are or are to become fixtures, then in the real estate records in the office where a mortgage on the real estate would be filed or recorded;

(c) in all other cases, in the office of the secretary of state;

(2) A filing which 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 article 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.

(3) A filing which 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) The rules stated in Section 9-103 [55-9-103 NMSA 1978] determine whether filing is necessary in this state.

(5) Notwithstanding the preceding subsections, and subject to Subsection (3) of Section 9-302 [55-9-302 NMSA 1978] and to Sections 62-13-8 through 62-13-12.1 NMSA 1978, the proper place to file in order to perfect a security interest in collateral, including

fixtures, of a transmitting utility is the office of the secretary of state. This filing constitutes a fixture filing (Section 9-313 [55-9-313 NMSA 1978]) as to the collateral described therein which is or is to become fixtures.

(6) For the purposes of this section, the residents [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.

History: 1953 Comp., § 50A-9-401, enacted by Laws 1961, ch. 96, § 9-401; 1967, ch. 186, § 26; 1985, ch. 193, § 26.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 4, Uniform Trust Receipts Act; Sections 6 and 7, Uniform Conditional Sales Act.

Purposes.1. Under chattel mortgage acts, the Uniform Conditional Sales Act and other conditional sales legislation the geographical unit for filing or recording was local: the county or township in which the mortgagor or vendee resided or in which the goods sold or mortgaged were kept. The Uniform Trust Receipts Act used the state as the geographical filing unit: under that act statements of trust receipt financing were filed with an official in the state capital and were not filed locally. The statewide filing system of the Trust Receipts Act has been followed in many accounts receivable and factor's lien acts.

Both systems have their advocates and both their own advantages and drawbacks. The principal advantage of statewide filing is ease of access to the credit information which the files exist to provide. Consider for example the national distributor who wishes to have current information about the credit standing of the thousands of persons he sells to on credit. The more completely the files are centralized on a statewide basis, the easier and cheaper it becomes to procure credit information; the more the files are scattered in local filing units, the more burdensome and costly. On the other hand, it can be said that most credit inquiries about local businesses, farmers and consumers come from local sources; convenience is served by having the files locally available and there is no great advantage in centralized filing.

This section does not attempt to resolve the controversy between the advocates of a completely centralized statewide filing system and those of a large degree of local autonomy. Instead the section is drafted in a series of alternatives; local considerations of policy will determine the choice to be made.

2. Fortunately there is general agreement that the proper filing place for security interests in fixtures is in the office where a mortgage on the real estate concerned would be filed or recorded, and Paragraph (1) (a) in the first alternative and Paragraph (1) (b) in the second and third alternatives so provide. This provision follows the Uniform Conditional Sales Act. Note that there is no requirement for an additional filing with the

chattel records.

3. In states where it is felt wise to preserve local filing for transactions of essentially local interest, either the second or third alternative of subsection (1) should be adopted. Paragraph (1) (a) in both alternatives provides county (township, etc.) filing for consumer goods transactions and for agricultural transactions (farm equipment, farm products, farm accounts and crops). Note that the subsection departs from Section 6 of the Uniform Conditional Sales Act and adopts instead the policy of many chattel mortgage acts in selecting the county of the debtor's residence, rather than the county where the goods are located, as the normal filing place. Where, however, the debtor is an out-of-state resident, the filing must of necessity be in the county where the goods are, and the subsection so provides. Though not expressly stated, it is evident that filing for an assignment of accounts arising from the sale of farm products by a farmer who is not a resident must be in the county where the debtor keeps his farm products. In the case of crops growing or to be grown, where the land is in one county and the debtor's residence in another, filing must be made in both counties. Neither this filing for crops in the county where the land is nor the requirements that the security agreement (Section 9-203(1) (a)) and the financing statement (Section 9-402(1) and (3)) contain a description of the real estate point to the conclusion that a financing statement for a security interest in crops must be filed in the real estate records. This article follows pre-code law which recognized such a financing as a chattel mortgage. The policy of the subsection is to require filing in the place or places where a creditor would normally look for information concerning interests created by the debtor.

For some incorporated farmers, reference to residence is an anomaly. Therefore Subsection (6) provides that the residence of an organization is its place of business, or its chief executive office if it has more than one place of business. Compare Section 9-103(3), which reaches essentially the same concept as a definition of the "location" of a debtor.

4. It is thought that sound policy requires a statewide filing system for all transactions except the essentially local ones covered in Paragraph (1) (a) of the second and third alternatives and land related transactions covered in Paragraph (1) (b) of the second and third alternatives. Paragraph (1) (c) so provides in both alternatives, as does Paragraph (1) (b) in the first alternative. In a state which has adopted either the second or third alternative, central filing would be required when the collateral was goods except consumer goods, farm equipment or farm products (including crops), or was documents or chattel paper or was accounts or general intangibles, unless related to a farm. Note that the filing provisions of this article do not apply to instruments (see Section 9-304).

If the third alternative Subsection (1) is adopted, then local filing, in addition to the central filing, is required in all the cases stated in the preceding paragraph, with respect to any debtor whose places of business within the state are all within a single county (township, etc.) or a debtor who is not engaged in business. The last event test stated in Section 9-103(1) (b) and comment thereto applies to determine whether local filing is

required under the present section, as well as to determine in which state filing is required.

In states where the arguments for a completely centralized set of files (except for fixtures) prevail, the first alternative Subsection (1) should be adopted. That alternative provides for exclusive central filing of all security interests except those in fixtures.

5. When a secured party has in good faith attempted to comply with the filing requirements but has not done so correctly, Subsection (2) makes his filing effective in so far as it was proper, and also makes it good for all collateral covered by the financing statement against any person who actually knows the contents of the improperly filed statement. The subsection rejects the occasional decisions that an improperly filed record is ineffective to give notice even to a person who knows of it. But if the third alternative Subsection (1) is adopted, the requirements of Paragraph (1) (c) are not complied with unless there is filing in both offices specified; filing in only one of two required places is not effective except as against one with actual knowledge of the contents of the defective financing statement.

6. Subsection (3) deals with change of residence or place of business or the location or use of the goods

after a proper filing has been made. The subsection is important only when local filing is required, and covers only changes between local filing units in the state. For changes of location between states see Section 9-103(1) (d).

Subsection (3) is presented in alternative forms. Under the first no new filing is required in the county to which the collateral has been removed. Under alternative Subsection (3) the original filing lapses four months after the change in location; this is basically the same rule that is applied by Section 9-103(1) (d) to the case of collateral brought into the state subject to a security interest which attached elsewhere.

7. The usual filing rules do not apply well for a transmitting utility (defined in Section 9-105). Many pre-code statutes provided special filing rules for railroads and in some cases for other public utilities to avoid the requirements for filing with legal descriptions in every county in which such debtors had property. The code recreates and broadens these provisions by Subsection (5) of this section, which provides that for transmitting utilities the filing need only be in the office of the secretary of state. The nature of the debtor will inform persons searching the record as to where to make a search.

Cross references.Sections 9-302, 9-304 and 9-307(2).

Point 2: Section 9-313.

Point 6: Section 9-103(3).

Point 7: Sections 9-402(5) and 9-403(6).

Definitional cross references."Account". Section 9-106.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Debtor". Section 9-105.

"Equipment". Section 9-109.

"Farm products". Section 9-109.

"Financing statement". Section 9-402.

"Fixture filing". Section 9-313.

"Good faith". Section 1-201.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Signed". Section 1-201.

"Transmitting utility". Section 9-105.

ANNOTATION

Appropriations. - Laws 1986, ch. 36, § 6 appropriates $114,300 from the general fund to the secretary of state for expenditure in the seventy-fifth fiscal year for the purpose of processing and handling Uniform Commercial Code filings and provides that any unexpended or unencumbered balance remaining at the end of the seventy-fifth fiscal year shall revert to the general fund.

Limited duties of filing officers. - Where an instrument appears correct, it is not the duty of the filing officer to determine the validity of such document, to ascertain whether it is genuine or forged or to rule upon its legal efficacy. Similarly, whether an instrument presented for filing is in fact an original, duplicate original or a copy of an original, or whether the signature appearing upon an instrument filed under the code is intended to be operative are questions which the filing officer is not normally able to judge.

Consequently, the filing officer should accept instruments for filing under the code which appear valid on their face, leaving the determination of authenticity, legal effect and evidentiary value to the courts in cases where such issues are raised. 1961-62 Op. Att'y Gen. No. 62-126.

Law reviews. - For article, "Fixtures and the Uniform Commercial Code in New Mexico," see 4 Nat. Resources J. 109 (1964).

For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For comment on Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), see 8 Nat. Resources J. 183 (1968).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 35 Am. Jur. 2d Fixtures § 72; 68 Am. Jur. 2d Secured Transactions §§ 137, 156; 69 Am. Jur. 2d Secured Transactions §§ 407 to 412, 421, 515.
Effect of recording chattel mortgage in town or county to which the mortgagor subsequently removed, 1 A.L.R. 1662.
Omission of amount of debt in mortgage or in record thereof as affecting validity of mortgage, its operation as notice, or its coverage with respect to debts secured, 145 A.L.R. 369.
Construction and application of statutory provision respecting registration of mortgages or other liens on personal property in case of residents of other states, 10 A.L.R.2d 764.
Necessity of recording or filing chattel mortgage in state to which property is removed, 13 A.L.R.2d 1318.
Attorney's liability for negligence in preparing or recording security document, 87 A.L.R.2d 991.
6A C.J.S. Assignments § 57; 14 C.J.S. Chattel Mortgages § 151; 72 C.J.S. Pledges § 14; 78 C.J.S. Sales § 576.

§ 55-9-402. 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. 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 9-103 [55-9-103 NMSA 1978], or when the financing statement is filed as a fixture filing (Section 9-313 [55-9-313 NMSA 1978]) 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 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. Such a 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; or

(b) proceeds under Section 9-306 [55-9-306 NMA 1978] if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral; or

(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):

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

Name of debtor (or assignor)
.....
Address
.....
Name of secured party (or assignee)
.....
Address
.....
1. This financing statement covers the following types (or items) of property:

(Describe)
.....
2. (If collateral is crops) The above described crops are growing or are to be grown on:
(Describe Real Estate)
.....
3. (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
.....
* Where appropriate substitute either "The above timber is standing on ..." or "The above minerals or the like (including oil and gas) or accounts will be financed at the wellhead or minehead of the well or mine located on ...."
4. (If products of collateral are claimed)
Products of the collateral are also covered.

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

(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 article, unless the context otherwise requires, the term "financing statement" means the original financing 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 9-103 [55-9-103(5) NMSA 1978], or a financing statement filed as a fixture filing (Section 9-313 [55-9-313 NMSA 1978]) 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.

History: 1953 Comp., § 50A-9-402, enacted by Laws 1961, ch. 96, § 9-402; 1967, ch. 186, § 27; 1985, ch. 193, § 27.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 13(3), 13(4), Uniform Trust Receipts Act.

Purposes.1. Subsection (1) sets out the simple formal requisites of a financing statement under this article. These requirements are: (1) signature of the debtor; (2) addresses of both parties; (3) a description of the collateral by type or item.

Where the collateral is crops growing or to be grown or when the financing statement is filed as a fixture filing (Section 9-313) or when the collateral is timber to be cut or minerals or the like (including oil and gas) financed at wellhead or minehead or accounts resulting from the sale thereof, the financing statement must also contain a description of the lands concerned. On description generally, see Section 9-110 and Comment 5 to the present section. An important distinction must be drawn, however, between the function of the description of land in reference to crops and its function in the other cases mentioned. For crops it is merely part of the description of the crops concerned, and the security interest in crops is a code security interest, like the pre-code "crop mortgage" which was a

chattel mortgage. In contrast, in the other cases mentioned the function of the description of land is to have the financing statement filed in the county where the land is situated and in the realty records, as distinguished from the chattel records. Subsection (3) suggests a form which complies with the statutory requirements and makes clear that for the types of collateral mentioned other than crops, the financing statement containing a description of the land concerned is to go in the realty records. Note also Subsection (5) on the adequacy of the description of land where the filing is to be in the real estate records. See also Section 9-403 (7) on the indexing of these filings in the real estate records.

A copy of the security agreement may be filed in place of a separate financing statement, if it contains the required information and signature.

2. This section adopts the system of "notice filing" which proved successful under the Uniform Trust Receipts Act. What is required to be filed is not, as under chattel mortgage and conditional sales act, the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. Notice filing has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it obviates the necessity of refiling on each of a series of transactions in a continuing arrangement where the collateral changes from day to day. Where other types of collateral are involved, the alternative procedure of filing a signed copy of the security agreement may prove to be the simplest solution. Sometimes more than one copy of a financing statement or of a security agreement used as a financing statement is needed for filing. In such a case the section permits use of a carbon copy or photographic copy of the paper, including signatures.

However, even in the case of filings that do not necessarily involve a series of transactions the financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the description of collateral in the financing statement is broad enough to encompass them. Similarly, the financing statement is valid to cover after-acquired property and future advances under security agreements whether or not mentioned in the financing statement.

3. This section departs from the requirements of many pre-code chattel mortgage statutes that the instrument filed be acknowledged or witnessed or accompanied by affidavits of good faith. Those requirements did not seem to have been successful as a deterrent to fraud; their principal effect was to penalize good faith mortgagees who had inadvertently failed to comply with the statutory niceties. They are here abandoned in the interest of a simplified and workable filing system.

4. Subsection (2) allows the secured party to file a financing statement signed only by himself where the filing is required by any of the events listed, each of which occurs after the commencement of the financing, and therefore under circumstances where the cooperation of the debtor is not certain. Section 9-401(3), alternative provision, contains similar permission on removal between counties in this state. The secured party should not be penalized for failure to make a timely filing by reason of difficulty in procuring the signature of a possibly reluctant or hostile debtor. Financing statements filed under this subsection must explain the circumstances under which they are filed with the signature of the secured party rather than that of the debtor.

In contrast to the signatures on original financing statements, an amendment to a financing statement must be signed by both parties, to preclude either from adversely affecting the interests of the other.

The reference in Subsection (4) to an amendment which "adds collateral" refers to additional types of collateral. A security interest on additional units of a type of collateral already described can be created under an after-acquired property clause or a new security agreement. See Comment 5 to Section 9-204. On priorities in such cases see Section 9-312 and comments thereto.

5. A description of real estate must be sufficient to identify it. See Section 9-110. This formulation rejects the view that the real estate description must be by metes and bounds, or otherwise conforming to traditional real estate practice in conveyancing, but of course the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test is that a description of real estate must be sufficient so that the fixture financing statement will fit into the real estate search system and the financing statement be found by a real estate searcher. Optional language has been added by which the test of adequacy of the description is whether it would be adequate in a mortgage of the real estate. As suggested in the Note, more detail may be required if there is a tract indexing system or a land registration system.

Where the debtor does not have an interest of record in the real estate, a fixture financing statement must show the name of a record owner, and Section 9-403 (7) requires the financing statement to be indexed in the name of that owner. Thus the fixture financing statement will fit into the real estate search system.

6. A real estate mortgage may provide that it constitutes a security agreement with respect to fixtures (or other goods) in conformity with this article. Combined mortgages on real estate and chattels are common and useful for certain purposes. This section goes further and makes provision that the recording of the real estate mortgage (if it complies with the requirements of a financing statement) shall constitute the filing of a financing statement as to the fixtures (but not, of course, as to the other goods). Section 9-403(6) makes the usual five-year maximum life for financing statements inapplicable to real estate mortgages which operate as financing statements under Section 9-402 (6), and they are effective for the duration of the real estate recording.

Of course, if a combined mortgage covers chattels which are not fixtures, a regular chattel filing is necessary, and Subsection (6) is inapplicable to such chattels. Likewise, filing as a "fixture filing" provided in Section 9-401 does not apply to true chattels.

7. Subsection (7) undertakes to deal with some of the problems as to who is the debtor. In the case of individuals, it contemplates filing only in the individual name, not in a trade name. In the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners, and not in any other trade names. Trade names are deemed to be too uncertain and too likely not to be known to the secured party or

person searching the record, to form the basis for a filing system. However, provision is made in Section 9-403 (5) for indexing in a trade name if the secured party so desires.

Subsection (7) also deals with the case of a change of name of a debtor and provides some guidelines when mergers or other changes of corporate structure of the debtor occur with the result that a filed financing statement might become seriously misleading. Not all cases can be imagined and covered by statutes in advance; however, the principle sought to be achieved by the subsection is that after a change which would be seriously misleading, the old financing statement is not effective as to new collateral acquired more than four months after the change, unless a new appropriate financing statement is filed before the expiration of the four months. The old financing statement, if legally still valid under the circumstances, would continue to protect collateral acquired before the change and, if still operative under the particular circumstances, would also protect collateral acquired within the four months. Obviously, the subsection does not undertake to state whether the old security agreement continues to operate between the secured party and the party surviving the corporate change of the debtor.

8. Subsection (7) also deals with a different problem, namely whether a new filing is necessary where the collateral has been transferred from one debtor to another. This question has been much debated both in pre-code law and under the code. This article now answers the question in the negative. Thus, any person searching the condition of the ownership of a debtor must make inquiry as to the debtor's source of title, and must search in the name of a former owner if circumstances seem to require it.

9. Subsection (8) is in line with the policy of this article to simplify formal requisites and filing requirements and is designed to discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged themselves. As an example of the sort of reasoning which this subsection rejects, see General Motors Acceptance Corporation v. Haley, 329 Mass. 559, 109 N.E.2d 143 (1952).

Cross references.Point 1: Section 9-110.

Point 2: Section 9-208.

Point 4: Sections 9-103, 9-306 and 9-401(3).

Point 5: Section 9-110.

Point 6: Section 9-403(6).

Point 7: Section 9-403(8).

Point 8: Section 9-311.

Definitional cross references."Collateral". Section 9-105.

"Debtor". Section 9-105.

"Fixture". Section 9-313.

"Fixture filing". Section 9-313.

"Goods". Section 9-105.

"Party". Section 1-201.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Signed". Section 1-201.

"Transmitting utility". Section 9-105.

ANNOTATION

I. General Consideration.

Old security devices replaced by simplified procedures. - Under the terms of the code, the traditional distinctions among security devices such as conditional sales contracts and chattel mortgages are not retained. The code substitutes for such a simplified statutory procedure which applies to all transactions intended to create security interests in personal property and fixtures. 1961-62 Op. Att'y Gen. No. 62-1.

Although traditional forms may continue. - The traditional forms of security agreements in use before the enactment of this section may continue to be used after its enactment. Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967).

Acknowledgement not required for filing. - In keeping with the declared purpose of the code to simplify, clarify and modernize the law governing commercial transactions, and the rule of construction that the code shall be liberally construed and applied so as to promote its underlying purposes and policies, such instruments as are filed pursuant to the provisions of the code are not required to be acknowledged as a prerequisite to being filed with the county clerks. 1961-62 Op. Att'y Gen. No. 62-1.

But security agreement must cover disputed items. - Although the filing of the financing statement was sufficient to put defendants on inquiry as to plaintiff's security interest, this avails plaintiff nothing when the security agreement did not cover the disputed items. Jones & Laughlin Supply v. Dugan Prod. Corp., 85 N.M. 51, 508 P.2d 1348 (Ct. App. 1973).

And language of security agreement prevails over financing statement. - In a conflict between the unsigned financing statement and the language of the security agreement the latter prevails for the reason that no security interest can exist in the absence of a security agreement, and therefore a financing statement which goes beyond the scope of the agreement has no effect to that extent. Jones & Laughlin Supply v. Dugan Prod. Corp., 85 N.M. 51, 508 P.2d 1348 (Ct. App. 1973).

Law reviews. - For article, "Fixtures and the Uniform Commercial Code in New Mexico," see 4 Nat. Resources J. 109 (1964).

For note, "Fixtures, Security Interests and Filing: Problems of Title Examination in New Mexico," see 8 Nat. Resources J. 513 (1968).

For comment on Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967), see 8 Nat. Resources J. 713 (1968).

For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

For article, "Essential Attributes of Commercial Paper-Part I," see 1 N.M. L. Rev. 479 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 35 Am. Jur. 2d Fixtures § 72; 68 Am. Jur. 2d Secured Transactions §§ 88, 103, 158, 164, 188; 69 Am. Jur. 2d Secured Transactions §§ 278, 292, 295, 342, 379, 385, 390, 399, 404, 497.
Construction and application of statutory provisions respecting registration of mortgages on personal property in case of residents of other states, 10 A.L.R.2d 764.
Necessity and sufficiency of notice or statement prescribed by factor's lien law, 96 A.L.R.2d 727.

Sufficiency of description in chattel mortgage as covering all property of a particular kind, 2 A.L.R.3d 839.
What constitutes "security interest" as to which financing statement must be filed under U.C.C. § 9-302, 11 A.L.R.3d 1231.
Sufficiency of designation of debtor or secured party in security agreement of financing statement under UCC § 9-402, 99 A.L.R.3d 478.
Sufficiency of address of debtor in financing statement required by UCC § 9-402(1), 99 A.L.R.3d 807.
Sufficiency of address of secured party in financing statement required under UCC § 9-402(1), 99 A.L.R.3d 1080.
Sufficiency of description of collateral in financing statement under UCC §§ 9-110 and 9-402, 100 A.L.R.3d 10.
Sufficiency of secured party's signature on financing § 9-402, or security agreement under UCC § 9-402, 100 A.L.R.3d 390.
Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402, 3 A.L.R.4th 502.
14 C.J.S. Chattel Mortgages §§ 9, 132; 76 C.J.S. Records § 4.

II. Requisites of Financing Statement.

This section adopts system of notice filing designed to replace rigid description requirements. But, while the description requirements have been liberalized, the language of Subsection (1) clearly requires some specificity of description. Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc., 92 N.M. 215, 585 P.2d 1096 (1978).

Need for description of property and names of parties to instrument. - With chattel mortgages, constructive notice generally is given by recording the instrument in the proper county along with designating the mortgagee and mortgagor (or assignee of mortgagor), inasmuch as ofttimes it is impractical to discover whether personal property is subject to a lien from solely the description of the personal property itself, without the name of the mortgagor. Reconstruction Fin. Corp. v. Stephens, 118 F. Supp. 565 (D.N.M. 1954) (decided under former law).

"Inventory," "equipment" and "supplies" sufficient to describe collateral. - The terms "inventory," "equipment" and "supplies" are sufficient to meet the requirement that collateral must be described in general language reasonably describing the items. Waterfield v. Burnett, 21 Bankr. 752 (Bankr. D.N.M. 1982).

Language in financing statement fails to satisfy section. - The words "all assets . . . regardless of type or description now owned . . . or to be bought in the future . . ." in a financing statement fail to satisfy the requirements of this section. The language is too general and vague to fulfill the demand that the financing statement at least reveal "the type" of collateral. The language is misleading and does not give subsequent secured parties adequate notice of a security interest in inventory and accounts receivable.

Mogul Enters., Inc. v. Commercial Credit Bus. Loans, Inc., 92 N.M. 215, 585 P.2d 1096 (1978).

Minor errors in information does not invalidate financing statement. - A security agreement is sufficient as a financing statement if it contains all the information required of a valid financing statement, even though there are minor errors in the information. First Nat'l Bank v. Niccum, 649 F.2d 763 (10th Cir. 1981).

But omitting debtor's address is major error. - Leaving the address of the debtor out of a financing statement is a major error. First Nat'l Bank v. Niccum, 649 F.2d 763 (10th Cir. 1981).

Lack of the secured party's signature does not make the instrument defective within the meaning of this section. Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967).

Since copies of signatures may be accepted. - The secretary of state may accept for filing under the uniform commercial code an instrument that contains a photo-copy or carbon-copy of the signature of the debtor and/or the secured party. 1961-62 Op. Att'y Gen. No. 62-126.

May file security agreement. - In lieu of a financing statement designated under this section, a security agreement may be filed which substantially complies with the requisites prescribed in this section. 1961-62 Op. Att'y Gen. No. 62-12.

Or chattel mortgage. - An instrument denominated as a "chattel mortgage" may be filed as a financing statement so long as it contains the necessary information. Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967).

But not abbreviated lease with no reservation of lien. - Recording of abbreviated lease which contained no express reservation of a lien reserved by landlord was not sufficient compliance with the Chattel Mortgage Act to be prior statutory lien against a subsequent mortgagee who did comply, or as against the trustee in bankruptcy. Savage v. McNeany, 372 F.2d 199 (10th Cir. 1967).

III. Sample Form.

No specific form is required for a financing statement filed under the code. 1961-62 Op. Att'y Gen. No. 62-2.

IV. Substantial Compliance.

Name only on cover of instrument not substantial compliance. - Where secured party's name appears only on cover of instrument, the secured party does not substantially comply with the necessary requirements, and such instrument is defective as a financing statement and does not give notice to the defendant of the secured party's security interest. Strevell-Paterson Fin. Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967).

Security interest not unperfected where change in debtor's name not recorded. - Filed security agreement listing debtor under former corporate name did not become "seriously misleading", as referred to in Subsection (5) (now see Subsection (8)), once debtor changed its name so as not to serve sufficient notice of security interest, since financing statement is sufficient even if it fails to give any name for a debtor where debtor's address and mailing address are given, and since later creditor knew of debtor's first corporate name and of first creditor's intention to advance money so that later creditor could not have been misled; consequently, first creditor's priority did not become "unperfected" for failure to file new security agreement and financing statement. In re Bud Long Chevrolet, Inc. 39 Bankr. 499 (Bankr. D.N.M. 1984).

V. Transfer of Collateral.

Failure to identify new debtor. - Where the secured party had knowledge of the debtor's transfer of the collateral and accepted payments from the transferee on the debtor's note but never amended its financing statement to identify the transferee as the new debtor, the secured party's filing of a "continuation statement" naming the original debtor whom it knew was no longer in possession of the collateral was insufficient to preserve the security interest. Production Credit Ass'n v. Lane (In re Cattle Complex Corp.), 61 Bankr. 526 (Bankr. D.N.M. 1986).

§ 55-9-403. What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer.

(1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under Chapter 55, Article 9 NMSA 1978.

(2) Except as provided in Subsection (6) of this section, a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of sixty days or until expiration of the five-year period, whichever occurs later. Upon lapse, the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is

deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

(3) A continuation statement may be filed by the secured party within six months prior to the expiration of the five-year period specified in Subsection (2) of this section. Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. A continuation 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 and complying with Subsection (2) of Section 55-9-405 NMSA 1978, including payment of the required fee. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in Subsection (2) of this section, unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse. The filing officer shall so arrange matters by physical annexation of financing statements to continuation statements or other related filings, or by other means, that if he physically destroys the financing statements of a period more than five years past, those which have been continued by a continuation statement or which are still effective under Subsection (6) of this section shall be retained.

(4) Except as provided in Subsection (7) of this section a filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.

(5) The uniform fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for an original financing statement or for a continuation statement shall be eleven dollars fifty cents ($11.50) if the statement consists of one page otherwise fifteen dollars ($15.00); provided, however, if the number of pages filed exceeds twenty-five, such fee shall be fifty-four dollars ($54.00).

(6) If the debtor is a transmitting utility (Subsection (5) of Section 55-9-401 NMSA 1978) and a filed financing statement so states, it is effective until a termination statement is filed. A real estate mortgage which is effective as a fixture filing under Subsection (6) of Section 55-9-402 NMSA 1978 remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.

(7) When a financing statement, continuation statement, termination statement,

statement of assignment or statement of release covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to Subsection (5) of Section 55-9-103 NMSA 1978, or is filed as a fixture filing, it shall be filed for record in the real estate records, notwithstanding the provisions of Sections 55-9-403, 55-9-404, 55-9-405 and 55-9-406 NMSA 1978 pertaining to the filing of such statements, and the filing officer shall index it under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described, and, to the extent that the law of this state provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder or where indexing is by description in the same fashion as if the financing statement were a mortgage of the real estate described. The fee for filing such documents for record in the real estate records shall be the fee prescribed by Subsection C of Section 14-8-12 NMSA 1978 for recording real estate records. None of these documents need be acknowledged in order to be so recorded.

History: 1953 Comp., § 50A-9-403, enacted by Laws 1961, ch. 96, § 9-403; 1967, ch. 186, § 28; 1977, ch. 179, § 1; 1985, ch. 113, § 1; 1985, ch. 193, § 28; 1986, ch. 36, § 1.

OFFICIAL COMMENT

Prior uniform statutory provision. Sections 13(3), 13(4), Uniform Trust Receipts Act; Section 10, Uniform Conditional Sales Act.

Purposes.1. Prior law was not always clear whether a mortgage filed for record gave constructive notice from the time of presentation to the filing officer or only from the time of indexing. Subsection (1) adopts the former position.

2. Prior statutes have usually limited the effectiveness of a filing to a specified period of time after which refiling is necessary. Subsection (2) follows the same policy, establishing five years as the filing period, with an exception for the cases mentioned in Subsection (6). Subsection (3) provides for the filing of one or more continuation statements (which need be signed only by the secured party) if it is desired to continue the effectiveness of the original filing.

The theory of this article is that the public files of financing statements are self-clearing, because the filing officer may automatically discard each financing statement after a period of five years plus the year after lapse required by Subsection (3), unless a continuation statement is filed, or the financing statement is still effective under Subsection (6). This theory materially lessens the tension that would otherwise exist to have the files cleared by termination statements under Section 9-404. Similarly, a person searching the files need not go back past this five years plus one year; and if the indices are arranged by years, he has a limited and defined search problem. The section asks the filing officer to attach financing statements whose life has been continued by continuation statements to the latter statements, so that anything contained in the files of old years can be discarded.

Subsection (6) provides certain special filing rules, namely, filings against transmitting utilities (Section 9-105), for which financing statements are filed in the office of the [secretary of state]; and real estate mortgages which serve as fixture financing statements and which are filed in the real estate records. In both of these cases the financing statement is valid for the life of the obligations secured. No confusion as to the required scope of search should result, because of the special nature of the filings involved.

3. Under Subsection (2) the security interest becomes unperfected when filing lapses. Thereafter, the interest of the secured party is subject to defeat by purchasers and lienors even though before lapse the conflicting interest may have been junior. Compare the situation arising under Section 9-103(1) (d) when a perfected security interest under the law of another jurisdiction is not perfected in this state within four months after the property is brought into this state.

Thus if A and B both make nonpurchase money advances against the same collateral, and both perfect security interests by filing, A who files first is entitled to priority under Section 9-312(5). But if no continuation statement is filed, A's filing may lapse first. So long as B's interest remains perfected thereafter, he is entitled to priority over A's unperfected interest. This rule avoids the circular priority which arose under some prior statutes, under which A was subordinate to the debtor's trustee in bankruptcy, A retained priority over B, and B's interest was valid against the trustee in bankruptcy. In re Andrews, 172 F.2d 996 (7th Cir. 1949).

4. Subsection (7) makes clear that the filings in real estate records (Sections 9-401 and 9-402(3) and (5)) shall be indexed in the real estate records, where they will be found by a real estate searcher. Where the debtor is not an owner of record, the financing statement must show the name of an owner of record, and the statement is to be indexed in his name. See Sections 9-313(4) (b) and (c); 9-402(3) and 9-402(5).

Cross references.Point 3: Sections 9-103(3), 9-301 and 9-312(5).

Point 4: Sections 9-313(4) (b) and (c), 9-401(1), 9-402(3) and (5) and 9-405(2).

Definitional cross references."Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Fixture". Section 9-313.

"Fixture filing". Section 9-313.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Transmitting utility". Section 9-105.

ANNOTATION

The 1986 amendment, throughout the section, inserted "of this section" after references to subsections; in Subsection (1), substituted "Chapter 55, Article 9 NMSA 1978" for "this article"; in the third sentence in Subsection (3), substituted "Section 55-9-405 NMSA 1978" for "Section 9-405"; in Subsection (5), substituted "eleven dollars fifty cents ($11.50) if the statement consists of one page otherwise fifteen dollars ($15.00); provided, however, if the number of pages filed exceeds twenty-five, such fee shall be fifty-four dollars ($54.00)" for "three dollars ($3.00)"; in Subsection (6), substituted "Section 55-9-401 NMSA 1978" for "Section 9-401" and "Section 55-9-402 NMSA 1978" for "Section 9-402"; in the first sentence in Subsection (7), substituted "Section 55-9-103 NMSA 1978" for "Section 9-103," "Sections 55-9-403, 55-9-404, 55-9-405 and 55-9-406 NMSA 1978" for "Sections 9-403, 9-404, 9-405 and 9-406," and in the next-to-last sentence in Subsection (7) substituted "Subsection C" for "Subsection (c)".

Emergency clauses. - Laws 1986, ch. 36, § 8 makes the act effective immediately. Approved February 28, 1986.

Applicability. - Laws 1986, ch. 36, § 7 makes the provisions of §§ 1 to 5 of the act applicable to filings made on and after April 1, 1986.

Compiler's notes. - Subsection C of § 14-8-12 NMSA 1978, referred to in the next-to-last sentence in Subsection (7), was repealed by Laws 1985, ch. 122, § 1. For present provisions, see Subsection B of § 14-8-12.

Lapse prior to end of five-year period. - A security interest may lapse before the end of the five-year period in this section only if (1) a termination statement is filed pursuant to 55-9-404 NMSA 1978, or (2) the debtor makes full payment on the underlying note. Bond Enters., Inc. v. Western Bank, 54 Bankr. 366 (Bankr. D.N.M. 1985).

Lapse during bankruptcy proceedings. - A creditor's security interest, perfected and valid at the initiation of bankruptcy proceedings but due to expire during the pendency of those proceedings does not lapse where the creditor fails to file a continuation statement. Rather, the creditor's rights in the security interest are preserved until the later of either (1) the end of the time period fixed by this section for the lapsing of a financing statement, or (2) thirty days after notice of the expiration or termination of the stay under 11 U.S.C. 362. Bond Enters., Inc. v. Western Bank, 54 Bankr. 366 (Bankr. D.N.M. 1985).

Fee for mortgage executed before but filed after effective date of code. - Where a chattel mortgage was entered into by the parties and executed prior to the date of January 1, 1962, but was offered for filing with the county clerk of secretary of state after the effective date of the uniform commercial code the proper filing fee for such

instruments was the fee specified under the provisions of former 61-8-6, 1953 Comp. 1961-62 Op. Att'y Gen. No. 62-12.

Law reviews. - For comment, "New Mexico's Uniform Commercial Code in Oil and Gas Transactions," see 10 Nat. Resources J. 361 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 69 Am. Jur. 2d Secured Transactions §§ 357, 416 to 419, 422, 429, 430, 436.
Premature refiling, 63 A.L.R. 591.
Sufficiency of description of property in recorded conditional sales contract to give notice of third persons, 65 A.L.R. 717.
Effect of officer's failure properly to file contract, 70 A.L.R. 595.
Assignees for creditors as within protection of statute requiring filing of conditional sales contract, 71 A.L.R. 981.
Failure of conditional seller of property to tenant to file contract as defeating his rights against landlords, 98 A.L.R. 634.
Federal government or agencies of federal government as subject to payment of tax or fee imposed upon or for recording or filing instrument, 124 A.L.R. 1267.
Construction and application of statute requiring conditional sale contract or record thereof to describe all conditions or terms of the sale, 130 A.L.R. 725.
What amounts to notice which will subject one's rights to unrecorded conditional sale contract, 159 A.L.R. 669.
Registration of mortgages or other liens on personal property in case of residents of other states, 10 A.L.R.2d 764.
Sufficiency of designation of debtor or secured party in security agreement of financing statement under UCC § 9-402, 99 A.L.R.3d 478.
14 C.J.S. Chattel Mortgages § 131; 76 C.J.S. Records § 4.

§ 55-9-404. Termination statement.

(1) If a financing statement covering consumer goods is filed on or after January 1, 1986, 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 no longer claims a security interest under the financing statement, which shall be identified by file number. In other cases whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must 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 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 55-9-405 NMSA 1978, including payment of the required fee.

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 liable to the debtor for one hundred dollars ($100), 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 note it in the index. If he has received the termination statement in duplicate, he 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 may remove the originals from the files at any time after receipt of the termination statement, or if he has no such record, he may remove them from the files at any time after one year after receipt of the termination statement.

(3) The uniform fee for filing and indexing the termination statement shall be eleven dollars fifty cents ($11.50) if the statement consists of one page otherwise fifteen dollars ($15.00).

History: 1953 Comp., § 50A-9-404, enacted by Laws 1961, ch. 96, § 9-404; 1977, ch. 179, § 2; 1985, ch. 113, § 2; 1985, ch. 193, § 29; 1986, ch. 36, § 2.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 12, Uniform Conditional Sales Act.

Purposes.1. To provide a procedure for noting discharge of the secured obligation on the records and for noting that a financing arrangement has been terminated.

Since most financing statements expire in five years unless a continuation statement is filed (Section 9-403), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods. Because many consumers will not realize the importance of clearing the situation as it appears on file, an affirmative duty is put on the secured party in that case. But many purchase money security interests in consumer goods will not be filed, except for motor vehicles (Section 9-302(1) (d)); and in the case of motor vehicles a certificate of title law may control instead of the provisions of Article 9.

2. This section adds to the usual provisions one covering the problem which arises because a secured party under a notice filing system may file notice of an intention to make advances which may never be made. Under this section a debtor may require a secured party to send a termination statement when there is no outstanding obligation and no commitment to make future advances.

Cross references.Point 2: Section 9-402(1).

Definitional cross references."Consumer goods". Section 9-109.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Person". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Value". Section 1-201.

"Written". Section 1-201.

ANNOTATION

I. General Consideration.
II. Duties of Secured Party or Assignee.
III. Duties of Filing Officers.
IV. Fees.

I. General Consideration.

The 1986 amendment, in the next-to-last sentence in Subsection (1), substituted "Section 55-9-405 NMSA 1978" for "Section 9-405" and, in Subsection (3), substituted "eleven dollars fifty cents ($11.50) if the statement consists of one page otherwise fifteen dollars ($15.00)" for "three dollars ($3.00)".

Emergency clauses. - Laws 1986, ch. 36, § 8 makes the act effective immediately. Approved February 28, 1986.

Applicability. - Laws 1986, ch. 36, § 7 makes the provisions of §§ 1 to 5 of the act applicable to filings made on and after April 1, 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 69 Am. Jur. 2d Secured Transactions §§ 431, 440, 441, 539.
14 C.J.S. Chattel Mortgages § 347; 72 C.J.S. Pledges § 46; 76 C.J.S. Records § 29; 78 C.J.S. Sales § 571.

II. Duties of Secured Party or Assignee.

Termination statement not necessary for refinancing. - Small loan companies are no longer required to file termination statements and new financing statements merely because a loan has been refinanced. 1970 Op. Att'y Gen. No. 70-78.

III. Duties of Filing Officers.

Return of instruments to secured party deemed mandatory. - Subsection (2) directs the county clerks to return certain instruments upon presentation to them of a termination statement accompanied by an assignment, if necessary, or upon presentation of the termination statement if signed by the secured party of record. Such language is mandatory and not permissive in effect. 1961-62 Op. Att'y Gen. No. 62-1 (opinion rendered under prior law).

But termination statement not returned. - The termination statement should be retained by the filing officer and not returned with the other instruments since such documents evidence the fact of termination under such statute. 1964 Op. Att'y Gen. No. 64-42 (opinion rendered under prior law).

And clerks liable for failure to perform prescribed duties. - A county clerk may be personally responsible for damages to individuals incurring personal damage by reason of the neglect of the clerk or his failure to perform his required duties as set forth and prescribed under the provisions of the code. 1961-62 Op. Att'y Gen. No. 62-1 (opinion rendered under prior law).

IV. Fees.

Fees for filing statement of assignment may vary. - Under this section, the fee for filing an assignment or statement by the secured party of record, when accompanying a termination statement is $0.75. Where, however, the statement of assignment is filed separately under provisions of 55-9-405 NMSA 1978, and does not accompany a termination statement, then the proper fee for filing such instrument is $1.00. As provided in Subsection (2) of 55-9-405 NMSA 1978, the proper fee for a separate assignment not accompanying a termination statement is slightly higher. 1961-62 Op. Att'y Gen. No. 62-1 (opinion rendered under prior law).

But termination and assignment require separate fees. - Each instrument required under this section, if separately filed, is subject to the separate filing fee specified. And if both an assignment and a termination statement are contained in a combined instrument, the

filing fee chargeable would be $1.75, being the combined filing fee for both instruments. 1961-62 Op. Att'y Gen. No. 62-1 (opinion rendered under prior law).

And fee on mortgage recorded before but released after effective date of Code. - The correct fee to be charged by a clerk for satisfying a chattel mortgage recorded prior to the effective date of the uniform commercial code and which is sought to be released after the effective date of the code is $.25. 1961-62 Op. Att'y Gen. No. 62-12 (opinion rendered under prior law).

§ 55-9-405. Assignment of security interest; duties of filing officer; fees.

(1) A financing statement may disclose an assignment of a security interest in the collateral described in the financing statement by indication in the financing statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in Subsection (4) of Section 55-9-403 NMSA 1978. The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be twelve dollars fifty cents ($12.50).

(2) A secured party may assign of record all or a part of his rights under a financing statement by the filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement, or in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like (including oil and gas) or accounts subject to Subsection (5) of Section 55-9-103 NMSA 1978, he shall index the assignment under the name of the assignor as grantor and, to the extent that the law of this state provides for indexing the assignment of a mortgage under the name of the assignee, he shall index the assignment of the financing statement under the name of the assignee. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be four dollars ($4.00). Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (Subsection (6) of Section 55-9-402 NMSA 1978) may be made only by an assignment of the mortgage in the manner provided by the law of this state other than the Uniform Commercial Code.

(3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record.

History: 1953 Comp., § 50A-9-405, enacted by Laws 1961, ch. 96, § 9-405; 1977, ch. 179, § 3; 1985, ch. 113, § 3; 1985, ch. 193, § 30; 1986, ch. 36, § 3.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.This section provides a permissive device whereby a secured party who has assigned all or part of his interest may have the assignment noted of record. Note that under Section 9-302 (2) no filing of such an assignment is required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor. A secured party who has assigned his interest might wish to have the fact noted of record, so that inquiries concerning the transaction would be addressed not to him but to the assignee (see Point 2 of comment to Section 9-402). After a secured party has assigned his rights of record, the assignee becomes the "secured party of record" and may file a continuation statement under Section 9-403, a termination statement under Section 9-404 or a statement of release under Section 9-406.

Where a mortgage of real estate is effective as a financing statement filed as a fixture filing (Section 9-402(6)), then an assignment of record of the security interest may be made only in the manner in which an assignment of the mortgage may be made under the local state law.

Cross references.Sections 9-302(2) and 9-402 to 9-406.

Definitional cross references."Collateral". Section 9-105.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Signed". Section 1-201.

"Written". Section 1-201.

ANNOTATION

The 1986 amendment, in Subsection (1), in the second sentence, substituted "Subsection (4) of Section 55-9-403 NMSA 1978" for "Section 9-403(4)" and, in the last sentence, "twelve dollars fifty cents ($12.50)" for "five dollars ($5.00)"; in Subsection (2), substituted "Section 55-9-103 NMSA 1978" for "Section 9-103" in the fourth sentence,

substituted "four dollars ($4.00)" for "two dollars ($2.00)" in the fifth sentence, "Section 55-9-402 NMSA 1978" for "Section 9-402," and "the Uniform Commercial Code" for "this act" in the last sentence.

Emergency clauses. - Laws 1986, ch. 36, § 8 makes the act effective immediately. Approved February 28, 1986.

Applicability. - Laws 1986, ch. 36, § 7 makes the provisions of §§ 1 to 5 of the act applicable to filings made on and after April 1, 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 69 Am. Jur. 2d Secured Transactions §§ 201, 352, 431, 433, 434, 444.
14 C.J.S. Chattel Mortgages § 313; 72 C.J.S. Pledges §§ 41 to 43; 78 C.J.S. Sales § 642.

§ 55-9-406. Release of collateral; duties of filing officer; fees.

A secured party of record may by his signed statement release all or part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. A statement of release 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 and complying with Subsection (2) of Section 55-9-405 NMSA 1978, including payment of the required fee. Upon presentation of such a statement of release to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be seven dollars fifty cents ($7.50) if the statement consists of one page otherwise fifteen dollars ($15.00).

History: 1953 Comp., § 50A-9-406, enacted by Laws 1961, ch. 96, § 9-406; 1977, ch. 179, § 4; 1985, ch. 113, § 4; 1985, ch. 193, § 31; 1986, ch. 36, § 4.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.Like the preceding section, this section provides a permissive device for noting of record any release of collateral. There is no requirement that such a statement be filed when collateral is released (cf. Section 9-404 on Termination Statements). It is merely a method of making the record reflect the true state of affairs so that fewer inquiries will have to be made by persons who consult the files.

If the statement of release is not signed by the secured party of record, the assignment procedure of Section 9-405(2) must be followed.

Cross reference.Section 9-404.

Definitional cross references."Collateral". Section 9-105.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Secured party". Section 9-105.

"Signed". Section 1-201.

ANNOTATION

The 1986 amendment substituted "Section 55-9-405 NMSA 1978" for "Section 9-405" in the third sentence and "seven dollars fifty cents ($7.50) if the statement consists of one page otherwise fifteen dollars ($15.00)" for "three dollars ($3.00)" in the last sentence.

Emergency clauses. - Laws 1986, ch. 36, § 8 makes the act effective immediately. Approved February 28, 1986.

Applicability. - Laws 1986, ch. 36, § 7 makes the provisions of §§ 1 to 5 of the act applicable to filings made on and after April 1, 1986.

Fee on mortgage recorded before but released after effective date of code. - The correct fee to be charged by a clerk for satisfying a chattel mortgage recorded prior to the effective date of the uniform commercial code and which is sought to be released after the effective date of the code is $.25. 1961-62 Op. Att'y Gen. No. 62-12 (opinion rendered under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 69 Am. Jur. 2d Secured Transactions §§ 418, 431, 434, 539, 543.
14 C.J.S. Chattel Mortgages § 347; 72 C.J.S. Pledges § 44; 76 C.J.S. Records § 29; 78 C.J.S. Sales § 573.

§ 55-9-407. Information from filing officer.

(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 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, the secretary of state shall furnish a copy of any filed financing statement or of assignment for a uniform fee of one dollar ($1.00) per page.

(3) Upon request of any person, the county clerk shall furnish a photocopy of any instrument filed with said filing officer and shall, upon request, certify said photocopy as being a true copy of the record. The uniform fee for each such photocopy shall be one dollar ($1.00) per page, and the fee for each such certificate shall be one dollar ($1.00). The county clerk shall further certify as a true and correct copy of the record any typed or photocopied instrument furnished to the county clerk by any person, if the county clerk finds such a copy to be a true and correct copy. The fee for such certificate shall be one dollar ($1.00), with an additional fee of seventy-five cents ($.75) for comparing each page so certified with the filed instrument.

History: 1953 Comp., § 50A-9-407, enacted by Laws 1961, ch. 96, § 9-407; 1985, ch. 193, § 32; 1986, ch. 36, § 5.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. Subsection (1) requires the filing officer upon request to return to the secured party a copy of the financing statement on which the material data concerning the filing are noted. Receipt of such a copy will assure the secured party that the mechanics of filing have been complied with. Note, however, that under Section 9-403(1) the secured party does not bear the risk that the filing officer will not properly perform his duties: under that section the secured party has complied with the filing requirements when he presents his financing statement for filing and the filing fee has been tendered or the statement accepted by the filing officer.

2. Subsection (2) requires the filing officer on request to issue to any person who has tendered the proper fee his certificate as to what filings have been made against any particular debtor and to furnish copies of such filed financing statements. In view of the centralized filing system adopted by this article (see Section 9-401 and comment thereto), this provision is of obvious convenience to a person who wishes to know what the files contain but who cannot conveniently consult files located in the state capital.

Cross references.Point 1: Section 9-403(1).

Point 2: Section 9-401.

Definitional cross references."Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Person". Section 1-201.

"Secured party". Section 9-105.

"Send". Section 1-201.

ANNOTATION

The 1986 amendment deleted the former first and second sentences of Subsection (2) which read, "Upon request of any person, the secretary of state shall issue his or her 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 uniform fee for such a certificate shall be three dollars ($3.00)." and substituted "one dollar ($1.00)" for "seventy-five cents ($.75)" at the end of the subsection; in Subsection (3), substituted "one dollar ($1.00)" for "seventy-five cents ($.75)" and "one dollar ($1.00)" for "fifty cents ($.50)" in the second sentence, and substituted "one dollar ($1.00)" for "fifty cents ($.50)" in the last sentence.

Emergency clauses. - Laws 1986, ch. 36, § 8 makes the act effective immediately. Approved February 28, 1986.

Applicability. - Laws 1986, ch. 36, § 7 makes the provisions of §§ 1 to 5 of the act applicable to filings made on and after April 1, 1986.

Copy of filed information. - A secured party does not have a duty to retain a copy of what was filed: This section requires the noting of filing information on a copy only upon the request of the person filing and is inconsistent with any such duty. Greenman Motor, Inc. v. United N.M. Bank, 48 Bankr. 611 (Bankr. D.N.M. 1985).

The secretary of state is not required to perform searches of file documents related to the Uniform Commercial Code upon request. 1987 Op. Att'y Gen. No. 87-17.

Clerk not under duty to search records. - A county clerk is not under any legal duty to conduct searches at the request of private persons of records filed in such office pursuant to the code, and no statutory fee is provided for such service. 1961-62 Op. Att'y Gen. No. 62-20.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 69 Am. Jur. 2d Secured Transactions §§ 419, 435, 436.
76 C.J.S. Registers of Deeds § 10.

§ 55-9-408. Financing statements covering consigned or leased goods.

A consignor or lessor of goods may file a financing statement using the term

"consignor", "consignee", "lessor", "lessee" or the like instead of the terms specified in Section 9-402 [55-9-402 NMSA 1978]. The provisions of this part shall apply as appropriate to such a financing statement but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (Section 1-201(37) [55-1-201(37) NMSA 1978]). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing.

History: 1978 Comp., § 55-9-408, enacted by Laws 1985, ch. 193, § 33.

OFFICIAL COMMENT

Prior uniform statutory provisions. None.

Purposes.1. Where filing is required under Sections 2-326(3) and 9-114 for a consignment which is not a security interest (Section 1-201(37)), this section authorizes the appropriate adaptations of terminology.

Apart from the rules in Part 4, the rules of this article using the terms "debtor" and "secured party" will not apply to consignments if they are not security interests. Section 9-114 on consignments essentially parallels Section 9-312(3) on inventory priorities, and the latter rule therefore does not apply to consignments. Section 2-326 states the rights of creditors of a consignee who has not filed or otherwise complied with subsection (3), and Section 9-301 on unperfected security interests is therefore not applicable. Section 2-326 and the law of consignments supply rules which are provided by Section 9-311 for security interests and that section is therefore not applicable to consignments. For reasons indicated in the Comment to Section 9-114 Section 9-306 on proceeds is inapplicable to consignments. An equivalent to the protection of a buyer in ordinary course of business against a security interest under Section 9-307(1) is provided against consignments by Section 2-403(2) and (3).

2. If a lease is actually intended as security (Section 1-201(37)), this Article applies in full. But this question of intention is a doubtful one, and the lessor may choose to file for safety even while contending that the lease is a true lease for which no filing is required. This section authorizes filing with appropriate changes of terminology, and without affecting the substantive question of classification of the lease. If the lease is a true lease, none of the provisions of the article is applicable to the lease as an interest in the chattel. Note, however, that the article may be applicable to the lease in its aspect as chattel paper. See Section 9-105(b).

Part 5

DEFAULT

§ 55-9-501. Default; procedure when security agreement covers both real and personal property.

(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by Subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in Section 9-207 [55-9-207 NMSA 1978]. The rights and remedies referred to in this subsection are cumulative.

(2) After default, the debtor has the rights and remedies provided in this part, those provided in the security agreement and those provided in Section 9-207 [55-9-207 NMSA 1978].

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (Subsection (3) of Section 9-504 [55-9-504 NMSA 1978] and Section 9-505 [55-9-505 NMSA 1978]) and with respect to redemption of collateral (Section 9-506 [55-9-506 NMSA 1978]) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:

(a) Subsection (2) of Section 9-502 [55-9-502 NMSA 1978] and Subsection (2) of Section 9-504 [55-9-504 NMSA 1978] insofar as they require accounting for surplus proceeds of collateral;

(b) Subsection (3) of Section 9-504 [55-9-504 NMSA 1978] and Subsection (1) of Section 9-505 [55-9-501 NMSA 1978] which deal with disposition of collateral;

(c) Subsection (2) of Section 9-505 [55-9-505 NMSA 1978] which deals with acceptance of collateral as discharge of obligation;

(d) Section 9-506 [55-9-506 NMSA 1978] which deals with redemption of collateral; and

(e) Subsection (1) of Section 9-507 [55-9-507 NMSA 1978] which deals with the secured party's liability for failure to comply with this part.

(4) If the security agreement covers both real and personal property, the secured party may proceed under this part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this part do not apply.

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by

judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

History: 1953 Comp., § 50A-9-501, enacted by Laws 1961, ch. 96, § 9-501; 1971, ch. 246, § 1; 1985, ch. 193, § 34.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 6, Uniform Trust Receipts Act; Sections 16 through 26, Uniform Conditional Sales Act.

Purposes.1. The rights of the secured party in the collateral after the debtor's default are of the essence of a security transaction. These are the rights which distinguish the secured from the unsecured lender. This section and the following six sections state those rights as well as the limitations on their free exercise which legislative policy requires for the protection not only of the defaulting debtor but of other creditors. But Subsections (1) and (2) make it clear that the statement of rights and remedies in this part does not exclude other remedies provided by agreement.

2. Following default and the taking possession of the collateral by the secured party, there is no longer any distinction between the security interest which before default was nonpossessory and that which was possessory under a pledge. Therefore no general distinction is taken in this part between the rights of a nonpossessory secured party and those of a pledgee; the latter, being in possession of the collateral at default, will of course not have to avail himself of the right to take possession under Section 9-503.

3. Section 9-207 states rights, remedies and duties with respect to collateral in the secured party's possession. That section applies not only to the situation where he is in possession before default, as a pledgee, but also, by Subsections (1) and (2) of this section, to the secured party in possession after default. Nevertheless the relations of the parties have been changed by default, and Section 9-207 as it applies after default must be read together with this part. In particular, agreements permitted under Section 9-207 cannot waive or modify the rights of the debtor contrary to Subsection (3) of this section.

4. Section 1-102(3) states rules to determine which provisions of this act are mandatory and which may be varied by agreement. In general, provisions which relate to matters which come up between immediate parties may be varied by agreement. In the area of rights after default our legal system has traditionally looked with suspicion on agreements designed to cut down the debtor's rights and free the secured party of his duties: no mortgage clause has ever been allowed to clog the equity of redemption. The default situation offers great scope for overreaching; the suspicious attitude of the courts has been grounded in common sense.

Subsection (3) of this section contains a codification of this long-standing and deeply

rooted attitude: the specified rights of the debtor and duties of the secured party may not be waived or varied except as stated. Provisions not specified in Subsection (3) are subject to the general rules stated in Section 1-102 (3).

5. The collateral for many corporate security issues consists of both real and personal property. In the interest of simplicity and speed Subsection (4) permits, although it does not require, the secured party to proceed as to both real and personal property in accordance with his rights and remedies in respect of the real property. Except for the permission so granted, this act leaves to other state law all questions of procedure with respect to real property. For example, this act does not determine whether the secured party can proceed against the real estate alone and later proceed in a separate action against the personal property in accordance with his rights and remedies against the real estate. By such separate actions the secured party "proceeds as to both," and this part does not apply in either action. But Subsection (4) does give him an option to proceed under this part as to the personal property.

6. Under Subsection (1) a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure, outside this article, which state law may provide. The first sentence of Subsection (5) makes clear that any judgment lien which the secured party may acquire against the collateral is, so to say, a continuation of his original interest (if perfected) and not the acquisition of a new interest or a transfer of property to satisfy an antecedent debt. The judgment lien is therefore stated to relate back to the date of perfection of the security interest. The second sentence of the subsection makes clear that a judicial sale following judgment, execution and levy is one of the methods of foreclosure contemplated by Subsection (1); such a sale is governed by other law and not by this article and the restrictions which this article imposes on the right of a secured party to buy in the collateral at a sale under Section 9-504 do not apply.

Cross references.Point 2: Section 9-503.

Point 3: Section 9-207.

Point 4: Section 1-102(3).

Point 5: Sections 9-102(1) and 9-104(j).

Point 6: Section 9-504.

Definitional cross references."Agreement". Section 1-201.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Documents". Section 9-105.

"Goods". Section 9-105.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

A secured creditor is not required to elect a remedy, but can take any permitted action or combination of actions. Western Bank v. Matherly, 106 N.M. 31, 738 P.2d 903 (1987).

Secured party may satisfy debt outside of code. - A secured party may reduce his claim to judgment and execute upon the collateral, or otherwise satisfy the debt by resorting to state law other than the commercial code. Riblet Tramway Co. v. Monte Verde Corp. 453 F.2d 313 (10th Cir. 1972).

Doctrine of election of remedies abolished. - The purpose of Subsections (1) and (5) of this section is to abolish the doctrine of election of remedies. Ruidoso State Bank v. Garcia, 92 N.M. 288, 587 P.2d 435 (1978).

Secured party's rights upon default. - Upon default, a secured party is entitled to take possession of the collateral for the purpose of preserving it and in addition may sue on the note for money judgment. Kimura v. Wauford, 104 N.M. 3, 715 P.2d 451 (1986).

Secured party suing on defaulted note may sue and reduce debt to judgment. In that case, the debt would be merged into the judgment. However, the debt would be carried forward so that the secured party's rights under the security agreement would not be destroyed. The security agreements would not be merged into the judgment. Ruidoso State Bank v. Garcia, 92 N.M. 288, 587 P.2d 435 (1978).

Rights of one claiming interest through vendee. - Where there are no intervening equities whereby the vendor may be estopped to enforce a forfeiture against one claiming through a conditional vendee of personal property, a vendee can create no greater interest in personal property than is possessed by the vendee, and one claiming a UCC security interest through the vendee takes his interest in the property subject to all claims of title enforceable against the vendee, including forfeiture upon default. Western Bank v. Matherly, 106 N.M. 31, 738 P.2d 903 (1987).

Recovery of judgment for debt does not prevent later proceedings. - The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a mortgage or other lien given to secure its payment. Ruidoso State Bank v. Garcia, 92 N.M. 288, 587 P.2d 435 (1978).

Law reviews. - For comment on Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), see 4 Nat. Resources J. 175 (1964).

For article, "Essential Attributes of Commercial Paper - Part I," see 1 N.M. L. Rev. 479 (1971).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 9, 61, 62, 92, 116, 137, 158, 200; 69 Am. Jur. 2d Secured Transactions §§ 255, 306, 307, 321, 447, 548, 549, 551 to 553, 558, 559, 567, 583, 600, 601, 616, 622, 627, 630, 649.
Claim of lien by conditional vendor as waiver of title, 45 A.L.R. 185.
Note for price as waiver of reservation of title under conditional sale, 55 A.L.R. 1160.
Demand for payment or for possession as condition of seller's right to retake property or otherwise enforce forfeiture after waiver of strict performance, 59 A.L.R. 134.
Novation of contract as affecting applicability of protective provisions of Uniform Conditional Sales Act or similar statute, 83 A.L.R. 998.
Waiver by conditional purchaser of rights or provisions as to repossession, redemption or resale, 99 A.L.R. 1298.
Action for price as waiver by conditional vendor of right to reclaim property, 113 A.L.R. 653.
Title and interest of parties, 10 A.L.R.2d 758.
Purchase by pledgee of subject of pledge, 37 A.L.R.2d 1381.
14 C.J.S. Chattel Mortgages § 355; 72 C.J.S. Pledges §§ 49, 50; 78 C.J.S. Sales § 597.

§ 55-9-502. Collection rights of secured party.

(1) When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under Section 9-306 [55-9-306 NMSA 1978].

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any

deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

History: 1953 Comp., § 50A-9-502, enacted by Laws 1961, ch. 96, § 9-502; 1985, ch. 193, § 35.

OFFICIAL COMMENT

Prior uniform statutory provisions. None.

Purposes.1. The assignee of accounts, chattel paper or instruments holds as collateral property which is not only the most liquid asset of the debtor's business but also property which may be collected without any interruption of the business, assuming it to continue after default. The situation is far different from that where the collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore the problems of valuation and identification, present where the collateral is tangible chattels, do not arise so sharply on the assignment of intangibles. Considerations, similar although not identical, apply to assignments of general intangibles, which are also covered by the rule of the section. Consequently, this section recognizes the fact that financing by assignment of intangibles lacks many of the complexities which arise after default in other types of financing, and allows the assignee to liquidate in the regular course of business by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i.e., payment by the account debtor to the assignee, "notification" financing) or indirect (i.e., payment by the account debtor to the assignor, "nonnotification" financing). By agreement, of course, the secured party may have the right to give notice and to make collections before default.

2. In one form of accounts receivable financing, which is found in the "factoring" arrangements which are common in the textile industry, the assignee assumes the credit risk - that is, he buys the account under an agreement which does not provide for recourse or charge-back against the assignor in the event the account proves uncollectible. Under such an arrangement, neither the debtor nor his creditors have any legitimate concern with the disposition which the assignee makes of the accounts. Under another form of accounts receivable financing, however, the assignee does not assume the credit risk and retains a right of full or limited recourse or charge-back for uncollectible accounts. In such a case both debtor and creditors have a right that the assignee not dump the accounts, if the result will be to increase a possible deficiency claim or to reduce a possible surplus.

3. Where an assignee has a right of charge-back or a right of recourse, Subsection (2) provides that liquidation must be made with due regard to the interest of the assignor and of his other creditor - "in a commercially reasonable manner" (compare Section 9-504 and see Section 9-507(2)) - and the proceeds allocated to the expenses of realization and to the indebtedness. If the "charge-back" provisions of the assignment

arrangement provide only for "charge-back" of bad accounts against a reserve, the debtor's claim to surplus and his liability for a deficiency are limited to the amount of the reserve.

4. Financing arrangements of the type dealt with by this section are between businessmen. The last sentence of Subsection (2) therefore preserves freedom of contract, and the subsection recognizes that there may be a true sale of accounts or chattel paper although recourse exists. The determination whether a particular assignment constitutes a sale or a transfer for security is left to the courts. Note that, under Section 9-102, this article applies both to sales and to security transfers of such intangibles.

Cross references.Sections 9-205 and 9-306.

Point 3: Sections 9-504 and 9-507(2).

Point 4: Sections 9-102(1) (b) and 9-104(f).

Definitional cross references."Account". Section 9-106.

"Account debtor". Section 9-105.

"Agreement". Section 1-201.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Instrument". Section 9-105.

"Notify". Section 1-201.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

ANNOTATION

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 40, 169; 69 Am. Jur. 2d Secured Transactions § 228.
6A C.J.S. Assignments § 98; 14 C.J.S. Chattel Mortgages § 328; 72 C.J.S. Pledges §§ 49, 50; 78 C.J.S. Sales § 597.

§ 55-9-503. Secured party's right to take possession after default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504 [55-9-504 NMSA 1978].

History: 1953 Comp., § 50A-9-503, enacted by Laws 1961, ch. 96, § 9-503.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 6, Uniform Trust Receipts Act; Sections 16 and 17, Uniform Conditional Sales Act.

Purposes.Under this article the secured party's right to possession of the collateral (if he is not already in possession as pledgee) accrues on default unless otherwise agreed in the security agreement. This article follows the provisions of the earlier uniform legislation in allowing the secured party in most cases to take possession without the issuance of judicial process. In the case of collateral such as heavy equipment, the physical removal from the debtor's plant and the storage of the equipment pending resale may be exceedingly expensive and in some cases impractical. The section therefore provides that in lieu of removal the lender may render equipment unusable or dispose of collateral on the debtor's premises. The authorization to render equipment unusable or to dispose of collateral without removal would not justify unreasonable action by the secured party, since, under Section 9-504(3), all his actions in connection with disposition must be taken in a "commercially reasonable manner".

Cross reference.Section 9-504.

Definitional cross references."Action". Section 1-201.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Equipment". Section 9-109.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

ANNOTATION

Secured party may recover possession of chattel by replevin from judicial officer who has properly taken possession thereof under execution. State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966).

Debtor has no conversion claim if did not redeem. - A debtor who could have regained his right to possession by redemption, but did not redeem, has no claim in conversion, as conversion only protects the rights of one entitled to lawful possession. Cordova v. Lee Galles Oldsmobile, Inc., 100 N.M. 204, 668 P.2d 320 (Ct. App. 1983).

Law enforcement officer accompanying repossessor. - Any time a law enforcement officer accompanies a repossessor and makes his official presence known to the defaulting party at or near the attempted self-help repossession, that officer has transgressed the line of benign attendance. Hence, repossession of a truck on an air force base became wrongful as a matter of law, where the repossessor was accompanied by an armed military security police sergeant who informed the debtor that "we have to take the truck" or words to that effect. Waisner v. Jones, 107 N.M. 260, 755 P.2d 598 (1988).

Action by Indian for violation of tribal law in repossession of pickup truck. - See GMAC v. Chischilly, 96 N.M. 113, 628 P.2d 683 (1981).

Law reviews. - For article, "Breach of the Peace and New Mexico's Uniform Commercial Code," see 4 Nat. Resources J. 85 (1964).

For comment on Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), see 4 Nat. Resources J. 175 (1964).

For note, "Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503," see 4 N.M. L. Rev. 75 (1973).

For survey, "Civil Procedure in New Mexico in 1975," see 6 N.M. L. Rev. 367 (1976).

For article, "Problems in the Application of Full Faith and Credit for Indian Tribes," see 7 N.M. L. Rev. 133 (1977).

For annual survey of New Mexico law relating to Indian law, see 12 N.M.L. Rev. 409 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 2, 50, 61, 116, 147, 200; 69 Am. Jur. 2d Secured Transactions §§ 202, 253, 257, 321, 540, 560, 565, 580, 583, 584, 587 to 599, 609, 648.

Retaking of property conditionally sold as affecting action previously commenced for purchase price, 23 A.L.R. 1462.
Breaking and entering for purpose of retaking possession upon default of purchaser, 36 A.L.R. 853.
Validity of provision for collection of unpaid purchase money after retaking the property in the contract, 43 A.L.R. 1243.
Demand for payment or for possession as condition of seller's right to retake possession or otherwise enforce forfeiture under conditional sale, 59 A.L.R. 134.
What constitutes retaking property, 99 A.L.R. 1297.
Action for price as waiver by conditional vendor of right to reclaim property, 113 A.L.R. 653.
Repossession of property as within statute imposing tax on retail sales, 139 A.L.R. 410.
Right of conditional seller to retake property without legal process, 146 A.L.R. 1331.
What amounts to buyer's waiver of seller's duty to give notice before repossession, 174 A.L.R. 1363.
Rights and remedies as between parties to conditional sale after seller has repossessed himself of the property, 49 A.L.R.2d 15.
Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like, 72 A.L.R.2d 342.
Maintenance of replevin or similar possessory remedy by cotenant, or security transaction creditor thereof, against other cotenants, 93 A.L.R.2d 358.
What conduct by repossessing chattel mortgagee or conditional vendor entails tort liability, 99 A.L.R.2d 358.
Punitive damages for wrongful seizure of chattel by one claiming security interest, 35 A.L.R.3d 1016.
Repossession by secured seller as affecting his right to recover on a note or other obligation given as a down payment, 49 A.L.R.3d 364.
14 C.J.S. Chattel Mortgages § 183; 72 C.J.S. Pledges §§ 49, 50; 78 C.J.S. Sales § 597.

§ 55-9-504. Secured party's right to dispose of collateral after default; effect of disposition.

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on sales (Article 2). The proceeds of disposition shall be applied in the order following to:

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods, there shall be no statement renouncing or modifying this right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale. If a surplus remains after sale of consumer goods used to secure a loan or indebtedness in any manner described in Sections 56-8-15 through 56-8-20 NMSA 1978 [repealed], the secured party must make a record of the sale and the amount of surplus and must notify the debtor by first class mail sent to the debtor's last known address of the amount of the surplus and the debtor's right to claim it at a specified location within one year of the date of mailing of the notice. In the event that the first class mail addressed to any person is returned unclaimed to the secured party, then the secured party must post and maintain on a conspicuous public part of his premises an appropriately entitled list naming each such person. One year after the date of such mailing or posting, whichever is later, the secured party may retain any surplus remaining unclaimed by the debtor as his own property.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirement of this part or of any judicial

proceedings:

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

History: 1953 Comp., § 50A-9-504, enacted by Laws 1961, ch. 96, § 9-504; 1971, ch. 246, § 2; 1981, ch. 10, § 1; 1981, ch. 21, § 1; 1985, ch. 193, § 36.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 6, Uniform Trust Receipts Act; Sections 19, 20, 21, and 22, Uniform Conditional Sales Act.

Purposes.1. The Uniform Trust Receipts Act provides that an entruster in possession after default holds the collateral with the rights and duties of a pledgee, and, in particular, that he may sell such collateral at public or private sale with a right to claim deficiency and a duty to account for any surplus. The Uniform Conditional Sales Act insisted on a sale at public auction with elaborate provisions for the giving of notice of sale. This section follows the more liberal provisions of the Trust Receipts Act. Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable. In this respect this section follows the provisions of the section on resale by a seller following a buyer's rejection of goods (Section 2-706). Subsection (1) does not restrict disposition to sale: the collateral may be sold, leased, or otherwise disposed of - subject of course to the general requirement of Subsection (2) that all aspects of the disposition be "commercially reasonable". Section 9-507(2) states some tests as to what is "commercially reasonable".

2. Subsection (1) in general follows prior law in its provisions for the application of proceeds and for the debtor's right to surplus and liability for deficiency. Under Paragraph (1) (c) the secured party, after paying expenses of retaking and disposition and his own debt, is required to pay over remaining proceeds to the extent necessary to satisfy the holder of any junior security interest in the same collateral if the holder of the junior interest has made a written demand and furnished on request reasonable proof of his interest: this provision is necessary in view of the fact that under Subsection (4) the junior interest is discharged by the disposition. Since the requirement is conditioned on

written demand, it should not result in undue burden on the secured party making the disposition. It should be noted also that under Section 9-112 where the secured party knows that the collateral is owned by a person who is not the debtor, the owner of the collateral and not the debtor is entitled to any surplus.

3. In any security transaction the debtor (or the owner of the collateral if other than the debtor: see Section 9-112) is entitled to any surplus which results from realization on the collateral; the debtor will also, unless otherwise agreed, be liable for any deficiency. Subsection (2) so provides. Since this article covers sales of certain intangibles as well as transfers for security, the subsection also provides that apart from agreement the right to surplus or liability for deficiency does not accrue where the transaction between debtor and secured party was a sale and not a security transaction.

4. Subsection (4) provides that a purchaser for value from a secured party after default takes free of any rights of the debtor and of the holders of junior security interests and liens, even though the secured party has not complied with the requirements of this part or of any judicial proceedings. This subsection follows a similar provision in the Uniform Trust Receipts Act and in the section of this act on resale by a seller (Section 2-706). Where the purchaser for value has bought at a public sale he is protected under Paragraph (a) if he has no knowledge of any defects in the sale and was not guilty of collusive practices. Where the purchaser for value has bought at a private sale he must, to receive the protection of Paragraph (b), qualify in all respects as a purchaser in good faith. Thus while the purchaser at a private sale is required to proceed in the exercise of good faith, the purchaser at public sale is protected so long as he is not actively in bad faith, and is put under no duty to inquire into the circumstances of the sale.

5. Both the Uniform Trust Receipts Act and the Uniform Conditional Sales Act required a waiting period after repossession and before sale (five days in the Trust Receipts Act, ten days in the Conditional Sales Act). Under Subsection (3), the secured party in most cases is required to give reasonable notification of disposition to the debtor unless the debtor has after default signed a statement renouncing or modifying his right to notification of sale.

The secured party must also (except for consumer goods) give notice to any other secured parties who have in writing given notice of a claim of an interest in the collateral. This latter notice must be given before the debtor renounces his rights or before the secured party gives his notification to the debtor. Compare Section 9-505(2). Except for the requirement of notification there is no statutory period during which the collateral must be held before disposition. "Reasonable notification" is not defined in this article; at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire.

6. Section 19 of the Uniform Conditional Sales Act required that sale be made not more than thirty days after possession taken by the conditional vendor. The Uniform Trust Receipts Act contained no comparable provision. Here again this article follows the

Trust Receipts Act, and no period is set within which the disposition must be made, except in the case of consumer goods which under Section 9-505(1) must in certain instances be sold within ninety days after the secured party has taken possession. The failure to prescribe a statutory period during which disposition must be made is in line with the policy adopted in this article to encourage disposition by private sale through regular commercial channels. It may, for example, be wise not to dispose of goods when the market has collapsed, or to sell a large inventory in parcels over a period of time instead of in bulk. Note, however, that under Subsection (3) every aspect of the sale or other disposition of the collateral must be commercially reasonable; this specifically includes method, manner, time, place and terms. See Section 9-507(2). Under that provision a secured party who without proceeding under Section 9-505(2) held collateral a long time without disposing of it, thus running up large storage charges against the debtor, where no reason existed for not making a prompt sale, might well be found not to have acted in a "commercially reasonable" manner. See also Section 1-203 on the general obligation of good faith.

Cross references.Point 1: Sections 2-706 and 9-507(2).

Point 2: Section 9-112.

Point 3: Sections 9-102(1) (b) and 9-112.

Point 4: Section 2-706.

Point 6: Sections 9-505 and 9-507(2).

Definitional cross references."Account". Section 9-106.

"Agreement". Section 1-201.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Gives" notification. Section 1-201.

"Good faith". Section 1-201.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Proceeds". Section 9-306.

"Purchaser". Section 1-201.

"Receives" notification. Section 1-201.

"Rights". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

"Written". Section 1-201.

ANNOTATION

I. General Consideration.

Cross-references. - As to the allowance of a reasonable attorney fee for the debtor, if prevailing in a civil action pursuant to this section, see 39-2-2 NMSA 1978.

Compiler's notes. - Sections 56-8-15 through 56-8-20 NMSA 1978, referred to in the sixth sentence of Subsection (3), were repealed by Laws 1983, ch. 44, § 1, effective July 1, 1983. For present comparable provisions, see 56-12-1 NMSA 1978 et seq.

Scope of section. - This section pertains to a situation in which a secured party has taken possession of collateral, disposed of it, and then proceeded to an action against the debtor for a deficiency. Green Tree Acceptance, Inc. v. Layton, 108 N.M. 171, 769 P.2d 84 (1989).

Law reviews. - For article, "Breach of the Peace and New Mexico's Uniform Commercial Code," see 4 Nat. Resources J. 85 (1964).

For comment on Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), see 4 Nat. Resources J. 175 (1964).

For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M. L. Rev. 49 (1973).

For article, "The Impact of the Revised New Mexico Class Action Rules Upon Consumers," see 9 N.M.L. Rev. 263 (1979).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

For annual survey of New Mexico law relating to commercial law, see 12 N.M.L. Rev. 173 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 2, 51, 109, 145, 200; 69 Am. Jur. 2d Secured Transactions §§ 219, 321, 540, 565, 580 to 587, 592, 594, 599, 604, 608, 615, 625, 627, 639, 653.
Purchase by pledgee of subject of pledge, 76 A.L.R. 705; 37 A.L.R.2d 1381.
Rights and remedies as between parties after repossession of property by seller, 99 A.L.R. 1288.
What constitutes a "public sale," 4 A.L.R.2d 575.
Necessity and sufficiency of notice of sale to mortgagor where chattel mortgage is sought to be foreclosed without judicial proceedings by sale under power, 30 A.L.R.2d 539.
Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 A.L.R.2d 15.
Construction of term "debtor" as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation, 5 A.L.R.4th 1291.
What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3), 7 A.L.R.4th 308.
Loss or modification of right to notification of sale of repossessed collateral under Uniform Commercial Code § 9-504, 9 A.L.R.4th 552.
Failure of secured party to make "commercially reasonable" disposition of collateral

under UCC § 9-504(3) as bar to deficiency judgment, 10 A.L.R.4th 413.
Sufficiency of secured party's notification of sale or other intended disposition of collateral under UCC § 9-504(3), 11 A.L.R.4th 241.
Nature of collateral which secured party may sell or otherwise dispose of without giving notice to defaulting debtor under UCC § 9-504(3), 11 A.L.R.4th 1060.
Secured transactions: what is "public" or "private" sale under UCC § 9-504(3), 60 A.L.R.4th 1012.
UCC: value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency, 72 A.L.R.4th 1128.
14 C.J.S. Chattel Mortgages §§ 183, 366; 72 C.J.S. Pledges §§ 49, 50; 78 C.J.S. Sales § 599.

II. Liability for Surplus or Deficiency.

When failure to sell collateral does not bar judgment. - The referee in bankruptcy did not err in awarding a judgment in favor of appellee notwithstanding his failure to sell the collateral which secured appellants' debt where the judgment was based on the depletion of the inventory. With v. Amador, 596 F.2d 428 (10th Cir. 1979).

Burden of proof on value of collateral. - In a suit for a deficiency, where the value of the collateral is at issue, there is a presumption that the value of the repossessed collateral at resale is equal to the value of the outstanding debt. When the sale is conducted in accordance with Subsection (3) the sum received at sale is evidence of the market value; but when the sale is not conducted according to the code, the amount received is not evidence of the market value of the collateral, and the secured party will have the burden of proving the market value by other evidence. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975).

III. Disposition of Collateral.

U.C.C. encourages commercial sales of collateral. - The U.C.C. encourages sales of repossessed collateral through regular commercial channels as opposed to public auction which often times yields only disappointing results. Security Fed. Sav. & Loan v. Prendergast, 108 N.M. 572, 775 P.2d 1289 (1989).

Good faith duty of creditor to dispose of collateral reasonably. - The requirements of Subsection (3) place upon the creditor the good faith duty to the debtor to use reasonable means to see that a reasonable price is received for the collateral. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975).

Notice of sale should be given to a "public" reasonably expected to have an interest in the collateral and should be published in a manner reasonably calculated to assure

such publicity that the collateral will bring the best possible price from competitive bidding of a strived-for lively concourse of bidders. Villella Enters., Inc. v. Young, 108 N.M. 33, 766 P.2d 293 (1988).

Cash only auction sales. - "Cash only" terms of auction sale of farm equipment pledged as security for a note did not render the sale commercially unreasonable, where there was no evidence to suggest that this was not the normal practice of the auction company. First Nat'l Bank v. Ruttle, 108 N.M. 687, 778 P.2d 434 (1989).

Loan of collateral does not constitute "disposition" under Subsection (1). Cordova v. Lee Galles Oldsmobile, Inc., 100 N.M. 204, 668 P.2d 320 (Ct. App. 1983).

Creditor electing to sell in regular course of business must comply with section. - Once the creditor elects to retain collateral, and follow the mechanics of 55-9-505 NMSA 1978, he can do as he pleases with the property, but where he intends to sell the property in the regular course of his business, which is in substance selling the property as contemplated by this section, he must account for a surplus in conformity with this section. Reeves v. Foutz & Tanner, Inc., 94 N.M. 760, 617 P.2d 149 (1980).

Commercially reasonable sale to bring better price. - The importance of a commercially reasonable sale lies in the fact that the amount of the deficiency judgment will be inversely proportional to the sales price; if the price is high, the amount of the judgment will be low, and vice versa. The "method, manner, time, place and terms" tests are really proxies for "insufficient price," and their importance lies almost exclusively in the extent they protect against an unfairly low price. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975).

In determining commercial reasonableness, each case will turn on its particular facts but generally, evidence as to every aspect of the sale including the amount of advertising done, normal commercial practices in disposing of particular collateral, the length of time elapsing between repossession and resale, whether deterioration of the collateral has occurred, the number of persons contacted concerning the sale and even the price obtained will be pertinent. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975); Villella Enters., Inc. v. Young, 108 N.M. 33, 766 P.2d 293 (1988).

Burden of proof on creditor that sale commercially reasonable. - In light of the specific requirement of Subsection (3) as to commercial reasonableness, a creditor, when suing for a deficiency, should allege and prove that disposition of the collateral was conducted in compliance with that statute; the creditor must allege and, unless admitted, prove that the sale was commercially reasonable. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975).

However creditor must show some unreasonableness to avoid directed verdict. - Once a creditor suing for a deficiency has made a prima facie case indicating a commercially reasonable sale, the debtor may be required to elicit some evidence of commercial

unreasonableness to avoid a directed verdict on the issue, but when this is done, it becomes a question for the trier of the facts. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975).

Price as factor in determining commercial reasonableness. - A debtor will not rebut a prima facie presumption of commercial reasonableness merely by contending that the price obtained for the collateral was too low. Nonetheless, the price obtained is a relevant factor. Villella Enters., Inc. v. Young, 108 N.M. 33, 766 P.2d 293 (1988).

Secured party required to give notice. - Notice of the time and place of sale under the code is required to be given the debtor by a secured party. Foundation Discts., Inc. v. Serna, 81 N.M. 474, 468 P.2d 875 (1970).

Test for notification good faith effort not whether notice received. - In construing the requirements of notification to be sent a debtor under Subsection (3), the test of notification is not whether the debtor receives the notice but only whether the secured party has made a good faith effort and took such steps as a reasonable person would have taken to give notice. Begay v. Foutz & Tanner, Inc., 95 N.M. 106, 619 P.2d 551 (Ct. App. 1979), rev'd on other grounds sub nom. Reeves v. Foutz & Tanner, Inc., 94 N.M. 760, 617 P.2d 149 (1980).

Requirement of reasonable notification is a question of fact to be determined only after considering all the facts and circumstances of the individual case. Ridley v. First Nat'l Bank, 87 N.M. 184, 531 P.2d 607 (Ct. App. 1974), cert. denied, 87 N.M. 179, 531 P.2d 602 (1975).

And written not verbal notice satisfactory under code. - Where the record discloses that no formal written notice of the time and place of sale was given to defendant, the fact that defendant may have had verbal notice that there would be a sale of the collateral does not satisfy the requirements of the code. Foundation Discts., Inc. v. Serna, 81 N.M. 474, 468 P.2d 875 (1970).

Failure to achieve commercial reasonableness not forfeiture of deficiency. - A secured party's failure to comply with Subsection (3) does not result in a forfeiture of the right to a deficiency; the secured party has the right to recover the claimed deficiency less any loss occasioned by its failure to sell in a commercially reasonable manner. Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975).

A secured party's failure to comply with Subsection (3) does not constitute an absolute bar to a deficiency judgment; instead, the secured party has the burden of showing what amount a sale would have brought if done in compliance with the UCC, and, the difference between what the sale brought when performed improperly and what it should have brought, if done correctly, will be the damages allowed to the debtors. If such amount does not equal the total deficiency, the secured party may recover the amount remaining unpaid. First Nat'l Bank v. Jiron, 106 N.M. 261, 741 P.2d 1382 (1987).

When a secured party has not complied with the notice provisions of Subsection (3), it still may obtain a deficiency judgment if it proves the market value of the collateral. Such proof must be by evidence other than the sum received at sale. First Nat'l Bank v. Ruttle, 108 N.M. 687, 778 P.2d 434 (1989).

Where the collateral has been sold in a manner that does not comply with the provisions of the UCC, there is a rebuttable presumption that the collateral was worth an amount at least equal to the outstanding balance. To overcome the presumption, the secured party has the burden of proving the value of the collateral by evidence other than the sum received at the sale. First Nat'l Bank v. Jiron, 106 N.M. 261, 741 P.2d 1382 (1987).

"Commercially reasonable" requirement may be waived. - Guarantors of promissory note waived contract defense that sale of collateral securing promissory note was not conducted in commercially reasonable manner. United States v. Lattauzio, 748 F.2d 559 (10th Cir. 1984).

Sale of unadvertised mobile home by automobile dealer. - Sale of mobile home was commercially reasonable, even though the vehicle was never advertised for sale, where the vehicle was placed on the premises of a dealer in used autos, and where customers could view repossessed vehicles and make written offers to purchase them. Security Fed. Sav. & Loan v. Prendergast, 108 N.M. 572, 775 P.2d 1289 (1989).

Bank's auction of farm equipment. - Bank's decision to auction farm equipment pledged as security for a note was reasonable, where the bank's loan officer testified he contacted several dealers in farm equipment in the area, and none were interested in purchasing the equipment auctioned. First Nat'l Bank v. Ruttle, 108 N.M. 687, 778 P.2d 434 (1989).

§ 55-9-505. Compulsory disposition of collateral; acceptance of the collateral as discharge of obligation.

(1) If the debtor has paid sixty percent of the cash price in the case of a purchase money security interest in consumer goods or sixty percent of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part a secured party who has taken possession of collateral must dispose of it under Section 9-504 [55-9-504 NMSA 1978] and if he fails to do so within ninety days after he takes possession the debtor at his option may recover in conversion or under Section 9-507(1) [55-9-507(1) NMSA 1978] on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this

subsection. In the case of consumer goods, there shall be no statement renouncing or modifying a right under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within twenty-one days after the notice was sent, the secured party must dispose of the collateral under Section 9-504 [55-9-504]. In the absence of such written objection the secured part may retain the collateral in satisfaction of the debtor's obligation.

History: 1953 Comp., § 50A-9-505, enacted by Laws 1961, ch. 96, § 9-505; 1985, ch. 193, § 37.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 23, Uniform Conditional Sales Act.

Purposes.1. Experience has shown that the parties are frequently better off without a resale of the collateral; hence this section sanctions an alternative arrangement. In lieu of resale or other disposition, the secured party may propose under Subsection (2) that he keep the collateral as his own, thus discharging the obligation and abandoning any claim for a deficiency. This right may not be exercised in the case of consumer goods where the debtor has paid 60% of the price or obligation and thus has a substantial equity, and may be exercised in other cases only on notification to the debtor, unless the debtor has signed after default a statement renouncing or modifying his rights under this section, and (except in the case of consumer goods) to any other secured party who has given written notice of a claim of an interest in the collateral. In the latter case, notice must be given before the secured party receives the debtor's renunciation or before he sends his notice to the debtor. The secured party may keep the goods in lieu of sale on failure of anyone receiving notification to object within twenty-one days.

2. When an objection is received by the secured party he must then proceed to dispose of the collateral in accordance with Section 9-504, and on failure to do so would incur the liabilities set out in Section 9-507. In the case of consumer goods where 60% of the price or obligation has been paid the disposition must be made within 90 days after possession taken. For failure to make the sale within the 90-day period the secured party is liable in conversion or alternatively may incur the liabilities set out in Section 9-507.

In the absence of objection the secured party is bound by his notice.

3. After default (but not before) a consumer-debtor who has paid 60% of the cash price may sign a written renunciation of his rights to require resale of the collateral.

Cross references.Sections 9-504 and 9-507(1).

Definitional cross references."Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Debtor". Section 9-105.

"Knows". Section 1-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchase money security interest". Section 9-107.

"Receives" notification. Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Signed". Section 1-201.

"Written". Section 1-201.

ANNOTATION

Remedies of Subsection (2) are accessible to all secured parties including pawnbrokers dealing in Indian pawn with Indian debtors, and they may avail themselves of the remedies provided by the code. Begay v. Foutz & Tanner, Inc., 95 N.M. 106, 619 P.2d 551 (Ct. App. 1979), rev'd on other grounds sub nom. Reeves v. Foutz & Tanner, Inc., 94 N.M. 760, 617 P.2d 149 (1980) (decided under prior law).

Creditor selling collateral in regular course of business must comply with 55-9-504 NMSA 1978. - Once the creditor elects to retain collateral, and follow the mechanics of this section, he can do as he pleases with the property, but where he intends to sell the property in the regular course of his business, which is in substance selling the property as contemplated by 55-9-504 NMSA 1978, he must account for a surplus in conformity with 55-9-504 NMSA 1978. Reeves v. Foutz & Tanner, Inc., 94 N.M. 760, 617 P.2d 149 (1980).

When creditor retains collateral in discharge of debt, he becomes owner. Begay v. Foutz & Tanner, Inc., 95 N.M. 106, 619 P.2d 551 (Ct. App. 1979), rev'd on other grounds sub nom. Reeves v. Foutz & Tanner, Inc., 94 N.M. 760, 617 P.2d 149 (1980).

But failure to sell collateral not always election to retain. - Where a decrease in inventory constitutes a willful and malicious conversion of collateral and a violation of 30-16-18 NMSA 1978, failure to sell the repossessed collateral will not be treated as an election under this section to retain the collateral in satisfaction of the obligation. With v. Amador, 596 F.2d 428 (10th Cir. 1979).

Creditor may retain collateral in excess of debt and interest owed. - Since Subsection (2) permits retention of collateral in satisfaction of a debt and places no limitation on the value of the collateral retained, presumably a creditor could lawfully retain collateral having a value substantially greater than the amount of the debt and lawful interest satisfied without running afoul of the usury statute; therefore the safeguard in such case is the right of the debtor to object and thereby require sale of the collateral. Begay v. Foutz & Tanner, Inc., 95 N.M. 106, 619 P.2d 551 (Ct. App. 1979), rev'd on other grounds sub nom. Reeves v. Foutz & Tanner, Inc., 94 N.M. 760, 617 P.2d 149 (1980) (decided under prior law).

Secured party retaining collateral need not notify unsecured creditors. - Subsection (2) does not require a secured part who decides to retain collateral in satisfaction of a debt to notify unsecured creditors. Michel v. J's Foods, Inc., 99 N.M. 574, 661 P.2d 474 (1983) (decided under prior law).

Recovery allowed for failure to sell truck within 90 days. - Plaintiff was entitled to recover damages in conversion from defendant for failure to comply with default provisions of uniform commercial code, where defendant, who repossessed plaintiff's pick-up truck after plaintiff had paid defendant more than 60% of purchase price, failed to sell truck within 90 days of possession. Crosby v. Basin Motor Co., 83 N.M. 77, 488 P.2d 127 (Ct. App. 1971).

But creditors allowed to assert counterclaims. - There is no language in 55-9-505 NMSA 1978, or elsewhere in the commercial code, which would preclude the full exercise of the right to interpose counterclaims under Rule 13, N.M.R. Civ. P. Charley v. Rico Motor Co., 82 N.M. 290, 480 P.2d 404 (Ct. App. 1971).

Law reviews. - For article, "Breach of the Peace and New Mexico's Uniform Commercial Code," see 4 Nat. Resources J. 85 (1964).

For comment on Graham v. Stoneham, 73 N.M. 382, 388 P.2d 389 (1963), see 4 Nat. Resources J. 175 (1964).

For annual survey of New Mexico law relating to commercial law, see 12 N.M.L. Rev. 173 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 138, 142; 69 Am. Jur. 2d Secured Transactions § 558.
Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 A.L.R.2d 15.
Construction and operation of U.C.C. § 9-505(2) authorizing secured party in possession of collateral to retain it in satisfaction of obligation, 55 A.L.R.3d 651.
14 C.J.S. Chattel Mortgages §§ 183, 366; 72 C.J.S. Pledges §§ 49, 50; 78 C.J.S. Sales § 599.

§ 55-9-506. Debtor's right to redeem collateral.

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Section 9-504 [55-9-504 NMSA 1978] or before the obligation has been discharged under Section 9-505 (2) [55-9-505 (2) NMSA 1978] the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

History: 1953 Comp., § 50A-9-506, enacted by Laws 1961, ch. 96, § 9-506.

OFFICIAL COMMENT

Prior uniform statutory provision. Section 18, Uniform Conditional Sales Act.

Purposes.Except in the case stated in Section 9-505(1) (consumer goods) the secured party is not required to dispose of collateral within any stated period of time. Under this section so long as the secured party has not disposed of collateral in his possession or contracted for its disposition, and so long as his right to retain it has not become fixed under Section 9-505(2), the debtor or another secured party may redeem. The debtor must tender fulfillment of all obligations secured, plus certain expenses: if the agreement contains a clause accelerating the entire balance due on default in one installment, the entire balance would have to be tendered. "Tendering fulfillment" obviously means more than a new promise to perform the existing promise; it requires payment in full of all monetary obligations then due and performance in full of all other obligations then matured. If unmatured obligations remain, the security interest continues to secure them as if there had been no default.

Under Section 9-504 the secured party may make successive sales of parts of the collateral in his possession. The fact that he may have sold or contracted to sell part of the collateral would not affect the debtor's right under this section to redeem what was left. In such a case, of course, in calculating the amount required to be tendered the debtor would receive credit for net proceeds of the collateral sold.

Cross references.Sections 9-504 and 9-505.

Definitional cross references."Agreement". Section 1-201.

"Collateral". Section 9-105.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Secured party". Section 9-105.

"Writing". Section 1-201.

ANNOTATION

Law reviews. - For article, "Breach of the Peace and New Mexico's Uniform Commercial Code," see 4 Nat. Resources J. 85 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Secured Transactions §§ 138, 197, 200; 69 Am. Jur. 2d Secured Transactions §§ 219, 242, 254, 276, 312, 313, 321, 536, 538, 552, 558, 578, 592, 612, 639, 640, 642 to 645, 648.
Buyer's right of redemption on repossession of property by seller, 99 A.L.R. 1296.
14 C.J.S. Chattel Mortgages §§ 336, 432; 72 C.J.S. Pledges §§ 47, 48; 78 C.J.S. Sales § 628.

§ 55-9-507. Secured party's liability for failure to comply with this part.

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers

in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

History: 1953 Comp., § 50A-9-507, enacted by Laws 1961, ch. 96, § 9-507.

OFFICIAL COMMENT

Prior uniform statutory provision. None.

Purposes.1. The principal limitation on the secured party's right to dispose of collateral is the requirement that he proceed in good faith (Section 1-203) and in a commercially reasonable manner. See Section 9-504. In the case where he proceeds, or is about to proceed, in a contrary manner, it is vital both to the debtor and other creditors to provide a remedy for the failure to comply with the statutory duty. This remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded. This section therefore provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide either that he proceed with the sale or other disposition under specified terms and conditions, or that the sale be made by a representative of creditors where insolvency proceedings have been instituted. The section further provides for damages where the unreasonable disposition has been concluded, and, in the case of consumer goods, states a minimum recovery.

A case may be put in which the liquidation value of an insolvent estate would be enhanced by disposing of all the debtor's property (including that subject to a security interest) in the liquidation proceeding and in which, if a secured party repossesses and sells that part of the property which he holds as collateral, the remainder will have little or no resale value. In such a case the question may arise whether a particular court has the power to control the manner of disposition, although reasonable in other respects, in order to preserve the estate for the benefit of creditors. Such a power is no doubt inherent in a federal bankruptcy court, and perhaps also in other courts of equity administering insolvent estates. Traditionally it was not exercised where the secured party claimed under a title retention device, such as conditional sale or trust receipt. See In re Lake's Laundry, Inc., 79 F.2d 326 (2d Cir. 1935) and the remarks of Clark, J., concurring, in In re White Plains Ice Service, Inc., 109 F.2d 913 (2d Cir. 1940). It has been held that distinctions in results based on these distinctions in form have been made obsolete by this article. In re Yale Express System, Inc., 370 F.2d 433 (2d Cir. 1966), 384 F.2d 990 (2d Cir. 1967).

2. In view of the remedies provided the debtor and other creditors in Subsection (1)

when a secured party does not dispose of collateral in a commercially reasonable manner, it is of great importance to make clear what types of disposition are to be considered commercially reasonable, and in an appropriate case to give the secured party means of getting, by court order or negotiation with a creditors' committee or a representative of creditors, approval of a proposed method of disposition as a commercially reasonable one. Subsection (2) states rules to assist in the determination, and provides for such advance approval in appropriate situations. One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer - a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales. Such a method of sale, fairly conducted, is recognized as commercially reasonable under the second sentence of Subsection (2). However, none of the specific methods of disposition set forth in Subsection (2) is to be regarded as either required or exclusive, provided only that the disposition made or about to be made by the secured party is commercially reasonable.

Cross references.Point 1: Sections 1-203, 9-202 and 9-504.

Definitional cross references."Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Knows". Section 1-201.

"Notification". Section 1-201.

"Person". Section 1-201.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

ANNOTATION

Notice of private collateral sale need not mention possible rebates. - Notice of a private sale of collateral which states a redemption amount accurate at the time but which fails to mention possible rebates is not unreasonable as a matter of law. Richardson Ford Sales, Inc. v. Johnson, 100 N.M. 779, 676 P.2d 1344 (Ct. App. 1984).

Damages not cumulative for violations on same disposition of collateral. - Because this section does not specifically authorize separate statutory damages for each asserted violation of Part 5, and because the statutory damage is not cumulative, the statutory damage for violation of Part 5 may be recovered only once, even though two violations are alleged. Crosby v. Basin Motor Co., 83 N.M. 77, 488 P.2d 127 (Ct. App. 1971).

And creditor may offset unpaid obligation against damages. - Recovery under this section does not prohibit creditor from collecting offset for unpaid truck repaid bill as the same offsets available to creditor under 55-9-505 NMSA 1978 are available under this section, and the recovery in favor of the debtor would be applied against the amount found owing to creditor under the counterclaim. Charley v. Rico Motor Co., 82 N.M. 290, 480 P.2d 404 (Ct. App. 1971).

But not where obligation already extinguished. - In a suit for loss caused by failure to comply with the provisions of the disposition of collateral code, creditor-defendant, having repossessed plaintiff's pickup truck, was not entitled to offset amount owing on truck where creditor had already applied proceeds from the sale of the truck to plaintiff's unpaid account, thereby extinguishing it as an obligation. Crosby v. Basin Motor Co., 83 N.M. 77, 488 P.2d 127 (Ct. App. 1971).

Law reviews. - For article, "Breach of the Peace and New Mexico's Uniform Commercial Code," see 4 Nat. Resources J. 85 (1964).

For article, "Buyers and Sellers of Goods in Bankruptcy," see 1 N.M. L. Rev. 435 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 69 Am. Jur. 2d Secured Transactions §§ 219, 625, 650 to 653.
Rights in proceeds of vehicle collision policy, under "loss-payable" clause, of conditional seller, chattel mortgagee or the like, of vehicle where there has been improper repossession or foreclosure after the damage, 46 A.L.R.2d 992.
Effect of default by conditional seller in the resale of repossessed property, 49 A.L.R.2d 77.
14 C.J.S. Chattel Mortgages §§ 183, 365; 72 C.J.S. Pledges § 30; 78 C.J.S. Sales § 627.

Article 10

and 11

Reserved

Article 12

Effective Date and Transition Provisions

§ 55-12-101. Effective date; ["old U.C.C." and "new U.C.C." defined].

This act shall become effective at 12:01 a.m. on January 1, 1986.

As used in this article, unless the context requires otherwise:

(a) "old U.C.C." means the Uniform Commercial Code, as effective in New Mexico, immediately prior to the effective day of this act.

(b) "new U.C.C." means the Uniform Commercial Code, as effective in New Mexico, as amended by this act.

History: 1978 Comp., § 55-12-101, enacted by Laws 1985, ch. 193, § 39.

ANNOTATION

Compiler's notes. - This section appears as § 11-101 in the Uniform Act.

Meaning of "this act". - The term "this act", referred to at the beginning of the section, means Laws 1985, ch. 193, which extensively amends the Uniform Commercial Code. For present compilation of the provisions of ch. 193, see the Table of Disposition of Laws in Volume 13.

§ 55-12-102. Preservation of old transition provision.

The provisions of Laws 1961, Chapter 96, Section 10-102, Subsection (2), shall continue to apply to the new U.C.C. and for this purpose the old U.C.C. and the new U.C.C. shall be considered one continuous statute.

History: 1978 Comp., § 55-12-102, enacted by Laws 1985, ch. 193, § 40.

ANNOTATION

Cross-references. - For definition of "old U.C.C." and "new U.C.C.", see 55-12-101 NMSA 1978.

Compiler's notes. - Laws 1961, Chapter 96, Section 10-102, Subsection (2), referred to near the beginning of this section, provides that the act does not apply to transactions entered prior to the act's effective date. Section 10-101 of ch. 96 makes the Uniform

Commercial Code effective on January 1, 1962.

This section appears as § 11-102 in the Uniform Act.

§ 55-12-103. Transition to new U.C.C.; general rule.

Transactions validly entered into after January 1, 1962, and before January 1, 1986, and which were subject to the provisions of the old U.C.C. and which would be subject to this act as amended if they had been entered into after the effective date of the new U.C.C. and the rights, duties and interests flowing from such transactions remain valid after the latter date and may be terminated, completed, consummated or enforced as required or permitted by the new U.C.C. Security interests arising out of such transactions which are perfected when the new U.C.C. becomes effective shall remain perfected until they lapse as provided in the new U.C.C., and may be continued as permitted by the new U.C.C., except as stated in Section 12-105 [55-12-105 NMSA 1978].

History: 1978 Comp., § 55-12-103, enacted by Laws 1985, ch. 193, § 41.

ANNOTATION

Cross-references. - For definition of "old U.C.C." and "new U.C.C.," see 55-12-101 NMSA 1978.

Compiler's notes. - This section appears as § 11-103 in the Uniform Act.

Meaning of "this act". - This act, referred to near the middle of the first sentence, means Laws 1985, ch. 193, which extensively amends the Uniform Commercial Code. For present compilation of the provisions of ch. 193, see the Table of Disposition of Laws in Volume 13.

§ 55-12-104. Transition provision on change of requirement of filing.

A security interest for the perfection of which filing or the taking of possession was required under the old U.C.C. and which attached prior to the effective date of the new U.C.C. but was not perfected shall be deemed perfected on the effective date of the new U.C.C. if the new U.C.C. permits perfection without filing or authorizes filing in the office or offices where a prior ineffective filing was made.

History: 1978 Comp., § 55-12-104, enacted by Laws 1985, ch. 193, § 42.

ANNOTATION

Cross-references. - For definition of "old U.C.C." and "new U.C.C.," see 55-12-101 NMSA 1978.

Compiler's notes. - This section appears as § 11-104 in the Uniform Act.

§ 55-12-105. Transition provision on change of place of filing.

(1) A financing statement or continuation statement filed prior to January 1, 1986 which shall not have lapsed prior to January 1, 1986 shall remain effective for the period provided in the old U.C.C., but not less than five years after the filing.

(2) An effective financing statement or continuation statement filed before January 1, 1986, in the place or places that were proper to perfect a security interest under the old U.C.C. shall continue to apply to the collateral described therein for the period specified in Subsection (1), without being filed in the place or places that are proper to perfect a security interest under the new U.C.C.

(3) The effectiveness of any financing statement or continuation statement filed prior to January 1, 1986 may be continued by a continuation statement as permitted by the new U.C.C., except that if the new U.C.C. requires a filing in an office where there was no previous financing statement, a new financing statement conforming to Section 12-106 [55-12-106 NMSA 1978] shall be filed in that office.

(4) If the record of a mortgage of real estate would have been effective as a fixture filing of goods described therein if the new U.C.C. had been in effect on the date of recording the mortgage, the mortgage shall be deemed effective as a fixture filing as to such goods under Subsection (6) of Section 9-402 [55-9-402 NMSA 1978] of the new U.C.C. on January 1, 1986.

History: 1978 Comp., § 55-12-105, enacted by Laws 1985, ch. 193, § 43.

ANNOTATION

Cross-references. - For definition of "old U.C.C." and "new U.C.C.," see 55-12-101 NMSA 1978.

Compiler's notes. - This section appears as § 11-105 in the Uniform Act.

§ 55-12-106. Required refilings.

(1) If a security interest is perfected or has priority when this act takes effect as to all persons or as to certain persons without any filing or recording, and if the filing of a financing statement would be required for the perfection or priority of the security interest against those persons under the new U.C.C., the perfection and priority rights of

the security interest continue until January 1, 1989. The perfection will then lapse unless a financing statement is filed as provided in Subsection (4) or unless the security interest is perfected otherwise than by filing.

(2) If a security interest is perfected when the new U.C.C. takes effect under a law other than the Uniform Commercial Code which requires no further filing, refiling or recording to continue its perfection, perfection continues until and will lapse on January 1, 1989, unless a financing statement is filed as provided in Subsection (4) or unless the security interest is perfected otherwise than by filing, or unless under Subsection (3) of Section 9-302 [55-9-302 NMSA 1978] the other law continues to govern filing, or unless the security interest is perfected under Sections 62-13-8 through 62-13-12.1 NMSA 1978.

(3) If a security interest is perfected by a filing, refiling or recording under a law repealed by this act which required further filing, refiling or recording to continue its perfection, perfection continues and will lapse on the date provided by the law so repealed for such further filing, refiling or recording unless a financing statement is filed as provided in Subsection (4) or unless the security interest is perfected otherwise than by filing.

(4) A financing statement permitted by Section 12-105 [55-12-105 NMSA 1978] or 12-106 [this section] may be filed before the perfection of a security interest would otherwise lapse. Any such financing statement may be signed by either the debtor or the secured party. It must identify the security agreement, statement or notice (however denominated in any statute or other law repealed or modified by this act), state the office where and the date when the last filing, refiling or recording, if any, was made with respect thereto, and the filing number, if any, or book and page, if any, of recording and further state that the security agreement, statement or notice, however denominated, in another filing office under the U.C.C. or under any statute or other law repealed or modified by this act is still effective. Section 9-401 [55-9-401 NMSA 1978] and Section 9-103 [55-9-103 NMSA 1978] determine the proper place to file such a financing statement. Except as specified in this subsection, the provisions of Section 9-403(3) [55-9-403(3) NMSA 1978] for continuation statements apply to such a financing statement.

History: 1978 Comp., § 55-12-106, enacted by Laws 1985, ch. 193, § 44.

ANNOTATION

Cross-references. - For definition of "old U.C.C." and "new U.C.C.," see 55-12-101 NMSA 1978.

Compiler's notes. - This section appears as § 11-106 in the Uniform Act.

Meaning of "this act". - This act, referred to in the first sentence of Subsection (1), near the beginning of Subsection (3), and twice in the third sentence of Subsection (4), means Laws 1985, ch. 193, which extensively amends the Uniform Commercial Code.

For present compilation of the provisions of ch. 193, see the Table of Disposition of Laws in Volume 13.

§ 55-12-107. Transition provisions as to priorities.

Except as otherwise provided in Article 12 [55-12-101 to 55-12-108 NMSA 1978], the old U.C.C. shall apply to any questions of priority if the positions of the parties were fixed prior to January 1, 1986. In other cases questions of priority shall be determined by the new U.C.C.

History: 1978 Comp., § 55-12-107, enacted by Laws 1985, ch. 193, § 45.

ANNOTATION

Cross-references. - For definition of "old U.C.C." and "new U.C.C.," see 55-12-101 NMSA 1978.

Compiler's notes. - This section appears as § 11-107 in the Uniform Act.

§ 55-12-108. Presumption that rule of law continues unchanged.

Unless a change in law has clearly been made, the provisions of the new U.C.C. shall be deemed declaratory of the meaning of the old U.C.C.

History: 1978 Comp., § 55-12-108, enacted by Laws 1985, ch. 193, § 46.

ANNOTATION

Cross-references. - For definition of "old U.C.C." and "new U.C.C.," see 55-12-101 NMSA 1978.

Compiler's notes. - This section appears as § 11-108 in the Uniform Act.