TITLE 4

UNIFORM COMMERCIAL CODE

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Cross references: For offenses relating to this title, see part 5 of article 5 of title 18.

Art. 1. General Provisions, 4-1-101 to 4-1-310.

Art. 2. Sales, 4-2-101 to 4-2-725.

Art. 2.5. Leases, 4-2.5-101 to 4-2.5-533.

Art. 3. Negotiable Instruments, 4-3-101 to 4-3-605.

Art. 4. Bank Deposits and Collections, 4-4-101 to 4-4-504.

Art. 4.5. Funds Transfers, 4-4.5-101 to 4-4.5-507.

Art. 5. Letters of Credit, 4-5-101 to 4-5-119.

Art. 6. Bulk Transfers (Repealed).

Art. 7. Documents of Title, 4-7-101 to 4-7-703.

Art. 8. Investment Securities, 4-8-101 to 4-8-603.

Art. 9. Secured Transactions, 4-9-101 to 4-9-809.

Art. 9.3. Central Information System (Repealed).

Art. 9.5. Central Filing of Effective Financing Statements, 4-9.5-101 to 4-9.5-112.5.

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PART 1

GENERAL PROVISIONS

4-1-101. Short titles.

(a) This title shall be known and may be cited as the "Uniform Commercial Code".

(b) This article shall be known and may be cited as the "Uniform Commercial Code - General Provisions".

Source: L. 2006: Entire article R&RE, p. 457, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-101 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965). For list of Colorado general assembly changes in the Uniform Commercial Code, see 38 U. Colo. L. Rev. 2 (1965).

4-1-102. Scope of article.

This article applies to a transaction to the extent that it is governed by any other article of this title.

Source: L. 2006: Entire article R&RE, p. 457, § 1, effective September 1.

4-1-103. Construction of act to promote its purposes and policies - applicability of supplemental principles of law.

(a) This title shall be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) To simplify, clarify, and modernize the law governing commercial transactions;

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

(3) To make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of this title, 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.

Source: L. 2006: Entire article R&RE, p. 457, § 1, effective September 1.

Editor's note: This section is similar to former §§ 4-1-102 (1) and (2) and 4-1-103 as they existed prior to 2006.

ANNOTATION

Law reviews. For article, "Exclusion and Modification of Warranty under the U.C.C. — How to Succeed in Business Without Being Liable for Not Really Trying", see 46 Den. L.J. 579 (1969). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Annotator's note. Since § 4-1-103 is similar to §§ 4-1-102 and 4-1-103 as they existed prior to the 2006 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

The parties to a contract may vary the provisions of the Uniform Commercial Code (UCC) by agreement and may provide for remedies in addition to or in substitution for those provided by the UCC. Colorado Interstate Gas Co. v. Chemco, Inc., 854 P.2d 1232 (Colo. 1993).

Evidence of current commercial practices and customs are considered when interpreting the UCC. The practice and custom of this state's real estate closings is that an original note is not presented at the closing. Citywide Banks v. Armijo, 313 P.3d 647 (Colo. App. 2011).

Section 90(1) of the restatement (second) of contracts adopted, which articulates the doctrine of promissory estoppel. Kiely v. St. Germain, 670 P.2d 764 (Colo. 1983).

The UCC does not exclude the application of promissory estoppel. Germain v. Boshouwers, 646 P.2d 952 (Colo. App. 1982), aff'd in part, rev'd in part on other grounds, 670 P.2d 764 (Colo. 1983).

Recovery will be allowed on a theory of promissory estoppel, notwithstanding a

statute of frauds defense, if injustice can be avoided only by enforcement of the promise. Germain v. Boshouwers, 646 P.2d 952 (Colo. App. 1982), aff'd in part, rev'd in part on other grounds, 670 P.2d 764 (Colo. 1983).

Elements of promissory estoppel are: (1) A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; and (2) which does induce such action or forbearance; and (3) if injustice can be avoided only by enforcement of the promise. Germain v. Boshouwers, 646 P.2d 952 (Colo. App. 1982), aff'd in part, rev'd in part on other grounds, 670 P.2d 764 (Colo. 1983).

The doctrine of estoppel was properly applied in a case arising under the secured transaction provisions of the code. First Nat'l Bank v. Ulibarri, 38 Colo. App. 428, 557 P.2d 1221 (1976).

Detrimental reliance upon oral promises. The principle embodied in section 139 of the restatement (second) of contracts that detrimental action performed in justifiable reliance upon oral promises may be sufficient to compel full or partial performance of the promise in spite of the applicability of a statute of frauds defense was applicable in a case involving an oral agreement to sell securities. Kiely v. St. Germain, 670 P.2d 764 (Colo. 1983).

Section 4-3-419 (3) does not explicitly displace common-law cause of action for moneys had and received. Citizens State Bank v. Nat'l Sur. Corp., 199 Colo. 497, 612 P.2d 70 (1980).

Common-law claim for money had and received is still viable since the uniform commercial code contains no provision dealing with such a claim. Nat'l Sur. Corp. v. Citizens State Bank, 41 Colo. App. 580, 593 P.2d 362 (1978), aff'd, 199 Colo. 497, 612 P.2d 70 (1980).

The common law of agency supplements the UCC. So, payment to an authorized agent has the same legal effect as payment to the holder. Citywide Banks v. Armijo, 313 P.3d 647 (Colo. App. 2011).

Statute as basis for jurisdiction. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

Applied in Rancher & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313 (1976); Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976); Caldwell v. Kats, 38 Colo. App. 156, 555 P.2d 190 (1976); Commercial Credit Corp. v. Univ. Nat'l Bank, 590 F.2d 849 (10th Cir. 1979); Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981).

4-1-104. Construction against implied repeal.

This title 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.

Source: L. 2006: Entire article R&RE, p. 458, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-104 as it existed prior to 2006.

4-1-105. Severability.

If any provision or clause of this title or application thereof to any person or circumstances is held invalid, such invalidity does not affect other provisions or applications of this title that can be given effect without the invalid provision or application, and to this end the provisions of this title are declared to be severable.

Source: L. 2006: Entire article R&RE, p. 458, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-108 as it existed prior to 2006.

4-1-106. Use of singular and plural - gender.

In this title, unless the statutory context otherwise requires:

(1) Words in the singular number include the plural, and those in the plural include the singular; and

(2) Words of any gender also refer to any other gender.

Source: L. 2006: Entire article R&RE, p. 458, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-102 (5) as it existed prior to 2006.

4-1-107. Captions.

Section captions are part of this title.

Source: L. 2006: Entire article R&RE, p. 458, § 1, effective September 1.

PART 2

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

4-1-201. General definitions.

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of this title that apply to particular articles or parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of this title 4 that apply to particular articles or parts of this title 4:

(1) "Action", in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.

(2) "Aggrieved party" means a party entitled to pursue a remedy.

(3) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in section 4-1-303. (Compare "contract".)

(3.5) "Authenticate" means:

(A) To sign; or

(B) With the intent to sign a record, otherwise to execute or adopt an electronic symbol, sound, message, or process referring to, attached to, included in, or logically associated or linked with, that record.

(4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

(5) "Bearer" means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt.

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

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

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under article 2 of this title may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(10) "Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court.

(10.5) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(11) "Contract" means the total legal obligation that results from the parties' agreement as determined by this title as supplemented by any other applicable laws. (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 counterclaim or third-party claim.

(14) "Delivery", with respect to an electronic document of title, means voluntary transfer of control; and with respect to an instrument, a tangible document of title, or an authoritative tangible copy of a record evidencing chattel paper, means voluntary transfer of possession.

(15) "Document of title" means a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.

(15.5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(16) "Fault" means a wrongful act, omission, breach, or default.

(17) "Fungible goods" means either:

(A) Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or

(B) Goods that by agreement are treated as equivalent.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith", except as provided in article 5 of this title, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(20) "Holder" means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

(B) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(C) The person in control, other than pursuant to section 4-7-106 (g), of a negotiable electronic document of title.

(21) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(22) An "insolvent" person is a person that:

(A) Has generally ceased to pay debts in the ordinary course of business other than as a result of a bona fide dispute as to the debts;

(B) Is unable to pay debts as they become due; or

(C) Is insolvent within the meaning of federal bankruptcy law.

(23) "Money" means a medium of exchange that is currently authorized or adopted by a domestic or foreign government and that is not in an electronic form. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

(24) "Organization" means a person other than an individual.

(25) "Party", as distinct from a "third party", means a person that has engaged in a transaction or made an agreement subject to this title.

(26) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, government subdivision, agency, or instrumentality, or any other legal or commercial entity. The term includes a protected series, however denominated, of an entity if the protected series is established under the laws of another state that:

(A) Limits, or limits if conditions specified under the law are satisfied, the ability of a creditor of the entity or of any other protected series of the entity to satisfy a claim from assets of the protected series; and

(B) Treats the protected series as an entity.

(27) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(28) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced that would support a finding of its nonexistence.

(29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(30) "Purchaser" means a person that takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) "Remedy" means any remedial right to which an aggrieved party is entitled, with or without resort to a tribunal.

(33) "Representative" means any person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.

(34) "Right" includes remedy.

(35) "Security interest" means an interest in personal property or fixtures that secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to article 9 of this title. The special property interest of a buyer of goods on identification of those goods to a contract for sale under section 4-2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with article 9 of this title. Except as otherwise provided in section 4-2-505, the right of a seller or lessor of goods under article 2 or 2.5 of this title to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with article 9 of this title. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 4-2-401) is limited in effect to a reservation of a "security interest". Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to section 4-1-203.

(36) "Send", in connection with a record or notification, means to:

(A) Deposit in the mail, deliver for transmission, or transmit by any other usual means of communication with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or

(B) Cause the record or notification to be received within the time it would have been received if properly sent under subsection (b)(36)(A) of this section.

(37) (A) "Sign" means, with present intent to authenticate or adopt a record:

(i) Execute or adopt a tangible symbol; or

(ii) Attach to or logically associate with the record an electronic symbol, sound, or process.

(B) "Signed", "signing", and "signature" have corresponding meanings.

(38) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) "Surety" includes a guarantor or other secondary obligor.

(40) "Term" means a portion of an agreement that relates to a particular matter.

(41) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(42) "Warehouse receipt" means a document of title issued by a person engaged in the business of storing goods for hire.

(43) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

Source: L. 2006: Entire article R&RE, p. 458, § 1, effective September 1. **L. 2007:** (b)(5), (b)(15), (b)(20)(A), and (b)(20)(C) amended, p. 374, § 26, effective August 3. **L. 2023:** IP(b), (b)(10), (b)(14), (b)(20)(C), (b)(23), (b)(26), (b)(36), and (b)(37) amended and (b)(15.5) added, (SB 23-090), ch. 136, p. 524, § 1 effective August 7.

Editor's note: This section is similar to former § 4-1-201 as it existed prior to 2006.

Cross references: For offenses relating to security interest, see §§ 18-5-504, 18-5-505, and 18-5-511.

ANNOTATION

I. General Consideration.

II. Agreement.

III. Buyer in Ordinary Course of Business.

IV. Conspicuous.

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IX. Holder.

X. Purchase.

XI. Purchaser.

XII. Written or Writing.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Secured Transactions — Part 1: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Commercial Law", which discusses Tenth Circuit decisions dealing with questions of definition and interpretation, see 63 Den. U.L. Rev. 225 (1986). For article, "Criminal Law", which discusses Tenth Circuit decisions dealing with good faith defense, see 63 Den. U.L. Rev. 291 (1986).

Annotator's note. Since § 4-1-201 is similar to § 4-1-201 as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Applied in Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974); Budget Syst. v. Seifert Pontiac, Inc., 40 Colo. App. 406, 579 P.2d 87 (1978); State, Dept. of Natural Res. v. Benjamin, 41 Colo. App. 520, 587 P.2d 1207 (1978); Comm'l Credit v. Univ. Nat'l Bank, 590 F.2d 849 (10th Cir. 1979); W. Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979); Jackson v. Sec. Indus. Bank, 4 B.R. 293 (Bankr. D. Colo. 1980); Layne v. Fort Carson Nat'l Bank, 655 P.2d 856 (Colo. App. 1982); Ackmann v. Merchants Mtg. & Trust Corp., 659 P.2d 697 (Colo. App. 1982); Walgreen Co. v. Charnes, 859 P.2d 235 (Colo. App. 1992).

II. AGREEMENT.

Evidence of previous course of performance is admissible. Evidence of course of dealing and course of performance is admissible if it does not directly contradict the terms of a written agreement, but merely explains or supplements it. Great W. Sugar Co. v. N. Natural Gas Co., 661 P.2d 684 (Colo. App. 1982), aff'd sub nom. KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769 (Colo. 1985).

Previous course of dealing considered in determining meaning of contract provisions. It is the policy of the uniform commercial code to consider previous course of dealing in determining the meaning of contract provisions. Amerine Nat'l Corp. v. Denver Feed Co., 493 F.2d 1275 (10th Cir. 1974).

After defendant was provided a copy of the manufacturer's statement and disclaimer of warranty, those items became part of the agreement between the parties. Graham Hydraulic v. Stewart & Stevenson, 797 P.2d 835 (Colo. App. 1990).

III. BUYER IN ORDINARY COURSE OF BUSINESS.

Homeowners who purchased materials kits from log home building firm were buyers in ordinary course of business and received title to materials when submaterialman made delivery and homeowners paid entrustee of goods. Lumber company, as submaterialman, has no ownership interest in or right to payment for materials delivered to homeowners. Schneider v. J. W. Metz Lumber Co., 715 P.2d 329 (Colo. 1986).

IV. CONSPICUOUS.

The term "conspicuous", as defined in subsection (10) of this section, is qualified by the provisions of § 4-2-316 (3). Richard O'Brien Cos. v. Challenge-Cook Bros., 672 F. Supp. 466 (D. Colo. 1987).

V. CREDITOR.

Applied in Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970).

VI. DOCUMENTS OF TITLE.

Bean company's drafts addressed to a bailee and purporting to cover goods in the bailee's possession, which were tangible portions of an identified mass, were "documents of title" under this section, since they were treated as such both by the parties themselves and were customarily so used in the bean business in general. Midland Bean

Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

VII. GENUINE.

Stock certificates issued with facsimile signatures of corporate president and secretary are "genuine" under § 4-8-101 et seq., though not countersigned by a transfer agent as required by § 7-4-108. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

Even though certificates are issued without authority, it cannot be said that facsimile signatures are either forged or counterfeit, and so, in that sense, they are effective against the issuer. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

VIII. GOOD FAITH.

"Good faith" standard is a subjective one. Under a subjective standard, an absence of knowledge is not equivalent to a lack of good faith. Money Mart Check Cashing Ctr., Inc. v. Epicycle Corp., 667 P.2d 1372 (Colo. 1983).

"Good faith" unaffected by payee's low account. In the case of a bank cashing a check, if the bank establishes that the check was taken without notice of dishonor or of any other defense, this is sufficient to establish "good faith". The issue of good faith, to establish that the bank is a holder in due course, is unaffected by the fact that the payee's account is low or overdrawn at the time the check is cashed. Vail Nat'l Bank v. J. Wheeler Constr. Corp., 669 P.2d 1038 (Colo. App. 1983).

Evidence of purchaser's lack of good faith. Knowledge that the holder of a subordinate security interest had not been given the notice required by § 4-9-504 might be evidence of a want of good faith on the part of a purchaser. Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977).

Broker's disregard of suspicious circumstances is evidence of bad faith. First Nat'l Bank v. Gilbert Marshall, 780 P.2d 73 (Colo. App. 1989).

IX. HOLDER.

Law reviews. For note, "Judicial Limitations on Holder in Due Course Claims", see 42 U. Colo. L. Rev. 439 (1971).

Applied in Cole v. Farner, 749 P.2d 970 (Colo. App. 1987); Barclay Receivables v. Mtn. Majesty, Ltd., 903 P.2d 37 (Colo. App. 1995).

X. PURCHASE.

Applied in Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

XI. PURCHASER.

Definition encompasses lender taking security interest in goods. The definition of "purchase" and "purchaser", as set forth in the UCC, are sufficiently broad to encompass a lender who takes a security interest in goods as security for its loan. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Applied in Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

XII. WRITTEN OR WRITING.

When parties to an oral contract agree that the oral contract shall be tape recorded, the contract is "reduced to tangible form" when it is placed on the tape. Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

4-1-202. Notice - knowledge.

(a) Subject to subsection (f) of this section, a person has "notice" of a fact if the person:

(1) Has actual knowledge of it;

(2) Has received a notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know that it exists.

(b) "Knowledge" means actual knowledge.

(c) "Discover", "learn", or words of similar import refer to knowledge rather than to notice.

(d) 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 the other person actually comes to know of it.

(e) Subject to subsection (f) of this section, a person "receives" a notice or notification when:

(1) It comes to that person's attention; or

(2) It is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's 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 the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

Source: L. 2006: Entire article R&RE, p. 463, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-201 (25) to (27) as it existed prior to 2006.

ANNOTATION

Annotator's note. Since § 4-1-202 is similar to § 4-1-201 (25), (26), and (27) as they existed prior to the 2006 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

There is no actual notice of the unauthorized issuance of stock certificates where it does not appear that one was aware of the provision in the Colorado law requiring that certificates issued with facsimile signatures of the president and the secretary be countersigned by a transfer agent when the certificates do not contain a statement that they are void unless countersigned by a transfer agent and it does not appear that there were facts or circumstances known which would have put one on notice of illegality issue or of the deficiency arising from the failure of the transfer agent to countersign them. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

Tests other than "actual knowledge" may be used in resolving the issue of whether an endorsee of a promissory note is a holder in due course, including whether the holder had in his possession facts from which he had reason to know of the defenses "at the time in question". The critical time for such notice is when the party comes into possession of the note as a holder. Salter v. Vanotti, 42 Colo. App. 448, 599 P.2d 962 (1979).

Inquiry required. If the purchaser has actual knowledge of facts which would apprise him of possible irregularities some inquiry is required by the notice provisions of the UCC. Salter v. Vanotti, 42 Colo. App. 448, 599 P.2d 962 (1979).

Inquiry not required. Where an instrument is regular on its face there is no duty on the part of a check cashing service to inquire as to possible defenses, unless circumstances of which the holder in due course has knowledge are of such a nature that the failure to inquire reveals a deliberate desire to evade knowledge because of a fear that investigation would disclose the existence of a defense. Money Mart Check Cashing Ctr., Inc. v. Epicycle Corp., 667 P.2d 1372 (Colo. 1983).

Refusal to investigate. The protection afforded a holder in due course cannot be used to shield one who simply refuses to investigate when the facts known to him suggest an irregularity concerning the commercial paper he purchases. Salter v. Vanotti, 42 Colo. App. 448, 599 P.2d 962 (1979).

Patient gave sufficient notice to physician of defective character of product and such notice "came to the attention" of the physician, within the meaning of subsection (26), when patient presented herself to the physician in a life-threatening condition. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

Facts not sufficient to constitute notice. The fact that the documents given to subsequent holder referred to a "Deed of Trust" rather than a "Land Sales Agreement" did not give such holder reason to know that the transaction may not have been consummated. Therefore, the subsequent holder did not have knowledge of facts that would give him reason to know of the maker's defense under the Truth in Lending Act. Merchants Mortg. & Trust Corp. v. Dawe, 754 P.2d 418 (Colo. App. 1987).

Record supported the trial court's finding that the bank had no notice of any offset against the promissory note where the note was current in its payments at the time of the transfer, the maker of the note made another payment thereon subsequent to the transfer to the bank, and the note itself did not specify any offset against it. First Nat'l Bank v. Lohman, 827 P.2d 583 (Colo. App. 1992).

4-1-203. Lease distinguished from security interest.

(a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

(1) The original term of the lease is equal to or greater than the remaining economic life of the goods;

(2) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;

(3) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or

(4) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

(c) A transaction in the form of a lease does not create a security interest merely because:

(1) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;

(2) The lessee assumes risk of loss of the goods;

(3) The lessee agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs, with respect to the goods;

(4) The lessee has an option to renew the lease or to become the owner of the goods;

(5) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or

(6) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:

(1) When the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or

(2) When the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.

(e) The "remaining economic life of the goods" and "reasonably predictable" fair market rent, fair market value, or cost of performing under the lease agreement shall be determined with reference to the facts and circumstances at the time the transaction is entered into.

Source: L. 2006: Entire article R&RE, p. 464, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-201 (37) as it existed prior to 2006.

ANNOTATION

Annotator's note. Since § 4-1-202 is similar to § 4-1-201 (37) as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

A "joint payment agreement" which provides that payments on a contract are

to be made jointly to a workman and his supplier is a security agreement which creates a security interest in a contract right. Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970).

Factors in determining whether a transaction is a lease or sale may include: (1) Whether the lessee is given an option to purchase the equipment, and, if so, whether the option price is nominal; (2) whether the lessee acquires any equity in the equipment; (3) whether the lessee is required to bear the entire risk of the loss; (4) who pays all charges and taxes imposed on ownership; (5) whether there is a provision for acceleration of rental payments; (6) whether the property was purchased specifically for lease to this lessee; and (7) whether the warranties of merchantability and fitness for a particular purpose are specifically excluded by the lease agreement. Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

Characterization of transaction as lease or sale is not conclusive. Whether a transaction is characterized as a lease or sale is not conclusive, but rather it is the intention of the parties that is controlling, that intention to be determined by the facts of each case. Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

Right to reclaim not right to secure payment. The right to reclaim created by § 4-2-507 (2) is a right to undo the transaction, not a right to "secure" payment of the price as required by the definition of "security interest" under subsection (37) of this section. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Whether a lease is a security interest is applied in In re Mesa Refining, Inc., 52 B.R. 359 (Bankr. D. Colo. 1985).

4-1-204. Value.

Except as otherwise provided in articles 3, 4, 5, 6, and 12 of this title 4, a person gives value for rights if the person acquires them:

(1) 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;

(2) As security for, or in total or partial satisfaction of, a preexisting claim;

(3) By accepting delivery under a preexisting contract for purchase; or

(4) In return for any consideration sufficient to support a simple contract.

Source: L. 2006: Entire article R&RE, p. 465, § 1, effective September 1. **L. 2023:** IP amended, (SB 23-090), ch. 136, p. 526, § 2, effective August 7.

Editor's note: This section is similar to former § 4-1-201 (44) as it existed prior to 2006.

4-1-205. Reasonable time - seasonableness.

(a) Whether a time for taking an action required by this title is reasonable depends on the nature, purpose, and circumstances of the action.

(b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

Source: L. 2006: Entire article R&RE, p. 466, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-204 (2) and (3) as it existed prior to 2006.

ANNOTATION

Annotator's note. Since § 4-1-205 is similar to § 4-1-204 as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

The question of reasonableness is a question of fact to be measured by all of the circumstances of the case, and pre U.C.C. cases are applicable as they relate to the time for rescission of a contract of sale. Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 343, 483 P.2d 980 (1971); Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

Whether notice is given within a reasonable time is a question of fact to be measured by all the circumstances of the case. White v. Mississippi Order Buyers, Inc., 648 P.2d 682 (Colo. App. 1982).

Delivery date not specified. Under either the UCC or common law, where no delivery date is specified, a reasonable date will be furnished by the court. Beiriger and Sons Irrigation, Inc. v. Southwest Land Co., Inc., 705 P.2d 532 (Colo. App. 1985).

Applied in Surplus Electronics Corp. v. Gallin, 653 P.2d 752 (Colo. App. 1982).

PART 3

TERRITORIAL APPLICABILITY AND GENERAL RULES

4-1-301. Territorial applicability - parties' power to choose applicable law.

(a) Except as otherwise provided 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 of such other state or nation shall govern their rights and duties.

(b) In the absence of an agreement effective under subsection (a) of this section, and except as provided in subsection (c) of this section, the "Uniform Commercial Code" applies to transactions bearing an appropriate relation to this state.

(c) If one of the following provisions of the "Uniform Commercial Code" specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

(1) Section 4-2-402;

(2) Sections 4-2.5-105 and 4-2.5-106;

(3) Section 4-4-102;

(4) Section 4-4.5-507;

(5) Section 4-5-116;

(6) (Reserved)

(7) Section 4-8-110;

(8) Sections 4-9-301 to 4-9-307;

(9) Section 4-12-107.

Source: L. 2006: Entire article R&RE, p. 466, § 1, effective September 1. **L. 2023:** (c)(9) added, (SB 23-090), ch. 136, p. 526, § 3, effective August 7.

Editor's note: This section is similar to former § 4-1-105 as it existed prior to 2006.

4-1-302. Variation by agreement.

(a) Except as otherwise provided in subsection (b) of this section or elsewhere in this title, the effect of provisions of this title may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by this title may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever this title requires any action to be taken within a reasonable time, any time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of this title of the phrase "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

Source: L. 2006: Entire article R&RE, p. 466, § 1, effective September 1.

Editor's note: This section is similar to former §§ 4-1-102 (3) and (4) and 4-1-204 (1) as they existed prior to 2006.

4-1-303. Course of performance, course of dealing, and usage of trade.

(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:

(1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and

(2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

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

(c) 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 trade code or similar record, the interpretation of the record is a question of law.

(d) A course of performance or course of dealing between the parties, or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware, is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

(e) Except as otherwise provided in subsection (f) of this section, the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade shall be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

(1) Express terms prevail over course of performance, course of dealing, and usage of trade;

(2) Course of performance prevails over course of dealing and usage of trade; and

(3) Course of dealing prevails over usage of trade.

(f) Subject to section 4-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.

Source: L. 2006: Entire article R&RE, p. 467, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-205 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Annotator's note. Since § 4-1-303 is similar to § 4-1-205 as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Previous course of dealing considered in determining meaning of contract provisions. It is the policy of the uniform commercial code to consider previous course of dealing in determining the meaning of contract provisions. Amerine Nat'l Corp. v. Denver Feed Co., 493 F.2d

1275 (10th Cir. 1974); Great W. Sugar Co. v. N. Natural Gas Co., 661 P.2d 684 (Colo. App. 1982), aff'd sub nom. KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769 (Colo. 1985).

Test of admissibility of evidence of prior course of dealing is not whether the contract appears to be complete in every detail, but whether the proffered evidence of course of dealing reasonably can be construed as consistent with the express terms of the agreement; if this evidence contradicts or negates the terms of a written agreement, it is inadmissible. Budget Sys. v. Seifert Pontiac, Inc., 40 Colo. App. 406, 579 P.2d 87 (1978).

Evidence of course of dealing and course of performance is admissible if it does not directly contradict the terms of a written agreement, but merely explains or supplements it. Great W. Sugar Co. v. N. Natural Gas Co., 661 P.2d 684 (Colo. App. 1982), aff'd sub nom. KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769 (Colo. 1985).

Course of dealing not purchased with business. Absent evidence to the contrary, the purchaser of a business does not automatically adopt the seller's prior course of dealing with third parties. Budget Sys. v. Seifert Pontiac, Inc., 40 Colo. App. 406, 579 P.2d 87 (1978).

The provisions of a security agreement may be supplemented by the "usage of trade", provided the express terms of the agreement and the supplement are consistent with each other. Colo. Bank & Trust Co. v. Western Slope Invs., Inc., 36 Colo. App. 149, 539 P.2d 501 (1975).

Absent express or otherwise demonstrated authorization for borrower's conduct, the UCC mandates that the express terms of the agreement are controlling. U.S. v. Winter Livestock Comm'n, 924 F. 2d 986 (10th Cir. 1991).

Terms of agreement control. Even assuming that a loan officer's testimony showed a "usage of trade", where that usage would not be consistent with the terms of the security agreement, the express terms of the agreement control. Colo. Bank & Trust Co. v. Western Slope Invs., Inc., 36 Colo. App. 149, 539 P.2d 501 (1975).

Course of dealing supported interest charge. Murray Equipment Co. v. Curtis, Inc., 725 P.2d 35 (Colo. App. 1986).

Course of dealing did not support interest charge. Winer's Pumping Units v. Emerald Gas Operating Co., 936 P.2d 627 (Colo. App. 1997).

Applied in Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

4-1-304. Obligation of good faith.

Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement.

Source: L. 2006: Entire article R&RE, p. 468, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-203 as it existed prior to 2006.

ANNOTATION

Annotator's note. Since § 4-1-304 is similar to § 4-1-203 as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Notwithstanding a provision precluding implied covenants, all contracts contain an implied duty of good faith and fair dealing. Amoco Oil Co. v. Ervin, 908 P.2d 493 (Colo. 1995); Transamerica Premier Ins. Co. v. Brighton Sch. Dist. 27J, 940 P.2d 348 (Colo. 1997).

Financial statement not listing partners as debtors does not violate good faith. A financial statement which does not list the partners as debtors, but only sets forth the partnership name, does not violate the obligation of good faith required by this section. Bd. of County Comm'rs v. Berkeley Vill., 40 Colo. App. 431, 580 P.2d 1251 (1978).

Implied covenant of good faith and fair dealing found in some commercial contracts held not to extend to employment contracts. Pittman v. Larson Distributing Co., 724 P.2d 1379 (Colo. App. 1986).

Applied in MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1971); Layne v. Fort Carson Nat'l Bank, 655 P.2d 856 (Colo. App. 1982); ADT Sec. Servs. v. Premier Home Prot., 181 P.3d 288 (Colo. App. 2007).

4-1-305. Remedies to be liberally administered.

(a) The remedies provided by this title must 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 damages nor penal damages may be had except as specifically provided in this title or by other rule of law.

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

Source: L. 2006: Entire article R&RE, p. 468, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-106 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "An Introduction to the Economic Analysis of Contract Remedies", see 57 U. Colo. L. Rev. 683 (1986).

Annotator's note. Since § 4-1-305 is similar to § 4-1-106 as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Damages need not be exactly calculable. Although damages may not be calculable with mathematical exactitude, so long as the plaintiff introduces some evidence which is sufficient to allow a reasonable estimate of damages, it is incumbent upon the trier of fact to determine a monetary award which will adequately compensate the plaintiff. Great W. Food Packers, Inc. v. Longmont Foods Co., 636 P.2d 1331 (Colo. App. 1981).

Damages need not be allocatable where defendant manufactures number of defective products. Where a plaintiff's total damages can be ascertained and they stem from a number of defective products manufactured by the same defendant, it is not necessary to allocate damages among specific items. Great W. Food Packers, Inc. v. Longmont Foods Co., 636 P.2d 1331 (Colo. App. 1981).

Where award of replacement cost of defective part insufficient. Where there is a "latent defect" which cannot be corrected simply by replacing a defective part and awarding the costs of replacing that part would not make the aggrieved party whole, an award of the entire value of the product damages is appropriate. Gibbons v. Windish, Inc., 662 P.2d 500 (Colo. App. 1983).

4-1-306. Waiver or renunciation of claim or right after breach.

A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in a signed record.

Source: L. 2006: Entire article R&RE, p. 468, § 1, effective September 1. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 526, § 4, effective August 7.

Editor's note: This section is similar to former § 4-1-107 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Loan Documentation Clauses to Avoid Lender Liability", 19 Colo. Law. 2225 (1990).

Annotator's note. Since § 4-1-306 is similar to § 4-1-107 as it existed prior to the 2006 repeal and reenactment of this article, a relevant case construing that provision has been included in the annotations to this section.

Payors were not "aggrieved parties", and thus could not relieve themselves of their obligations under notes by notifying bank that they waived their signatures. Farmers and Stockmens Bank v. Stafford, 738 P.2d 60 (Colo. App. 1987).

4-1-307. 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.

Source: L. 2006: Entire article R&RE, p. 468, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-202 as it existed prior to 2006.

4-1-308. Performance or acceptance under reservation of rights.

(a) A party that 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.

(b) Subsection (a) of this section does not apply to an accord and satisfaction.

Source: L. 2006: Entire article R&RE, p. 468, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-207 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "UCC Section 1-207 on 'Full Payment' Checks: Lawyers Beware", see 11 Colo. Law. 2584 (1982).

Annotator's note. Since § 4-1-308 is similar to § 4-1-207 as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

This section does not alter the law of accord and satisfaction. If a check is tendered as full satisfaction of an obligation, acceptance and negotiation of the check by the obligee discharges the underlying obligation notwithstanding a restrictive endorsement made by the obligee. R.A. Reither Const. Co. v. Wheatland Rural Elec. Ass'n, 680 P.2d 1342 (Colo. App. 1984); Anderson v. Rosebrook, 737 P.2d 417 (Colo. 1987).

Plaintiff landowner who promised performance "under protest" by letter from his attorney to the defendants and then later discharged a note and deed of trust without protest at closing, did not relinquish his rights having complied with the plain language of this section by protesting before performance. Margason v. Roberts, 919 P.2d 818 (Colo. App. 1995).

As plaintiff was not required to renew his protest at closing, so any reliance defendants placed on plaintiff's silence was unreasonable. Margason v. Roberts, 919 P.2d 818 (Colo. App. 1995).

4-1-309. Option to accelerate at will.

A term providing that one party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself insecure", or words of similar import, means that the party has power to do so only if that party 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 which the power has been exercised.

Source: L. 2006: Entire article R&RE, p. 469, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-208 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2107 (1988).

Annotator's note. Since § 4-1-309 is similar to § 4-1-208 as it existed prior to the 2006 repeal and reenactment of this article, a relevant case construing that provision has been included in the annotations to this section.

Objective test, rather than subjective test, should be applied to determine proper invocation of insecurity clause. The appropriate determination in the context of an insecurity clause is whether a reasonable person, under all the circumstances of the transaction, and motivated by good faith, would have accelerated the debt. Richards Engineers, Inc. v. Spanel, 745 P.2d 1031 (Colo. App. 1987).

4-1-310. Subordinated obligations.

An obligation may be issued as subordinated to performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor.

Source: L. 2006: Entire article R&RE, p. 469, § 1, effective September 1.

Editor's note: This section is similar to former § 4-1-209 as it existed prior to 2006.

ARTICLE 2

Sales

PART 1
SHORT TITLE, GENERAL CONSTRUCTION, AND SUBJECT MATTER

4-2-101. Short title.

4-2-102. Scope - certain security and other transactions excluded from this article.

4-2-103. Definitions and index of definitions.

4-2-104. Definitions: "merchant" - "between merchants" - "financing agency".

4-2-105. Definitions: transferability - "goods" - "future" goods - "lot" - "commercial unit".

4-2-106. Definitions: "contract" - "agreement" - "contract for sale" - "sale" - "present sale" - "conforming" - "termination" - "cancellation" - "hybrid transaction".

4-2-107. Goods to be severed from realty - recording.

PART 2
FORM, FORMATION, AND READJUSTMENT OF CONTRACT

4-2-201. Formal requirements - statute of frauds.

4-2-202. Final expression - parol or extrinsic evidence.

4-2-203. Seals inoperative.

4-2-204. Formation in general.

4-2-205. Firm offers.

4-2-206. Offer and acceptance in formation of contract.

4-2-207. Additional terms in acceptance or confirmation.

4-2-208. Course of performance or practical construction.

4-2-209. Modification, rescission, and waiver.

4-2-210. Delegation of performance - assignment of rights.

PART 3
GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

4-2-301. General obligations of parties.

4-2-302. Unconscionable contract or clause.

4-2-303. Allocation or division of risks.

4-2-304. Price payable in money, goods, realty, or otherwise.

4-2-305. Open price term.

4-2-306. Output, requirements, and exclusive dealings.

4-2-307. Delivery in single lot or several lots.

4-2-308. Absence of specified place for delivery.

4-2-309. Absence of specific time provisions - notice of termination.

4-2-310. Open time for payment or running of credit - authority to ship under reservation.

4-2-311. Options and cooperation respecting performance.

4-2-312. Warranty of title and against infringement - buyer's obligation against infringement.

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PART 1

SHORT TITLE, GENERAL CONSTRUCTION, AND SUBJECT MATTER

4-2-101. Short title.

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

Source: L. 65: p. 1298, § 1. **C.R.S. 1963:** § 155-2-101.

ANNOTATION

Law reviews. For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965). For article, "The Uniform Commercial Code and Sales Warranties in Colorado", see 38 U. Colo. L. Rev. 7 (1965).

4-2-102. Scope - certain security and other transactions excluded from this article.

(1) Unless the context otherwise requires, and except as provided in subsection (3) of this section, this article 2 applies to transactions in goods and, in the case of a hybrid transaction, it applies to the extent provided in subsection (2) of this section.

(2) In a hybrid transaction:

(a) If the sale-of-goods aspects do not predominate, only the provisions of this article 2 which relate primarily to the sale-of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply.

(b) If the sale-of-goods aspects predominate, this article 2 applies to the transaction but does not preclude application in appropriate circumstances of other law to aspects of the transaction which do not relate to the sale of goods.

(3) This article 2 does not:

(a) Apply to a transaction that, even though in the form of an unconditional contract to sell or present sale, operates only to create a security interest; or

(b) Impair or repeal a statute regulating sales to consumers, farmers, or other specified classes of buyers.

Source: L. 65: p. 1298, § 1. **C.R.S. 1963:** § 155-2-102. **L. 77:** Entire section R&RE, p. 313, § 5, effective January 1, 1978. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 526, § 5, effective August 7.

Editor's note - Colorado legislative change: Colorado added new paragraph (b). There is no counterpart to paragraph (b) in the uniform act.

Cross references: For secured transactions, sales of accounts, contract rights, and chattel paper, see article 9 of this title; for the "Revised Uniform Anatomical Gift Act", see part 2 of article 19 of title 15; for nontransplant tissue banks, see article 140 of title 12; for limitation on liability regarding transplants and transfusion of blood, see § 13-22-104.

ANNOTATION

Uniform commercial code does not apply to the transfer of interests in real property. Gallegos v. Graff, 32 Colo. App. 213, 508 P.2d 798 (1973).

The uniform commercial code does not supplant livestock bill of sale laws. Although livestock are "goods", the UCC does not supplant the livestock bill of sale laws concerning the passage of title to livestock. Cugnini v. Reynolds Cattle Co., 648 P.2d 159 (Colo. App. 1981), aff'd, 687 P.2d 962 (Colo. 1984).

Application of term "goods". The term "goods" as employed in this section applies to a sale by a merchant of used, as well as new, goods. Moore v. Burt Chevrolet, Inc., 39 Colo. App. 11, 563 P.2d 369 (1977).

Refinery sale did not involve sale of "goods" and thus was not covered by this article. McClanahan v. Am. Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980).

Statutory warranties not applicable to service contracts. The statutory warranties imposed by the uniform sales act do not apply as a matter of law to service contracts. Samuelson v. Chutich, 187 Colo. 155, 529 P.2d 631 (1974).

A contract for the delivery of natural gas is a sale of goods within the meaning of the sales article of the uniform commercial code. KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769 (Colo. 1985).

Transaction was within the scope of the sales article of the uniform commercial code. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), aff'd, 184 Colo. 166, 519 P.2d 354 (1974).

Marketing agreements for manufactured products was within the scope of the sales article of the uniform commercial code where one party purchased and maintained an inventory of the manufacturer's products for direct sales to customers. William H. White Co. v. B&A Mfg. Co., 794 P.2d 1099 (Colo. App. 1990).

Applied in Smith v. Union Supply Co., 675 P.2d 333 (Colo. App. 1983).

4-2-103. 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 portions thereof, and the sections in which they appear are:

"Acceptance". Section 4-2-606.

"Banker's credit". Section 4-2-325.

"Between merchants". Section 4-2-104.

"Cancellation". Section 4-2-106 (4).

"Commercial unit". Section 4-2-105.

"Confirmed credit". Section 4-2-325.

"Conforming to contract". Section 4-2-106.

"Contract for sale". Section 4-2-106.

"Cover". Section 4-2-712.

"Entrusting". Section 4-2-403.

"Financing agency". Section 4-2-104.

"Future goods". Section 4-2-105.

"Goods". Section 4-2-105.

"Identification". Section 4-2-501.

"Installment contract". Section 4-2-612.

"Letter of credit". Section 4-2-325.

"Lot". Section 4-2-105.

"Merchant". Section 4-2-104.

"Overseas". Section 4-2-323.

"Person in position of seller". Section 4-2-707.

"Present sale". Section 4-2-106.

"Sale". Section 4-2-106.

"Sale on approval". Section 4-2-326.

"Sale or return". Section 4-2-326.

"Termination". Section 4-2-106.

(3) "Control" as provided in section 4-7-106 and the following definitions in other articles apply to this article:

"Check". Section 4-3-104.

"Consignee". Section 4-7-102.

"Consignor". Section 4-7-102.

"Consumer goods". Section 4-9-102.

"Dishonor". Section 4-3-502.

"Draft". Section 4-3-104.

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

Source: L. 65: p. 1298, § 1. **C.R.S. 1963:** § 155-2-103. **L. 99:** (3) amended, p. 616, § 2, effective August 4. **L. 2001:** (3) amended, p. 1436, § 18, effective July 1. **L. 2006:** (3) amended, p. 490, § 3, effective September 1. **L. 2007:** (3) amended, p. 374, § 27, effective August 3.

Cross references: For the delegation of performance and assignment of rights, see § 4-2-210.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Upon repossession of collateral, a secured creditor becomes a legal successor in interest to its debtor, the initial buyer, and therefore becomes a buyer within the meaning of this section and may recover as a third-party beneficiary on a breach of warranty claim. Cheyenne Mtn. Bank v. Whetstone Corp., 787 P.2d 210 (Colo. App. 1990).

Applied in Palmer v. A.H. Robins, Co., Inc., 684 P.2d 187 (Colo. 1984).

4-2-104. 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 or are associated with 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 4-2-707).

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

Source: L. 65: p. 1299, § 1. **C.R.S. 1963:** § 155-2-104. **L. 2006:** (2) amended, p. 490, § 4, effective September 1.

Cross references: For the person in the position of a seller, see § 4-2-707.

ANNOTATION

Law reviews. For comment, "Implied Warranties in the Sale of Real Estate in Colorado: Rational Boundaries of the Doctrine", see 53 U. Colo. L. Rev. 137 (1981).

Where transaction "between merchants". A transaction between a manufacturer of pipe and one who regularly uses pipe in major construction projects, is a transaction between "merchants." Cement Asbestos Prods. Co. v. Hartford Accident & Indem. Co., 592 F.2d 1144 (10th Cir. 1979).

Farmer held to be "merchant" for purposes of § 4-2-201 (1). Transaction between long-time farmer and merchandiser of agricultural commodities for sale of corn upon harvest was between merchants. Colorado-Kansas Grain v. Reifschneider, 817 P.2d 637 (Colo. App. 1991); Am. Pride Co-op v. Seewald, 968 P.2d 139 (Colo. App. 1998).

Applied in Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977).

4-2-105. 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 of this title), 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 4-2-107).

(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 of 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.

Source: L. 65: p. 1300, § 1. **C.R.S. 1963:** § 155-2-105.

ANNOTATION

Law reviews. For article, "Technology Transfers: Do They Transfer Goods or Services?", see 25 Colo. Law. 13 (Jan. 1996).

Uniform commercial code does not apply to the transfer of interests in real property. Gallegos v. Graff, 32 Colo. App. 213, 508 P.2d 798 (1973).

Uniform commercial code does not supplant livestock bill of sale laws. Although livestock are "goods", the UCC does not supplant the livestock bill of sale laws concerning the passage of title to

livestock. Cugnini v. Reynolds Cattle Co., 648 P.2d 159 (Colo. App. 1981), aff'd, 687 P.2d 962 (Colo. 1984).

Refinery sale did not involve sale of "goods" and thus was not covered by this article. McClanahan v. Am. Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980).

Hose used in hydronic radiant heating systems is a "good" for purposes of the UCC. The hose was an existing and identifiable thing which was movable at the time of identification to the contract for sale, making it a "good" for purposes of the UCC. Separate units of goods that are later incorporated into a home or other building are still goods at the time that they are procured for installation. The fact that materials sold might later be installed in a home and assume the character of fixtures does not undermine the primary purpose of the contract as one for a sale of goods. Loughridge v. Goodyear Tire & Rubber Co., 192 F. Supp. 2d 1175 (D. Colo. 2002).

Automobiles held movable goods at the time of their identification to the contract for sale. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), aff'd, 184 Colo. 166, 519 P.2d 354 (1974).

Right to use office space, right to use telephone equipment, and customer list were not "goods" and therefore not covered by the Bulk Transfers Act. Smith Office Serv., Inc. v. Kelley, 762 P.2d 791 (Colo. App. 1988).

Applied in Smith v. Union Supply Co., 675 P.2d 333 (Colo. App. 1983); Homier v. Faricy Truck & Equipment Co., 784 P.2d 798 (Colo. App. 1988).

4-2-106. Definitions: "contract" - "agreement" - "contract for sale" - "sale" - "present sale" - "conforming" - "termination" - "cancellation" - "hybrid transaction".

(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 4-2-401). 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 canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

(5) "Hybrid transaction" means a single transaction involving a sale of goods and:

(a) The provision of services;

(b) A lease of other goods; or

(c) A sale, lease, or license of property other than goods.

Source: L. 65: p. 1301, § 1. **C.R.S. 1963:** § 155-2-106. **L. 2023:** (5) added, (SB 23-090), ch. 136, p. 527, § 6, effective August 7.

ANNOTATION

Nonconformity cannot be viewed as a question of the quantity and quality of goods alone, but of the performance of the totality of the seller's contractual undertaking. Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 343, 483 P.2d 980 (1971).

Applied in R.H. Lindsay Co. v. Greager, 204 F.2d 129 (10th Cir. 1953) (decided under repealed CSA, C. 143A, § 1, uniform sales act); Waggoner v. Wilson, 31 Colo. App. 518, 507 P.2d 482 (1972); Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973); Walgreen Co. v. Charnes, 859 P.2d 235 (Colo. App. 1992).

4-2-107. 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) of this section, 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.

Source: L. 65: p. 1301, § 1. **C.R.S. 1963:** § 155-2-107. **L. 77:** (1) and (2) amended, p. 313, § 6, effective January 1, 1978.

ANNOTATION

Refinery sale did not involve sale of "goods" and thus was not covered by this article. McClanahan v. Am. Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980).

PART 2

FORM, FORMATION, AND READJUSTMENT OF CONTRACT

4-2-201. Formal requirements - statute of frauds.

(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is a record 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 the party's authorized agent or broker. A record is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this subsection (1) beyond the quantity of goods shown in the record.

(2) Between merchants, if within a reasonable time a record in confirmation 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) of this section against the party unless notice in a record 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) of this section 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 4-2-606).

Source: L. 65: p. 1302, § 1. **C.R.S. 1963:** § 155-2-201. **L. 2023:** (1) and (2) amended, (SB 23-090), ch.136, p. 527, § 7, effective August 7.

Cross references: For what constitutes acceptance of goods, see § 4-2-606.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Commercial Law", see 55 Den. L.J. 425 (1978). For article, "Digital Age Shapes Modern Contract Law", see 54 Colo. Law. 22 (July 2025).

Annotator's note. Since § 4-2-201 is similar to repealed C.R.S. 1963, § 121-1-4 (uniform sales act), a relevant case construing § 121-1-4 has been included in the annotations to this section.

This section is a parallel provision to § 38-10-112. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Acceptance must be voluntary and unconditional. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Acceptance may be inferred from the buyer's conduct in taking physical possession of the goods or some part of them. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Question of having received and accepted "part of goods" where taken and returned. In an action against a buyer to recover for failure to complete the purchase, testimony that the buyer took part of the goods away, but returned such later, is prima facie evidence warranting submission to the trier of facts of the question whether the buyer received and accepted "part of the goods" within the meaning of this section. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Provisions not expressed in writing may be established by parol. In an action for damages for failure to complete purchase where the evidence presents a question of fact on the issue of acceptance of part of the goods, such evidence, if satisfactory to the trier of facts, takes the case from under the statute of frauds; and the provisions of the contract, not expressed in the writing, may then be established by parol. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Burden on plaintiff to prove preexisting oral contract. Under this section the burden is on the plaintiff to prove that an oral contract had been entered into before the

purchase order was drawn, and to constitute a sufficient writing to take the oral contract outside the statute of frauds, the writing must be "in confirmation of the contract". Nations Enters., Inc. v. Process Equip. Co., 40 Colo. App. 390, 579 P.2d 655 (1978).

Defendant has burden of proving the applicability of this section as an affirmative defense to a breach of contract claim. However, the burden switches back to the plaintiff to prove that the merchant exception in subsection (2) applies. Thus, it was reversible error for the trial court to instruct the jury that the defendant had the burden of proving that he was not a merchant and that no confirmatory writing was sent. Am. Pride Co-op v. Seewald, 968 P.2d 139 (Colo. App. 1998).

Totality of circumstances support trial court's conclusion that plaintiff intended to retain ownership of goods and that defendant's conduct did not constitute an acceptance for purposes of exception to the statute of frauds and, therefore, plaintiff's action to enforce oral contract was barred by statute of frauds. Lockhart v. Elm, 736 P.2d 429 (Colo. App. 1987).

Farmer held to be "merchant" for purposes of § 4-2-201 (1). Transaction between long-time farmer and merchandiser of agricultural commodities for sale of corn upon harvest was between merchants, and written confirmation of oral agreement held sufficient to take transaction out of statute of frauds. Colorado-Kansas Grain v. Reifschneider, 817 P.2d 637 (Colo. App. 1991).

Contract contemplating both service and goods. A contract which contemplates both the performance of services and the sale of goods must be examined to determine whether its primary purpose is the sale of goods or the rendition of services. Colo. Carpet Installation, Inc. v. Palermo, 647 P.2d 686 (Colo. App. 1982), aff'd, 668 P.2d 1384 (Colo. 1983).

If the primary purpose of the contract is the sale of goods and the performance of services is merely incidental, then the statute of frauds will bar any claim which lacks the requisite writing. Colo. Carpet Installation, Inc. v. Palermo, 647 P.2d 686 (Colo. App. 1982), aff'd, 668 P.2d 1384 (Colo. 1983).

Effect of part performance. While part performance can be sufficient to remove the bar of the statute of frauds, it will remove only that portion of the contract which relates to goods which have actually been received and accepted. Colo. Carpet Installation, Inc. v. Palermo, 647 P.2d 686 (Colo. App. 1982), aff'd, 668 P.2d 1384 (Colo. 1983).

Applicability of specially manufactured goods exception. The specially manufactured goods exception, subsection (3)(a), applies only when goods are not a stock item and are unsuitable for sale to others in the ordinary course of business. Colo. Carpet Installation, Inc. v. Palermo, 647 P.2d 686 (Colo. App. 1982), aff'd, 668 P.2d 1384 (Colo. 1983).

Applied in Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977); Morrison v. Droll, 41 Colo. App. 354, 588 P.2d 383 (1978); United States ex rel.

Mobile Premix Concrete, Inc. v. Santa Fe Eng'rs, Inc., 515 F. Supp. 512 (D. Colo. 1981); Mullenix v. Laplante, 568 F. Supp. 3d 1147 (D. Colo. 2021).

4-2-202. Final 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 record 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, usage of trade, or by course of performance (section 4-1-303); and

(b) By evidence of consistent additional terms unless the court finds the record to have been intended also as a complete and exclusive statement of the terms of the agreement.

Source: L. 65: p. 1303, § 1. **C.R.S. 1963:** § 155-2-202. **L. 2006:** (a) amended, p. 490, § 5, effective September 1. **L. 2023:** IP and (b) amended, (SB 23-090), ch. 136, p. 527, § 8, effective August 7.

Cross references: For the course of performance or practical construction, see § 4-2-208.

ANNOTATION

Law reviews. For article, "Exclusion and Modification of Warranty under the U.C.C. — How to Succeed in Business Without Being Liable for Not Really Trying", see 46 Den. L.J. 579 (1969). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Parol evidence is to be excluded if the writing was intended as a final, complete, and exclusive statement of the terms of the agreement. MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1971).

If the written expression is not "complete and exclusive", parol evidence is admissible if it relates to additional terms which are not inconsistent with a term of the written agreement. MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1971).

There is no longer the assumption that the parties intended a writing to be the complete expression of their agreement. The assumption is to the contrary, unless the court expressly finds that the parties intended the contract to be completely integrated. Amoco Prod. Co. v. W. Slope Gas Co., 745 F.2d 303 (10th Cir. 1985); Nw.

Cent. Pipeline Corp. v. JER P'ship, 943 F.2d 1219 (10th Cir. 1991).

Parol evidence admissible to vary or contradict terms of ambiguous agreement. Montoya v. Cherry Creek Dodge, Inc., 708 P.2d 491 (Colo. App. 1985); Nw. Cent. Pipeline Corp. v. JER P'ship, 943 F.2d 1219 (10th Cir. 1991).

General integration clause does not effect a waiver of a claim of negligent misrepresentation not specifically prohibited by the terms of the agreement. Parol evidence as to such misrepresentation allowed. Keller v. A.O. Smith Harvestore Prods., 819 P.2d 69 (Colo. 1991).

Parol evidence rule applicable to contract disputes had no force in a tort action alleging fraudulent misrepresentation in the inducement to execute an agreement. Bill Dreiling Motor Co. v. Shultz, 168 Colo. 59, 450 P.2d 70 (1969); Keller v. A.O. Smith Harvestore Prods., 819 P.2d 69 (Colo. 1991).

To be inconsistent, the offered evidence must contradict or negate the written terms. MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1971).

Where a buyer alleges the existence of oral warranties prior to execution of a written contract and there is conduct following the sale which tends to show that warranties were in fact made, there is a material issue of fact for resolution, namely, whether the parties intended the written contract to be a final expression of their agreement, and, if not, what the terms actually agreed upon by the parties consisted of. Evidence of both oral warranties and the conduct of the parties subsequent to signing the contract is admissible for purpose of resolving this issue. O'Neil v. Int'l Harvester Co., 40 Colo. App. 369, 575 P.2d 862 (1978).

Previous course of dealing considered in determining meaning of contract provisions. It is the policy of the uniform commercial code to consider previous course of dealing in determining the meaning of contract provisions. Amerine Nat'l Corp. v. Denver Feed Co., 493 F.2d 1275 (10th Cir. 1974); KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769 (Colo. 1985).

The lack of facial ambiguity in the contract language is basically irrelevant to whether extrinsic evidence ought to be considered by the court as an initial matter. Amoco Prod. Co. v. W. Slope Gas Co., 754 F.2d 303 (10th Cir. 1985).

If a contract's construction depends upon extrinsic facts, then its terms become questions of fact, and the district court's construction will be overturned only if clearly erroneous. Amoco Prod. Co. v. W. Slope Gas Co., 745 F.2d 303 (10th Cir. 1985); Nw. Cent. Pipeline Corp. v. JER P'ship, 943 F.2d 1219 (10th Cir. 1991).

Applied in Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977); Universal Drilling Co. v. Camay Drilling Co., 737 F.2d 869 (10th Cir. 1984).

4-2-203. Seals inoperative.

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

Source: L. 65: p. 1303, § 1. **C.R.S. 1963:** § 155-2-203. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 528, § 9, effective August 7.

4-2-204. 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.

Source: L. 65: p. 1303, § 1. **C.R.S. 1963:** § 155-2-204.

ANNOTATION

Applied in Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977); Nations Enters., Inc. v. Process Equip. Co., 40 Colo. App. 390, 579 P.2d 655 (1978); Western Conference Resorts, Inc. v. Pease, 668 P.2d 973 (Colo. App. 1983).

4-2-205. Firm offers.

An offer by a merchant to buy or sell goods in a signed record 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.

Source: L. 65: p. 1303, § 1. **C.R.S. 1963:** § 155-2-205. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 528, § 10, effective August 7.

ANNOTATION

An offer can be "firm" even if not made in writing. This section is not intended to provide the exclusive mechanism by which a valid offer can be made. Its purpose is only to establish a type of offer that, although not supported by consideration, is nonetheless irrevocable. Scoular Co. v. Denney, 151 P.3d 615 (Colo. App. 2006).

4-2-206. 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.

Source: L. 65: p. 1304, § 1. **C.R.S. 1963:** § 155-2-206.

ANNOTATION

Where partial performance not adequate acceptance. In cases where the purchase order provides for an acceptance in writing, and the acceptance copy points out that the order is not valid until the acceptance copy is received, the buyer's purchase order does not invite acceptance by partial performance, and the seller's conduct in shipping some of the pumps more than a year after the date of the purchase order does not amount to acceptance. Nations Enters., Inc. v. Process Equip. Co., 40 Colo. App. 390, 579 P.2d 655 (1978).

Small print on acknowledging invoice held not part of contract. Evidence held

insufficient to establish that the small print on the invoice acknowledging purchaser's order was a part of the contract. Surplus Electronics Corp. v. Gallin, 653 P.2d 752 (Colo. App. 1982).

A grain reseller's agreement to sell millet to a third party is not the beginning of a requested performance sufficient to constitute acceptance of a millet grower's offer to sell grain to the reseller. The performance desired by the millet grower was payment of money, which was not made, and nothing in the contract with the third party specified that the grain to be resold to the third party was to be grain purchased from the millet grower. Scoular Co. v. Denney, 151 P.3d 615 (Colo. App. 2006).

4-2-207. 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 title.

Source: L. 65: p. 1304, § 1. **C.R.S. 1963:** § 155-2-207.

ANNOTATION

Law reviews. For article, "Commercial Law", see 55 Den. L.J. 425 (1978). For article, "The 'Battle of the Forms' Under the Colorado Uniform Commercial Code", see 11 Colo. Law. 78 (1982).

Counteroffer. Under this section, whenever an offeree's acceptance contains terms that materially alter the contract, and the offeree had conditioned his participation on the offeror's acceptance of such terms, the offeree's response becomes a counteroffer, to be accepted or rejected by the offeror, rather than an acknowledgment of the original offer. Master Palletizer Sys. v. T.S. Ragsdale Co., 725 F. Supp. 1525 (D. Colo. 1989).

Effect of addition of material term on contract. Under this section, in transactions between merchants the addition of a material term does not void the contract but the other party is not bound by the new term. Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977).

Test for determining materiality consists of three-part analysis to find subjective surprise, objective surprise, and hardship. Avedon Eng'g, Inc. v. Seatex, 112 F. Supp. 2d 1090 (D. Colo. 2000).

Material alteration not found. Boilerplate "future transactions" clause, requiring future transactions between the parties to be governed by written terms printed on sales confirmation form unless superseded by a signed contract, was held not to "materially alter" the agreement and therefore was enforceable although not expressly bargained for. Avedon Eng'g, Inc. v. Seatex, 112 F. Supp. 2d 1090 (D. Colo. 2000).

Limitation of a seller's liability for incidental and consequential damages is a material alteration to the contract and therefore does not become a part of the contract. Leica Geosystems, Inc. v. L.W.S. Leasing, Inc., 872 F. Supp. 2d 1191 (D. Colo. 2012).

Boilerplate choice of law provision was held not to "materially alter" the contract and therefore was part of the parties' agreement. Leica Geosystems, Inc. v. L.W.S. Leasing, Inc., 872 F. Supp. 2d 1191 (D. Colo. 2012).

Boilerplate arbitration clause was held not to "materially alter" the agreement and therefore was enforceable although not expressly bargained for. Avedon Eng'g, Inc. v. Seatex, 112 F. Supp. 2d 1090 (D. Colo. 2000).

Material alteration found. Boilerplate clause purporting to reduce limitation period from three years to one year, contrary to state statute, was held to "materially alter" the agreement and therefore was not enforceable. Avedon Eng'g, Inc. v. Seatex, 112 F. Supp. 2d 1090 (D. Colo. 2000).

Material alteration held not agreed to and therefore is not binding. Flight Sys. v. Elgood-Mayo Corp., 660 P.2d 909 (Colo. App. 1982).

Small print on acknowledging invoice held not part of contract. Evidence held insufficient to establish that the small print on the invoice acknowledging purchaser's order was a part of the contract. Surplus Elecs. Corp. v. Gallin, 653 P.2d 752 (Colo. App. 1982).

Penalty interest and attorney fee provisions included on an invoice which constitutes written confirmation of terms orally agreed to by the parties do not

materially alter a contract and thus become a part thereof absent objection to such terms. Offen, Inc. v. Rocky Mtn. Constructors, 765 P.2d 600 (Colo. App. 1988).

After defendant was provided a copy of the manufacturer's statement and disclaimer of warranty, those items became part of the agreement between the parties. Graham Hydraulic v. Stewart & Stevenson, 797 P.2d 835 (Colo. App. 1990).

Whether a contract is established pursuant to subsection (3) is applied in Westinghouse Elec. Corp. v. Nielsons, Inc., 647 F. Supp. 896 (D. Colo. 1986).

4-2-208. 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 4-1-303).

(3) Subject to the provisions of section 4-2-209 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.

Source: L. 65: p. 1304, § 1. **C.R.S. 1963:** § 155-2-208. **L. 2006:** (2) amended, p. 490, § 6, effective September 1.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

When evidence admissible. Evidence of course of dealing and course of performance is admissible if it does not directly contradict the terms of a written agreement, but merely explains or supplements it. Great W. Sugar Co. v. N. Natural Gas Co., 661 P.2d 684 (Colo. App. 1982), aff'd sub nom. KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769 (Colo. 1985).

It is the policy of the UCC to consider the previous course of dealing in determining the meaning of contract provisions. Great W.

Sugar Co. v. N. Natural Gas Co., 661 P.2d 684 (Colo. App. 1982), aff'd sub nom. KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769 (Colo. 1985).

Applied in U.S., Trans-Colorado Concrete v. Midwest Const. Co., 653 F. Supp. 903 (D. Colo. 1987).

4-2-209. 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 or other signed record 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 4-2-201) 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) of this section, 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.

Source: L. 65: p. 1305, § 1. **C.R.S. 1963:** § 155-2-209. **L. 2023:** (2) amended, (SB 23-090), ch. 136, p. 528, § 11, effective August 7.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Meaning of "waiver". The term "waiver" as used in this section has been accorded its usual meaning, namely, the intentional relinquishment of a known right. Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

A waiver may be shown by a course of conduct or by oral statement. Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

A waiver can be shown by unequivocal conduct or statements betraying an intent to

relinquish known rights. Jelen and Son, Inc. v. Bandimere, 801 P.2d 1182 (Colo. 1990).

Applied in United States ex rel. Mobile Premix Concrete, Inc. v. Santa Fe Eng'rs, Inc., 515 F. Supp. 512 (D. Colo. 1981).

4-2-210. 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) Except as otherwise provided in section 4-9-406, 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 or her by his or her contract, or impair materially his or her 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 or her entire obligation can be assigned despite agreement otherwise.

(2.5) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of subsection (2) of this section unless, and then only to the extent that enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

(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 4-2-609).

Source: L. 65: p. 1305, § 1. **C.R.S. 1963:** § 155-2-210. **L. 2001:** (2) amended and (2.5) added, p. 1436, § 19, effective July 1.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

4-2-301. 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.

Source: L. 65: p. 1306, § 1. **C.R.S. 1963:** § 155-2-301.

4-2-302. 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.

Source: L. 65: p. 1306, § 1. **C.R.S. 1963:** § 155-2-302.

ANNOTATION

Law reviews. For article, "Exclusion and Modification of Warranty under the U.C.C. — How to Succeed in Business Without Being Liable for Not Really Trying", see 46 Den. L.J. 579 (1969). For note, "Exculpatory Clauses and Public Policy: A Judicial Dilemma", see 53 U. Colo. L. Rev. 793 (1982). For article, "When are Merger Clauses Unconscionable?", see 64 Den. U.L. Rev. 529 (1988).

Finding of unconscionability is a question of law. Mullan v. Quickie Aircraft Corp., 797 F.2d 845 (10th Cir. 1986).

In order to support a finding of unconscionability, there must be evidence of some overreaching on the part of one of the parties such as that which results from an inequality of bargaining power or under other circumstances in which there is an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to that party. McMillion v. McMillion, 31 Colo. App. 33, 522 P.2d 125 (1974); Davis v. M.L.G. Corp., 712 P.2d 985 (Colo. 1986); Mullan v. Quickie Aircraft Corp., 797 F.2d 845 (10th Cir. 1986); Leprino v. Intermountain Brick Co., 759 P.2d 835 (Colo. App. 1988).

Factors relevant to determining whether a contract is unconscionable: (1) a standardized agreement executed by parties of unequal bargaining strength; (2) lack of opportunity to read or become familiar with the document before signing it; (3) use of fine print in the portion of the contract containing the provision; (4) absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; (5) the terms of the contract, including substantive unfairness; (6) the relationship of the parties, including factors of assent, unfair surprise, and notice; and (7) all the circumstances surrounding the formation of the contract, including its commercial setting, purpose, and effect. Davis v. M.L.G. Corp., 712 P.2d 985 (Colo. 1986).

The first, second, third, sixth, and seventh factors relate to procedural unconscionability. Vernon v. Qwest Commc'ns Int'l, Inc., 925 F. Supp. 2d 1185 (D. Colo. 2013).

Whether contract was unconscionable is discussed in Mullan v. Quickie Aircraft Corp., 797 F.2d 845 (10th Cir. 1986); Leprino v. Intermountain Brick Co., 759 P.2d 835 (Colo. App. 1988); Platt v. Winnebago Indus., 960 F.3d 1264 (10th Cir. 2020).

Applied in In re Stokes, 43 Colo. App. 461, 608 P.2d 824 (1979); In re Manzo, 659 P.2d 669 (Colo. 1983).

4-2-303. 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.

Source: L. 65: p. 1307, § 1. **C.R.S. 1963:** § 155-2-303.

4-2-304. 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.

Source: L. 65: p. 1307, § 1. **C.R.S. 1963:** § 155-2-304.

ANNOTATION

Applied in Jelen and Son, Inc. v. Bandimere, 801 P.2d 1182 (Colo. 1990).

4-2-305. 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 canceled 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.

Source: L. 65: p. 1307, § 1. **C.R.S. 1963:** § 155-2-305.

ANNOTATION

The question of a reasonable price for goods pursuant to this section is a question for a jury. Fischer Imaging Corp. v. General Elec. Co., 187 F.3d 1165 (10th Cir. 1999).

4-2-306. 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.

Source: L. 65: p. 1307, § 1. **C.R.S. 1963:** § 155-2-306.

ANNOTATION

"Best efforts" requirement enforced. The "best efforts" requirement of an exclusive distributorship contract, governed by subsection (2), was held not negated by agreement of the parties, and remained as an obligation of the distributors. Stone v. Caroselli, 653 P.2d 754 (Colo. App. 1982).

4-2-307. 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.

Source: L. 65: p. 1308, § 1. **C.R.S. 1963:** § 155-2-307.

ANNOTATION

Parties "otherwise agreed" to delivery terms; therefore the contract obligated the buyer to pay the full amount of the invoice in spite of the fact that the seller had terminated only forty-five percent of the goods. Murray Equipment Co. v. Curtis, Inc., 725 P.2d 35 (Colo. App. 1986).

4-2-308. 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.

Source: L. 65: p. 1308, § 1. **C.R.S. 1963:** § 155-2-308.

4-2-309. 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.

Source: L. 65: p. 1308, § 1. **C.R.S. 1963:** § 155-2-309.

ANNOTATION

Where there is a material question of fact as to whether reasonable notice of termination as required by this section was given, the entry of summary judgment was error. William H. White Co. v. B&A Mfg. Co., 794 P.2d 1099 (Colo. App. 1990).

4-2-310. 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 4-2-513); and

(c) If delivery is authorized and made by way of documents of title otherwise than by subsection (b) of this section, then payment is due, regardless of where the goods are to be received, (i) at the time and place at which the buyer is to receive delivery of the tangible documents, or (ii) at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business or, if none, the seller's residence; 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 postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

Source: L. 65: p. 1308, § 1. **C.R.S. 1963:** § 155-2-310. **L. 2006:** (c) amended, p. 491, § 7, effective September 1.

4-2-311. Options and cooperation respecting performance.

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of section 4-2-204) 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 4-2-319, 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.

Source: L. 65: p. 1309, § 1. **C.R.S. 1963:** § 155-2-311.

Cross references: For the F.O.B. and F.A.S. terms, see § 4-2-319 (1)(c) and (3).

4-2-312. Warranty of title and against infringement - buyer's obligation against infringement.

(1) Subject to subsection (2) of this section, 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) of this section 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.

Source: L. 65: p. 1309, § 1. **C.R.S. 1963:** § 155-2-312.

ANNOTATION

Law reviews. For article, "One Year Review of Contracts", see 38 Dicta 161 (1961).

Annotator's note. Since § 4-2-312 is similar to repealed § 121-1-13, CRS 53, and CSA, C. 143A, § 13 (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

This section deals with implied warranties of titles. Koscove v. Brunger, 143 Colo. 354, 352 P.2d 961 (1960).

Purchaser may rescind entire transaction although portion has been disposed of. Where a seller of chattels is guilty of a breach of an implied warranty of title and the purchaser relying upon such warranty has sold or disposed of a minor portion of the chattels, the purchaser, upon learning of the defect of title, may elect to rescind the entire transaction. Koscove v. Brunger, 143 Colo. 354, 352 P.2d 961 (1960).

Contractual language announcing that a good is sold "as is" without any expressed or implied warranties is not sufficient to exclude a warranty of title imposed by this section. Hagerty Ins. Agency v. Luxury Asset Capital, 2023 COA 57, 536 P.3d 346.

Where one buys produce from a tenant farmer without determining landlord's lien upon such, he does so at his peril. Peterson & Co. v. Novinger, 121 Colo. 171, 214 P.2d 373 (1950).

4-2-313. 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.

Source: L. 65: p. 1310, § 1. **C.R.S. 1963:** § 155-2-313.

Cross references: For warranties relating to motor vehicles, see article 10 of title 42.

ANNOTATION

I. General Consideration.

III. Formal Words not Necessary.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Contracts", see 34 Dicta 85 (1957). For note, "Privity of Contract and the Breach of Warranty Action", see 35 U. Colo. L. Rev. 232 (1963).

The several types of warranties coexist. Westric Battery Co. v. Standard Elec. Co., 482 F.2d 1307 (10th Cir. 1973).

Lessee as third party beneficiary to warranties. Although a lessee of a machine does not directly receive the benefits of the warranties made by the seller to the lessor, the lessee may be a third party beneficiary of such warranties who could "reasonably be expected to use, consume, or be affected by the goods". Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

Warranty's existence or breach for trier of fact. The question of the existence of a warranty and whether that warranty was breached is ordinarily one for the trier of fact. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

Warranty applicable to heating system which was moved into buyers' residence for installation and later removed. Thomas v. Bove, 687 P.2d 534 (Colo. App. 1984).

Cause of action generally accrues at purchase. Normally, a cause of action for the breach of an express warranty accrues at the time of the purchase of the goods. Glen Peck, Ltd. v. Fritsche, 651 P.2d 414 (Colo. App. 1981).

Express warranty may explicitly extend to future performance. Glen Peck, Ltd. v. Fritsche, 651 P.2d 414 (Colo. App. 1981).

Unreasonable use most common defense. The most common accepted affirmative defense to a warranty claim is unreasonable use of the product by the plaintiff with knowledge of the defective condition and the risk it creates. This defense bears a resemblance to the negligence doctrine of assumption of risk. Hensley v. Sherman Car Wash Equip. Co., 33 Colo. App. 279, 520 P.2d 146 (1974).

For discussion of the distinction between liability in contract for breach of warranty and strict tort liability for product misrepresentation, see Am. Safety Equip. Corp. v. Winkler, 640 P.2d 216 (Colo. 1982).

Contributory negligence not defense. The concept of contributory negligence, as it is known in negligence case law and as distinct from the doctrine of assumption of risk, has no place in actions premised on breach of warranty. Hensley v. Sherman Car Wash Equip. Co., 33 Colo. App. 279, 520 P.2d 146 (1974).

Applied in Caldwell v. Kats, 38 Colo. App. 156, 555 P.2d 190 (1976); Hummel v. Skyline Dodge, Inc., 41 Colo. App. 572, 589 P.2d 73 (1978); Shaw v. General Motors Corp., 727 P.2d 387 (Colo. App. 1986); Molina v. Ford Motor Co., 441 F. Supp. 3d 1176 (D. Colo. 2020); Pawa Box Sales Grp. v. Roofer Elecs. Tech. (Shanwei) Co., 754 F. Supp. 3d 1081 (D. Colo. 2024).

II. EXPRESS WARRANTIES.

A. Affirmation or Promise.

B. Description.

C. Sample.

A. Affirmation or Promise.

Annotator's note. Since § 4-2-313(1)(a) is similar to repealed § 121-1-12, C.R.S. 1963, and § 121-1-12, CRS 53 (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

Evidence sufficient for submission of instruction to jury. Evidence pertaining to manufacturer's brochure which was considered by plaintiff in connection with the purchase of a bumper jack was sufficient to warrant submission of an instruction on express warranty to the jury. Kinard v. Coats Co., 37 Colo. App. 555, 553 P.2d 835 (1976).

Evidence pertaining to statements contained in literature printed by the manufacturer of an intrauterine device and statements by the manufacturer's representatives which were considered by the plaintiff and her physician in making the decision to use the product was sufficient to warrant submission of an instruction on express warranty to the jury. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

Ample evidence to allow claim for breach of express warranty to go to the jury where tags attached to fuel controls indicated that the controls were inspected and accepted in accordance with original manufacturer's latest methods procedures and specifications and the certificate of conformance accompanying the fuel controls stated that the controls were "as is tested/repaired to the original equipment manufacturer's specification requirements" and uncontested testimony at trial indicated that the fuel controls did not function properly at altitudes well below those called for in the internal specifications. Pegasus Helicopters, Inc. v. United Technologies Corp., 35 F.3d 507 (10th Cir. 1994).

An express warranty may be inferred from an affirmation of a fact or a promise by the seller which induces the purchase, on which the buyer relies, and on which the seller intended that he should so do. Duncan v. Bd. of County Comm'rs, 154 Colo. 447, 391 P.2d 368 (1964).

An averment at the time of the sale is a warranty provided the jury finds from the evidence on the trial it was so intended. Such intention may be reached as an inference or deduction from the facts or circumstances in connection with all the evidence on the trial, and when such deduction is made, if it rests upon proper and sufficient evidence, it becomes proof as a fact of warranty. Rudd v. Rogerson, 133 Colo. 506, 297 P.2d 533 (1956).

There can be no operative warranty unless it be affirmatively shown that the buyer relied on the affirmation of fact or promise of the seller. The affirmation asserted as a warranty must have been operative in causing the sale and must have been understood by the buyer as being intended as part of the contract. It need not, however, have been the sole inducement to the purchase, nor need the buyer actually have been deceived by the statement. Only such reliance is required as is necessary in contracts generally, and where a representation has entered into the contract as an intended element thereof and as a part of the consideration, the requirement that it be an inducement in order to be operative as a warranty is fully satisfied. Duncan v. Bd. of County Comm'rs, 154 Colo. 447, 391 P.2d 368 (1964).

There is no duty on the buyer of goods who purchases with an express warranty to inspect the article purchased, or to exercise care in discovering any defects, or to investigate the truth of the seller's statements; rather, he may rely on the contract of the seller for the delivery of goods which satisfy the warranty, except that the contract may expressly provide for an inspection or test to be made by the purchaser as a condition. Rudd v. Rogerson, 133 Colo. 506, 297 P.2d 533 (1956).

The maxim "caveat emptor" has no application to matters included in an express warranty, and even where the buyer has an equal opportunity with the seller to form his own judgment as to the character and condition of the property he may receive and rely on a warranty instead; opportunity on the part of the buyer to inspect does not militate against the availability of an express warranty in the sale. Rudd v. Rogerson, 133 Colo. 506, 297 P.2d 533 (1956).

Where an expressed warranty is given, the buyer is not precluded from relying upon it, unless his investigation reveals the defect. Rudd v. Rogerson, 133 Colo. 506, 297 P.2d 533 (1956).

Even though the buyer makes an inspection the warranty is not rendered inoperative unless the buyer is clearly relying upon his own investigation and waives the warranty; investigation is compatible with the giving of an express warranty. Rudd v. Rogerson, 133 Colo. 506, 297 P.2d 533 (1956); Norton v. Lindsay, 350 F.2d 46 (10th Cir. 1965).

Writing does not exclude undertaking by seller. Where a letter addressed to the buyer and signed by the seller described a machine, but did not include a provision as to its ability to produce, then, nevertheless, where it appeared that there were numerous conversations between the parties and that the buyer fully explained to the seller the machine was to be used on a mass production basis and its intricacies were also made known to the seller from the beginning, it cannot be said that the writing excluded undertakings by the seller in the light of the buyer's requirements that the seller produce a machine which would fulfill specific needs. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

Testimony that the seller specifically "guaranteed" or "promised" that an

article would work satisfactorily and that it was clearly understood by all that the seller would get paid if, and only if, the article functioned properly clearly supported the finding of an express warranty. Duncan v. Bd. of County Comm'rs, 154 Colo. 447, 391 P.2d 368 (1964).

The word "sound" when used with reference to many animals and especially a horse has a special and particular connotation. The statement that a horse is "sound" implies "the absence of any defect or disease which will impair the animal's natural usefulness for the purpose for which it is purchased." Norton v. Lindsay, 350 F.2d 46 (10th Cir. 1965).

An express warranty by a sales agent imposes liability on the salesman, but not the manufacturer, where the terms of the warranty as to safety exceeded the agent's authority. Senter v. B.F. Goodrich Co., 127 F. Supp. 705 (D. Colo. 1954).

No express warranty was created by language in automobile manufacturer's publication which was merely the seller's opinion of the goods rather than an affirmation of fact or promise. Shaw v. General Motors Corp., 727 P.2d 387 (Colo. App. 1986).

No form of disclaimer will be allowed a seller to disclaim the known true nature of an item to be sold. Olson Mfg. Co. v. Roberts, 131 Colo. 152, 280 P.2d 433 (1955).

B. Description.

Annotator's note. Since § 4-2-313(1)(b) is similar to repealed § 121-1-14, C.R.S. 1963, and CSA, C. 143A, § 14 (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

Where an order is in writing and describes the goods, it is clear that the parties consummated a "sale of goods by description", as those words are used in this section. Lindsey v. Stalder, 120 Colo. 58, 208 P.2d 83 (1949).

But where one orders a product and directs that the character thereof be changed before delivery, but no one can say whether the shipment was properly sent as initially described, then there is no evidence to support a judgment under this section. Lindsey v. Stalder, 120 Colo. 58, 208 P.2d 83 (1949).

Applied in Eggen v. M. & K. Trailers & Mobile Home Brokers, Inc., 29 Colo. App. 177, 482 P.2d 435 (1971); Universal Drilling Co. v. Camay Drilling Co., 737 F.2d 869 (10th Cir. 1984).

C. Sample.

No sale by sample where buyer does not rely on seller. Where the seller exhibited a small sample of a finished product, stating "here is what it looks like", and the buyer orders rough product in reliance on its own employees' evaluation, the sale was not a sale by sample carrying the warranty that the bulk should correspond to the sample. Lindsey v. Stalder, 120 Colo. 58, 208 P.2d 83 (1949) (decided under repealed CSA, C. 143A, § 16, uniform sales act).

III. FORMAL WORDS NOT NECESSARY.

Annotator's note. Since § 4-2-313(2) is similar to repealed § 121-1-12, C.R.S. 1963, and § 121-1-12, CRS 53 (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

An express warranty need not be in any particular form. Rudd v. Rogerson, 133 Colo. 506, 297 P.2d 533 (1956); Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

No special form of words is necessary to create a warranty. Rudd v. Rogerson, 133 Colo. 506, 297 P.2d 533 (1956); Norton v. Lindsay, 350 F.2d 46 (10th Cir. 1965).

To constitute an express warranty the term "warrant" need not be used, as no technical set of words is required. Duncan v. Bd. of County Comm'rs, 154 Colo. 447, 391 P.2d 368 (1964).

Warranties not confined to affirmations in written agreements. Express warranties are not confined only to affirmations of fact contained in the written agreement between the parties. Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981).

Promotional literature and correspondence are part of basic bargain. Express warranties made by the seller in promotional literature and correspondence sent to the buyer before a sale was made are part of the basic bargain between buyer and seller. Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981); Lutz Farm v. Asgrow Seed Co., 948 F.2d (10th Cir. 1991).

Corporation's dissemination of information qualified as warranties. Where a corporation disseminated information using advertising materials, trade publications, or technical publications and oral statements representing the quality of its product, this activity qualifies in law as warranties. Westric Battery Co. v. Standard Elec. Co., 482 F.2d 1307 (10th Cir. 1973).

Unnecessary to prove scienter. At common law, in an action for breach of an express warranty, it was unnecessary to allege or prove a scienter, and the uniform commercial code does not change this rule. Kensair Corp. v. Peltier, 28 Colo. App. 290, 472 P.2d 700 (1970).

Good faith and lack of knowledge do not constitute defenses. Where there is a breach of an express warranty, neither the fact that the seller acted in good faith nor the fact that the seller made the warranty without knowledge of its falsity constitute a defense. Kensair Corp. v. Peltier, 28 Colo. App. 290, 472 P.2d 700 (1970).

No particular reliance by buyer on affirmation of goods must be shown before such statement made by seller is considered an express warranty. Lutz Farms v. Asgrow Seed Co., 948 F.2d (10th Cir. 1991).

4-2-314. Implied warranty - merchantability - usage of trade.

(1) Unless excluded or modified (section 4-2-316), 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 4-2-316), other implied warranties may arise from course of dealing or usage of trade.

Source: L. 65: p. 1310, § 1. **C.R.S. 1963:** § 155-2-314.

ANNOTATION

Law reviews. For article, "The Uniform Commercial Code and Sales Warranties in Colorado", see 38 U. Colo. L. Rev. 7 (1965). For note, "Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings", see 43 Den. L. J. 379 (1966). For note, "Implied Warranties — Sales of Used Cars in Colorado", see 42 U. Colo. L. Rev. 473 (1971). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "The Enterprise Liability Theory of Torts", see 47 U. Colo. L. Rev. 153 (1976). For comment, "Implied Warranties in the Sale of Real Estate in Colorado: Rational Boundaries of the Doctrine", see 53 U. Colo. L. Rev. 137 (1981). For article, "Let the Builder-Vendor Beware: The Demise of Caveat Emptor in Colorado — Part I", see 16 Colo. Law. 463 (1987). For article, "Let the Builder-Vendor Beware: Defenses and Damages in Home Builder Litigation — Part II", see 16 Colo. Law. 629 (1987). For article, "What's in the Package: Food, Beverage, and Dietary Supplement Law and Litigation Part I", see 43 Colo. Law. 77 (July 2014).

Annotator's note. Since § 4-2-314 is similar to repealed § 121-1-15(1)(c), C.R.S. 1963, § 121-1-15(2), CRS 53, and CSA, C. 143A, § 15(2) (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

The several types of warranties coexist. Westric Battery Co. v. Standard Elec. Co., 482 F.2d 1307 (10th Cir. 1973).

Implied warranties of merchantability and fitness for a particular purpose may coexist when there is sufficient evidence to support the creation of each warranty. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984); Hawkinson v. A.H. Robins Co., Inc., 595 F. Supp. 1290 (D. Colo. 1984).

Evidence that woman selected intrauterine device not only for the ordinary purpose of preventing pregnancy, but also for the particular purpose of providing her with a safe contraceptive device was sufficient to justify submission to the jury of the dual implied warranties of fitness for a particular purpose and merchantability. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

Doctrine of strict liability adopted where design renders unreasonably dangerous an otherwise properly manufactured product. Pust v. Union Supply Co., 38 Colo. App. 435, 561 P.2d 355 (1976), rev'd sub nom. Holly Sugar Corp. v. Union Supply Co., 194 Colo. 316, 572 P.2d 148 (1977) (third party indemnification issue), and aff'd, 196 Colo. 162, 583 P.2d 276 (1978).

Design enhances extent of injuries. Strict liability attaches to an automobile design defect which, though not contributing to the collision itself, may have enhanced the injuries sustained. Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978).

Defect in design may render product unmerchantable or not fit for the particular purposes for which it was required. Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978).

For effect on manufacturer's liability where product is unavoidably unsafe, see Belle Bonfils Mem. Blood Bank v. Hansen, 665 P.2d 118 (Colo. 1983).

Summary judgment improper where factual question as to reasonableness of design. Where plaintiff's experts raise a factual question about the reasonableness of defendant's design strategies, the drastic remedy of summary judgment is improper, and the issue of whether the design of the car unreasonably increased the risks of injury by collision should be presented to the jury. Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978).

A dealer who sells articles which ordinarily are used in but one way impliedly warrants fitness for use in that particular way, unless there is evidence to the contrary, and this is a warrant of merchantability. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

Contract required to involve sale of product. A claim asserting a breach of the "implied warranty of merchantability and fitness" under this section required that the contract in question involve the sale of a

product. Strong v. Retail Credit Co., 38 Colo. App. 125, 552 P.2d 1025 (1976).

Concepts of liability without fault are not applicable to service contracts. Strong v. Retail Credit Co., 38 Colo. App. 125, 552 P.2d 1025 (1976).

Warranties arise in every contract for sale unless excluded. Warranties of merchantability and of fitness for a particular purpose, assuming all other statutory prerequisites have been met, arise in every contract for sale, unless properly excluded. Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

A seller in connection with a sale of goods who incidentally renders services in the installation of those goods, knows the use and purpose intended for the goods, and knows that the user is relying on his skill and judgment in connection with the sale is liable under the theory of implied warranty of merchantability for each and every step of the process under his control by which the goods are transferred to the ultimate user, including any services rendered. Bailey v. Montgomery Ward & Co., Inc., 690 P.2d 1280 (Colo. App. 1984).

Where contract provides for sale of goods and for performance of labor or service, test under this section is whether the circumstances underlying the formation of the agreement and the performance reasonably expected demonstrate that the primary purpose of the contract is either the sale of goods or the sale of labor or service. Factors to be considered include: 1) The contractual language; 2) whether an overall price is charged, or the goods and labor are separately billed; 3) the ratio of the cost of goods to the overall contract price; and 4) the nature and reasonableness of the purchaser's expectations of acquiring a property interest in the goods. Bailey v. Montgomery Ward & Co., Inc., 690 P.2d 1280 (Colo. App. 1984).

Warranty applicable to heating system which was moved into buyers' residence for installation and later removed. Thomas v. Bove, 687 P.2d 534 (Colo. App. 1984).

Transfusion of blood was not sale of product. St. Luke's Hosp. v. Schmaltz, 188 Colo. 353, 534 P.2d 781 (1975).

Implied warranty liability extended to component parts manufacturer. As in the area of strict liability, implied warranty liability may extend to the manufacturer of component parts if the lack of fitness for the purpose or use required is found in the component parts before they leave the component parts manufacturer, and not merely in the completed system. Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978); Shaw v. General Motors Corp., 727 P.2d 387 (Colo. App. 1986).

Corporation's dissemination of information qualified as warranties. Where a corporation disseminated information using advertising materials, trade publications, or technical publications and oral statements representing the quality of its product, this activity qualifies in law as warranties. Westric Battery Co. v. Standard Elec. Co., 482 F.2d 1307 (10th Cir. 1973).

Admission of industry safety codes as substantive evidence on strict liability

issue of whether a product is in a defective condition unreasonably dangerous is valid. Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978).

Evidence of industry safety standards, when relevant as to a defect, must be introduced through an expert, must be authenticated as reliable and bona fide industry-wide safety codes, and sufficient advance notice of the intended use of such standards must be given to the adverse party so that he will have sufficient time to prepare to meet the evidence. Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978).

Fertilizer containing herbicides was neither fit for its ordinary purpose nor for the farmers particular purpose, and therefore, breaches both the implied warranty of fitness and the implied warranty of merchantability. Deacon v. Am. Plant Food Corp., 782 P.2d 861 (Colo. App. 1989), rev'd on other grounds sub nom. Stone's Farm Supply, Inc. v. Deacon, 805 P.2d 1109 (Colo. 1991).

Lessee as third party beneficiary of warranties. Although a lessee of a machine does not directly receive the benefits of the warranties made by the seller to the lessor, the lessee may be a third party beneficiary of such warranties who could "reasonably be expected to use, consume, or be affected by the goods". Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

One who sells an article for use as food for human consumption is held to have impliedly warranted that it is fit for the purpose for which it was sold, and for breach of that warranty proximately resulting in injury, may be held to respond in damages. Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961).

Aside from the statute, a retailer who sells unwholesome food for human consumption is liable to the customer for the consequences under an implied warranty imposed by law as a matter of public policy, even though the food is in sealed containers bearing the label of the manufacturer and the retailer has no means of knowing that the contents are unfit for human consumption. Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961).

Where an advertisement does not mention the name of the product and the buyer does not see a label or other evidence of the name of the product before using it, but relies on the seller's judgment and skill to supply him with a sufficient and safe product, there is an implied warranty that the product is of merchantable quality, permitting recovery of actual damages sustained. Huscher v. Pfost, 122 Colo. 301, 221 P.2d 931 (1950). See Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961).

Warranties will be implied in a house purchased in the course of construction that it is built in an efficient and workmanlike manner and of proper materials and when finished will be fit for habitation. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).

Implied warranties include completed buildings. The implied warranty doctrine includes agreements between builder-

vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located, and where a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).

Implied warranty extends to a buyer who incurs injury through an allergic reaction to a product where such an individual is a member of an identifiable class of persons allergic thereto. Howard v. Avon Prods., Inc., 155 Colo. 444, 395 P.2d 1007 (1964).

The buyer has the burden of establishing that the product is injurious to a "significant number" of the population. Howard v. Avon Prods., Inc., 155 Colo. 444, 395 P.2d 1007(1964).

One fails to bring himself within the identifiable class or significant number concept when at the time of purchase, at which point the implied warranty attaches, there is no reasonably foreseeable class of potential users who could be described as prone to suffer from an allergic reaction. Howard v. Avon Prods., Inc., 155 Colo. 444, 395 P.2d 1007 (1964).

Sellers who failed to provide purchase documentation for liquor inventory to buyers of inn breached implied warranty of merchantability entitling buyers to reject undocumented portion of liquor inventory. Purpose of this section is to allocate to seller the risk of loss stemming from defects that render goods unmerchantable. Loden v. Drake, 881 P.2d 467 (Colo. App. 1994).

Plaintiff must prove injuries proximately caused. It is incumbent upon the plaintiff in an action for breach of an implied warranty of fitness to prove that the injuries were proximately caused by the breach of such warranty. Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962).

Negligence is a defense to an action for breach of such an implied warranty. Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962).

Section 13-21-115 is not the exclusive remedy for a plaintiff allegedly injured when a landowner sold a product meant for human consumption on site, and the plaintiff-purchaser was injured by ingesting the allegedly defective or dangerous product. Gangemi v. AMF Bowling Ctrs., Inc., 722 F. Supp. 3d 1170 (D. Colo. 2024).

An injury resulting from the sale of tainted or contaminated food or beverages by a restaurant or bar gives rise to a different kind of claim from a claim against a landowner for activities conducted on the property. This section, which creates an implied warranty of merchantability, is intended to protect purchasers from dangerous or unfit products. This is entirely different from the policy objectives the general assembly was trying to balance in passing § 13-21-115. Gangemi v. AMF Bowling Ctrs., Inc., 722 F. Supp. 3d 1170 (D. Colo. 2024).

Applied in Eggen v. M. & K. Trailers & Mobile Home Brokers, Inc., 29 Colo. App. 177, 482 P.2d 435 (1971); Pust v. Union Supply Co., 38 Colo. App. 435, 561 P.2d 355 (1976); Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981); White v. Miss. Order Buyers, Inc., 648 P.2d 682 (Colo. App. 1982); Pawa Box Sales Grp. v. Roofer Elecs. Tech. (Shanwei) Co., 754 F. Supp. 3d 1081 (D. Colo. 2024).

4-2-315. 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 section 4-2-316, an implied warranty that the goods shall be fit for such purpose.

Source: L. 65: p. 1311, § 1. **C.R.S. 1963:** § 155-2-315.

ANNOTATION

Law reviews. For article, "The Uniform Commercial Code and Sales Warranties in Colorado", see 38 U. Colo. L. Rev. 7 (1965). For note, "Implied Warranties — Sales of Used Cars in Colorado", see 42 U. Colo. L. Rev. 473 (1971). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 33 (1974-75). For comment, "Implied Warranties in the Sale of Real Estate in Colorado: Rational Boundaries of the Doctrine", see 53 U. Colo. L. Rev. 137 (1981).

Annotator's note. Since § 4-2-315 is similar to repealed § 121-1-15(1)(b), (3), and (4), C.R.S. 1963, § 121-1-15(1), (4), and (5), CRS 53, and CSA, C. 143A, § 15(1), (4), and (5)(uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

This section provides for an implied warranty that the goods be reasonably fit for the uses, made known to the seller by the buyer, for which they were purchased. Wallower v. Elder, 126 Colo. 109, 247 P.2d 682 (1952).

This section includes cases for which an implied warranty hinges on the question of whether or not the buyer makes known to the seller the uses for which he desires the chattels. Wallower v. Elder, 126 Colo. 109, 247 P.2d 682 (1952).

Expressly or by implication. There is no implied warranty of fitness for any particular purpose unless the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required. Schlottman v. Pressey, 96 F. Supp. 979 (D. Colo. 1951); Schlottman v. Pressey, 195 F.2d 343 (10th Cir. 1952); Comet

Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

General or specific purpose. The buyer's particular purpose may be equivalent to nothing more than a general purpose or it may relate to a more specific purpose. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

Under this section the buyer's reliance on the seller's skill or judgment must be shown before an implied warranty of fitness of purpose can arise. Wallower v. Elder, 126 Colo. 109, 247 P.2d 682 (1952); Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963); Klipfel v. Neill, 30 Colo. App. 428, 494 P.2d 115. (1972).

Actual reliance is required; affidavit alleging that a purchaser would have relied on the seller had the seller advised her the product was unsuitable does not create a genuine issue of material fact when the purchaser testified that she decided to buy the product before entering the seller's store. Wallman v. Kelley, 976 P.2d 330 (Colo. App. 1998).

The several types of warranties coexist. Westric Battery Co. v. Standard Elec. Co., 482 F.2d 1307 (10th Cir. 1973).

Implied warranties of merchantability and fitness for a particular purpose may coexist when there is sufficient evidence to support the creation of each warranty. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984); Hawkinson v. A.H. Robins Co., Inc., 595 F. Supp. 1290 (D. Colo. 1984).

Evidence that woman selected intrauterine device not only for the ordinary purpose of preventing pregnancy, but also for the particular purpose of providing her with a safe contraceptive device was sufficient to justify submission to the jury of the dual implied warranties of fitness for a particular purpose and merchantability. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

Doctrine of strict liability adopted where design renders unreasonably dangerous an otherwise properly manufactured product. Pust v. Union Supply Co., 38 Colo. App. 435, 561 P.2d 355 (1976), rev'd sub nom. Holly Sugar Corp. v. Union Supply Co., 194 Colo. 316, 572 P.2d 148 (1977) (party indemnification issue), and aff'd, 196 Colo. 162, 583 P.2d 276 (1978).

Design enhances extent of injuries. Strict liability attaches to an automobile design defect which, though not contributing to the collision itself, may have enhanced the injuries sustained. Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978).

For effect on manufacturer's liability where product is unavoidably unsafe, see Belle Bonfils Mem. Blood Bank v. Hansen, 665 P.2d 118 (Colo. 1983).

Warranties arise in every contract for sale unless excluded. Warranties of merchantability and of fitness for a particular purpose assuming all other statutory prerequisites have been met, arise in every contract for sale, unless properly excluded. Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

Defect in design may render product unmerchantable or not fit for the particular purposes for which it was required. Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978).

Fertilizer containing herbicides was neither fit for its ordinary purpose nor for the farmers particular purpose, and therefor, breaches both the implied warranty of fitness and the implied warranty of merchantability. Deacon v. Am. Plant Food Corp., 782 P.2d 861 (Colo. App. 1989), rev'd on other grounds sub nom. Stone's Farm Supply, Inc. v. Deacon, 805 P.2d 1109 (Colo. 1991).

Admission of industry safety codes as substantive evidence on strict liability issue of whether a product is in a defective condition unreasonably dangerous is valid. Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978).

Evidence of industry safety standards, when relevant as to a defect must be introduced through an expert, must be authenticated as reliable and bona fide industry-wide safety codes and sufficient advance notice of the intended use of such standards must be given to the adverse party so that he will have sufficient time to prepare to meet the evidence. Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978).

Summary judgment improper where factual question as to reasonableness of design. Where plaintiff's experts raise a factual question about the reasonableness of defendant's design strategies, the drastic remedy of summary judgment is improper, and the issue of whether the design of the car unreasonably increased the risks of injury by collision should be presented to the jury. Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978).

If the buyer has equal or superior skill and experience to that of the seller, has full opportunity to exercise it by examination and actual test in the uses intended, and fails to do so, then he is not warranted in relying solely upon a seller's statement that whatever is about to be furnished will accomplish the desired result. Wallower v. Elder, 126 Colo. 109, 247 P.2d 682 (1952).

Where the transaction is one of oral consummation, any question or dispute arising therefrom as to the matter of whether in implied warranty exists or not is a jury question. Wallower v. Elder, 126 Colo. 109, 247 P.2d 682 (1952).

Where there is no evidence that the seller was informed concerning the particular purpose for which a product is required, and it affirmatively appears that the buyer did not place reliance upon the "skill or judgment" of seller, because they were fully advised that he had no experience with such product, the essential elements set forth in this section which give rise to an implied warranty are wholly absent. Lindsey v. Stalder, 120 Colo. 58, 208 P.2d 83 (1949).

Where one purchases by relying on the trade name and manufacturer's reputation, there is no implied warranty as to fitness under this section. Elwood Edwards Auto Sales, Inc. v. Kinsey, 123 Colo. 52, 225 P.2d 59 (1950).

Where the sale is of a known, described, and definite article, designed and on the market for a particular purpose, such carries with it a warranty of fitness for the purpose for which it was sold. Platte Valley Motor Co. v. Wagner, 130 Colo. 365, 278 P.2d 870 (1954).

Such fitness for a particular purpose may be merely the equivalent of merchantability; in such a case, the warranties coexist and a recovery may be founded upon either. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

The buyer of a machine may, either under the common law or this section rely upon an implied warranty of fitness for the purpose indicated where he made known to the manufacturer and seller the purpose for which the machine was desired and trusted to the latter's skill and judgment to furnish a machine suitable for the purpose. Duncan v. Bd. of County Comm'rs, 154 Colo. 447, 391 P.2d 368 (1964).

Implied warranty liability extended to component parts manufacturer. As in the area of strict liability, implied warranty liability may extend to the manufacturer of component parts if the lack of fitness for the purpose or use required is found in the component parts before they leave the component parts manufacturer, and not merely in the completed system. Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978); Shaw v. General Motors Corp., 727 P.2d 387 (Colo. App. 1986).

Warranty applicable to heating system which was moved into buyers' residence for installation and later removed. Thomas v. Bove, 687 P.2d 534 (Colo. App. 1984).

Warranty's existence or breach for trier of fact. The question of the existence of a warranty and whether that warranty was breached is ordinarily one for the trier of fact. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975); Aetna Cas. & Sur. v. Crissy Fowler Lumber, 687 P.2d 514 (Colo. App. 1984).

Plaintiff established a prima facie case of breach of warranty and injury resulting from that breach, where it was shown that the plaintiff used the product according to the manufacturer's directions for its intended use, and the product was shown to be contaminated and an inference of proximate cause could arise from the fact of proven injury following use of the product. West v. Alberto Culver Co., 486 F.2d 459 (10th Cir. 1973).

Corporation's dissemination of information qualified as warranties. Where a corporation disseminated information using advertising materials, trade publications, or technical publications and oral statements representing the quality of its product, this activity qualifies in law as warranties. Westric Battery Co. v. Standard Elec. Co., 482 F.2d 1307 (10th Cir. 1973).

An implied warranty is present whether the seller is the manufacturer or not; the seller in such instance warrants that the goods are fit for the purpose for which they are purchased. Comet Indus., Inc. v.

Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

Seller is under no duty to inspect or remedy small details of mechanism of national brand articles sold in the ordinary course of business. Am. Furn. Co. v. Veazie, 131 Colo. 340, 281 P.2d 803 (1955).

A seller who has substantially complied with prescribed specifications will not be held to have extended a warranty of fitness for a particular purpose or be held responsible for the consequences of a deficiency in the specifications. Klipfel v. Neill, 30 Colo. App. 428, 494 P.2d 115 (1972); Shaw v. General Motors Corp., 727 P.2d 387 (Colo. App. 1986).

If a manufacturer undertakes to manufacture a machine according to his own judgment and plans, which is intended by the buyer for a disclosed purpose, there is an implied warranty that the machine will be fit for such purpose. Duncan v. Bd. of County Comm'rs, 154 Colo. 447, 391 P.2d 368 (1964).

This section also covers used or second-hand chattels. Wallower v. Elder, 126 Colo. 109, 247 P.2d 682 (1952); Platte Valley Motor Co. v. Wagner, 130 Colo. 365, 278 P.2d 870 (1954).

Where the buyer fails to give seller notice of a claimed breach of such a warranty within reasonable time, this failure relieves seller of any liability. Am. Furn. Co. v. Veazie, 131 Colo. 340, 281 P.2d 803 (1955).

Evidence showed water conditioner unfit for buyer's residence. Cherokee Inv. Co. v. Voiles, 166 Colo. 270, 443 P.2d 727 (1968).

Lessee as third party beneficiary of warranties. Although a lessee of a machine does not directly receive the benefits of the warranties made by the seller to the lessor, the lessee may be a third party beneficiary of such warranties who could "reasonably be expected to use, consume, or be affected by the goods". Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

Applied in Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981).

4-2-316. 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 4-2-202), negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3) of this section, 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) of this section:

(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 4-2-718 and 4-2-719).

Source: L. 65: p. 1311, § 1. **C.R.S. 1963:** § 155-2-316.

ANNOTATION

Law reviews. For article, "Exclusion and Modification of Warranty under the U.C.C. — How to Succeed in Business Without Being Liable for Not Really Trying", see 46 Den. L.J. 579 (1969). For article, "The 'Battle of the Forms' Under the Colorado Uniform Commercial Code", see 11 Colo. Law. 78 (1982).

Annotator's note. Since § 4-2-316 is similar to repealed § 121-1-71, C.R.S. 1963 (uniform sales act), relevant cases construing § 121-1-71 have been included in the annotations to this section.

A broad general disclaimer clause may negate implied warranties if there is a negotiated contract between a commercial seller and a commercial buyer. Cherokee Inv. Co. v. Voiles, 166 Colo. 270, 443 P.2d 727 (1968).

But it is not appropriate to a consumer who purchases after a home demonstration. Cherokee Inv. Co. v. Voiles, 166 Colo. 270, 443 P.2d 727 (1968).

Negating implied warranty of fitness for particular purpose by general disclaimer. The uniform commercial code, in providing for an implied warranty of

fitness for a particular purpose, announced a public policy adopted by the general assembly to give buyers protection against sellers of unfit merchandise under certain conditions. In order to negative this declaration of public policy, the express agreement provided for in this section must be clear, unequivocal, and the result of a genuine agreement between the parties, and where there is an attempt to negative an implied warranty of fitness by a broad general disclaimer, it must appear that the so-called disclaimer was clearly brought to the attention of the buyer and agreed to by him in order for this disclaimer to be effective. Cherokee Inv. Co. v. Voiles, 166 Colo. 270, 443 P.2d 727 (1968); Miehle Co. v. Smith-Brooks Printing Co., 303 F. Supp. 501 (D. Colo. 1969).

Warranties arise in every contract for sale unless excluded. Warranties of merchantability and of fitness for a particular purpose assuming all other statutory prerequisites have been met, arise in every contract for sale, unless properly excluded. Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

How implied warranty of fitness excluded. An implied warranty of fitness for a particular purpose can be excluded by a conspicuous writing which states generally that there are no warranties extending beyond the description in the contract. O'Neil v. Int'l Harvester Co., 40 Colo. App. 369, 575 P.2d 862 (1978).

Where a buyer alleges the existence of oral warranties prior to execution of a written contract and there is conduct following the sale which tends to show that warranties were in fact made, there is a material issue of fact for resolution, namely, whether the parties intended the written contract to be a final expression of their agreement, and, if not, what the terms actually agreed upon by the parties consisted of. Evidence of both oral warranties and the conduct of the parties subsequent to signing the contract is admissible for purpose of resolving this issue. O'Neil v. Int'l Harvester Co., 40 Colo. App. 369, 575 P.2d 862 (1978).

Provision in contract stating that it was sole warranty does not negate buyer's claim of negligent misrepresentation and parol evidence as to such misrepresentation allowable. Keller v. A.O. Harvestore Prods., 819 P.2d 69 (Colo. 1991).

Disclaimer of implied warranty of merchantability is required to include the word "merchantability" and prevalent view is that the provisions of subsection (3) do not qualify this requirement. Richard O'Brien Companies v. Challenge-Cook Bros., 672 F. Supp. 466 (D. Colo. 1987).

Disclaimer of implied warranties in trencher operator's manual satisfies the requirements of subsection (2). The disclaimer is on a single page with the word "Warranty" in bold and large letters at the top. The section heading "Exclusions from Product Warranty" is in bold. These two provisions are the only language in all caps on the page. The disclaimer explicitly mentions the implied warranties of fitness for a particular purpose and merchantability. Accordingly, the disclaimer complies with the requirements of subsection (2).

Townsend v. Toro Co., 735 F. Supp. 3d 1352 (D. Colo. 2024).

Where an inspection of inventory under this section would not have revealed defect affecting merchantability, claim of breach of implied warranty of merchantability under § 4-2-314 is not excluded by reason of such inspection. Loden v. Drake, 881 P.2d 467 (Colo. App. 1994).

Applied in Hummel v. Skyline Dodge, Inc., 41 Colo. App. 572, 589 P.2d 73 (1978); Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981); Universal Drilling Co. v. Camay Drilling Co., 737 F.2d 869 (10th Cir. 1984).

4-2-317. 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.

Source: L. 65: p. 1312, § 1. **C.R.S. 1963:** § 155-2-317.

4-2-318. Third party beneficiaries of warranties express or implied.

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

Source: L. 65: p. 1312, § 1. **C.R.S. 1963:** § 155-2-318.

Editor's note - Colorado legislative change: Colorado changed "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" to read "person who may reasonably be expected to".

ANNOTATION

The general assembly has expanded the class of persons protected by express and implied warranties beyond that set forth in the original uniform code. Prutch v. Ford Motor Co., 40 Colo. App. 129, 574 P.2d 102 (1977), rev'd on other grounds, 618 P.2d 657 (Colo. 1980).

Privity is not required in warranty actions. Pust v. Union Supply Co., 38 Colo. App. 435, 561 P.2d 355 (1976), rev'd sub nom. Holly Sugar Corp. v. Union Supply Co., 194 Colo. 316, 572 P.2d 148 (1977)(party indemnification issue), and aff'd, 196 Colo. 162, 583 P.2d 276 (1978).

Properly executed limitations of warranties or available remedies are equally applicable to anyone that would be a beneficiary of a seller's warranty. Wenner Petro. v. Mitsui & Co., 748 P.2d 356 (Colo. App. 1987).

There is no indication that the general assembly intended to include arbitration as a limitation which could be imposed on remote purchasers through the operation of this section. Recold, S.A. De C.V. v. Monfort of Colo., Inc., 893 F.2d 195 (8th Cir. 1990).

Lessee as beneficiary. Although a lessee of a machine does not directly receive the benefits of the warranties made by the seller to the lessor, the lessee may be a third party beneficiary of such warranties who could "reasonably be expected to use, consume, or be affected by the goods". Lease Fin., Inc. v. Burger, 40 Colo. App. 107, 575 P.2d 857 (1977).

Warranties provided by the uniform commercial code are not the exclusive means of recovery without a showing of negligence or fault. Larson v. Clark Equip. Co., 33 Colo. App. 277, 518 P.2d 308 (1974).

Judicial adoption of strict liability in tort not precluded. The legislative adoption of the UCC warranties without a privity requirement did not preclude the judicial adoption of strict liability in tort. Larson v. Clark Equip. Co., 33 Colo. App. 277, 518 P.2d 308 (1974).

For discussion of the distinction between liability in contract for breach of warranty and strict tort liability for product misrepresentation, see Am. Safety Equip. Corp. v. Winkler, 640 P.2d 216 (Colo. 1982).

Applied in Hansen v. Mercy Hosp., 40 Colo. App. 17, 570 P.2d 1309 (1977).

4-2-319. 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 4-2-504) 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 4-2-503);

(c) When under either paragraph (a) or (b) of this subsection 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 4-2-323).

(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 (1)(c) or subsection (2) of this section, 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 4-2-311). 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.

Source: L. 65: p. 1313, § 1. **C.R.S. 1963:** § 155-2-319.

4-2-320. 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.

Source: L. 65: p. 1314, § 1. **C.R.S. 1963:** § 155-2-320.

4-2-321. 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) of this section 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.

Source: L. 65: p. 1314, § 1. **C.R.S. 1963:** § 155-2-321.

4-2-322. 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.

Source: L. 65: p. 1315, § 1. **C.R.S. 1963:** § 155-2-322.

4-2-323. 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) of this section a tangible 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 4-2-508); 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.

Source: L. 65: p. 1315, § 1. **C.R.S. 1963:** § 155-2-323. **L. 2006:** IP(2) amended, p. 491, § 8, effective September 1.

4-2-324. "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 4-2-613).

Source: L. 65: p. 1316, § 1. **C.R.S. 1963:** § 155-2-324.

4-2-325. "Letter of credit" - "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.

Source: L. 65: p. 1316, § 1. **C.R.S. 1963:** § 155-2-325.

4-2-326. Sale on approval and sale or return - 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) 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) 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 4-2-201) and as contradicting the sale aspect of the contract within the provisions of this article on parol or extrinsic evidence (section 4-2-202).

(4) The provisions of this section shall not apply to the placement of works of fine art on consignment, which shall be governed by the provisions of part 1 of article 15 of title 6.

Source: L. 65: p. 1317, § 1. **C.R.S. 1963:** § 155-2-326. **L. 82:** (5) added, p. 231, § 2, effective March 25. **L. 2001:** Entire section amended, p. 1436, § 20, effective July 1. **L. 2017:** (4) amended, (HB 17-1241), ch. 163, p. 605, § 5, effective August 9.

Editor's note - Colorado legislative change: There is no counterpart to subsection (5) in the uniform act. Subsection (5) was renumbered as subsection (4) in 2001.

ANNOTATION

I. General Consideration.

II. Sale on Approval; Sale or Return.

III. Claims of Buyer's Creditors.

IV. Selling Goods of Others.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Exclusion and Modification of Warranty under the U.C.C. — How to Succeed in Business Without Being Liable for Not Really Trying", see 46 Den. L.J. 579 (1969). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

II. SALE ON APPROVAL; SALE OR RETURN.

"Sale or return" under subsection (1) is not defined in the Uniform Commercial Code. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

"Sale or return" transaction is not a new concept in Colorado law. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

A "sale or return" is a contract for the sale of goods whereby title passes immediately to the buyer subject to his option to rescind or return the goods if he does not resell them. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

Sale and delivery distinguished from bailment. An option to return a purchase, if one does not approve, is different from an option to purchase, if one does approve. In the former case, the title passes, subject to the right to rescind and return; in the latter, the title does not pass until the option to buy is determined. The former is a sale and delivery, the latter a bailment which may be converted into a sale, at the option of the bailee. Ferry-Morse Seed Co. v. Bd. of County Comm'rs, 126 Colo. 426, 250 P.2d 1003 (1952) (decided under repealed CSA, C. 143A, § 19, uniform sales act).

III. CLAIMS OF BUYER'S CREDITORS.

Subsection (2) provides that goods held on sale or return are subject to the claims of the buyer's creditors while such goods are in the buyer's possession. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

Consignments are subject to the claims of the buyer's creditors. Consignment transactions, in which the owner (consignor) delivers goods to a dealer (consignee) for sale by that dealer, are governed by the "sale or return" provisions of subsection (2), and the goods held on sale or return are subject to the security interests of the consignee's creditors. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

The purpose of this section is to allow a creditor of a dealer to attach a lien against

property of a third person which is in the dealer's possession on consignment and to permit the creditor to treat such property as if it were owned by the dealer. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Security interest not affected by transfer of possession. A security interest in consigned goods, having attached while the chattels were in consignee's possession, is not affected by a subsequent transfer of possession of the chattels from the consignee to the consignor, the transfer of possession of machines to being in violation of the perfected security interest in the chattels, and the secured party is entitled to recover possession of the goods from consignor or to recover the value of the goods if a return could not be had. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

This rule is consistent with the rights of a secured party as they existed prior to the enactment of the uniform commercial code, for, under the chattel mortgage statutes in effect prior to the adoption of the code, the rights of a mortgagee of chattels were superior to the rights of one acquiring possession of the chattels from the mortgagor even where the transfer purported to be absolute and in exclusion of the rights of the mortgagee, and in such cases, the mortgagee could recover the value of the chattels in an action against the transferee for conversion. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Bank, as secondary creditor, had no right to go against the primary creditor's debtor on the theory that collateral on the primary debt was insufficient to cover its secondary debt, and the bank's only action is against its own debtor. Am. Nat'l Bank v. Etter, 32 Colo. App. 187, 508 P.2d 415 (1973).

Fact that prior litigation established bank to be an unsecured creditor as regards its own debtor does not place any liability on the primary creditor's debtor. Am. Nat'l Bank v. Etter, 32 Colo. App. 187, 508 P.2d 415 (1973).

IV. SELLING GOODS OF OTHERS.

Consignment transactions are governed by this section. Consignment transactions, in which the owner (consignor) delivers goods to a dealer (consignee) for sale by that dealer are governed by the "sale or return" provisions of subsection (3), and the goods held on sale or return are subject to the security interests of the consignee's creditors. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Under the pre-U.C.C. common-law majority rule, the concept of title dictated that a bailee or consignee had no right to hypothecate the property; hence a consignee's creditors would have had no claim against the consignor if the consignee's assets were inadequate to satisfy their respective claims. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

The pre-U.C.C. majority rule placed a creditor of the consignee who relied on

the consignee's possession in an unfavorable position. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

This section of the U.C.C. was enacted to alleviate this problem. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

It is noted that Colorado did not follow the pre-U.C.C. majority rule as to the relative rights of the consignor and the creditor of the consignee, for in a pre-code replevin case, it was held that one who placed his goods with a dealer for sale under consignment may not assert his ownership against a judgment creditor of the dealer who levied upon the goods to satisfy his judgment while it was in the dealer's possession. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970).

And this practice was in accord with the concept of apparent title of this section which replaced the concept of title under the pre-U.C.C. majority rule. Am. Nat'l Bank v. Tina Marie Homes. Inc., 28 Colo. App. 477, 476 P.2d 573 (1970).

The purpose of this section is to allow the attachment of a third person's consignment property within a dealer's possession by a creditor of the dealer and to permit the creditor to treat such property as if it were owned by the dealer. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Subsection (3) does not distinguish between general and secured creditors. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

The section refers only to "creditors". Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

The term "creditor" as defined in § 4-1-201(12) is controlling and 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. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

To prevent the complete shift of risk to the consignor, this section provides three ways in which the consignor can protect his interest from the consignee's creditors in

subsections (3)(a), (b), and (c). Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

The code provides three ways by which a consignor of goods can protect his goods from the creditors of the consignee in subsections (3)(a), (b), (c). Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

The exceptions set forth in subsections (3)(a), (b), (c), apply only to transactions covered by subsection (3) and do not apply to a "sale or return" under subsection (1). Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

Consignment transactions. Consignment transactions (i.e., where title does not pass to the consignee) are covered by subsection (3), which deems such a transaction to be a "sale or return", and are subject to the claims of the consignee's creditors, unless one of the three exceptions under subsection (3) is established. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

Consignment versus bailment. Where the purpose of the delivery of an item is to attempt to sell it, and an eventual transfer of title is clearly contemplated by the parties, such a transaction clearly is a consignment and not a bailment, and as such is deemed to be a "sale or return" as set forth in subsection (3). Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970).

The real owner can protect himself by showing that the creditor had no right to assume that the goods were owned by the consignee. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

One of several means by which the consignor may protect himself is by showing that the dealer is generally known by his creditors to be substantially engaged in selling the goods of others. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Sufficient evidence. Finding that a dealer "was conducting or was substantially engaged in selling goods of others", within the exception provided by subsection (3)(b), is not conclusive absent a finding that the dealer was "generally known by his creditors" to be substantially engaged in selling the goods of others, and provided there is sufficient evidence to support such a finding. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

A creditor's actual knowledge that a debtor is substantially engaged in selling the goods of others is sufficient to establish the exception provided in subsection (3)(b).

Eurpac Serv. Inc. v. Republic Acceptance Corp., 37 P.3d 447 (Colo. App. 2000).

Evidence cannot be based on hearsay. Where the trial court allowed the consignor's witnesses, both creditors and others, to testify that consignee was engaged in selling goods of others but refused to permit these witnesses to testify to conversations with other persons concerning the knowledge of such other persons that consignee was engaged in selling the goods of others, such testimony was properly excluded as hearsay. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Where the creditor properly protects its interest in an item delivered to a dealer by filing according to subsection (3)(c) and the consignor does not comply with this provision, nor otherwise does anything to manifest its interest in the item, the rights of the creditor are superior. Am. Nat'l Bank v. Tina Marie Homes, Inc., 28 Colo. App. 477, 476 P.2d 573 (1970).

Right cannot be circumscribed by estoppel. Since the maxim that "equity follows the law" applies where a legal right is clearly established by a secured party under this section, the equitable doctrine of estoppel cannot be used to circumscribe that right, and the effect of this principle is reinforced where the secured party made no misrepresentation upon which consignor relied to his detriment. Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970).

Where an item is delivered for sale and the consignor fails to establish any of these exceptions, the application of the code provisions gives a secured party an interest superior to the consignor. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

Where the question of ownership is judicially settled in a buyer's favor, the item can thereafter be loaned to the seller without rendering such subject to attachment by the seller's creditors. Foster v. Howell, 122 Colo. 64, 220 P.2d 717 (1950) (decided under repealed CSA, C. 143A, § 9, uniform sales act).

4-2-327. 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.

Source: L. 65: p. 1317, § 1. **C.R.S. 1963:** § 155-2-327.

4-2-328. 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.

Source: L. 65: p. 1318, § 1. **C.R.S. 1963:** § 155-2-328.

PART 4

TITLE, CREDITORS, AND GOOD FAITH PURCHASERS

4-2-401. 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 4-2-501), and unless otherwise explicitly agreed, the buyer acquires by their identification a special property as limited by this title. 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 of this title), 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 tangible document of title, title passes at the time when and the place where the seller delivers such documents, and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document; or

(b) If the goods are at the time of contracting already identified and no documents of title 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".

(5) Notwithstanding any other provision of this section, when livestock have been delivered under a contract of sale, if on the accompanying brand inspection certificate or memorandum of brand inspection certificate the seller has conspicuously noted that payment of the consideration for the sale has not been received, title does not pass until payment is made.

Source: L. 65: p. 1318, § 1. **C.R.S. 1963:** § 155-2-401. **L. 75:** (5) added, p. 232, § 2, effective June 20. **L. 2006:** (3) amended, p. 491, § 9, effective September 1.

Editor's note - Colorado legislative change. Colorado added subsection (5). There is no counterpart to subsection (5) in the uniform act.

Cross references: For secured transactions, see article 9 of this title.

ANNOTATION

Law reviews. For article, "Commercial Law", see 58 Den. L.J. 279 (1981).

Annotator's note. Since § 4-2-401 is similar to repealed CRS 53, §§ 17 through 20, and CSA, C. 143A, §§ 17 through 20 (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

Delivery by the seller to a carrier for shipment to the buyer constitutes delivery to the buyer and the title passes. Denver-Chicago Trucking Co. v. Republic Drug Co., 134 Colo. 461, 306 P.2d 1076 (1957).

Where by the terms of the contract the merchandise to be sold is to be paid for in full upon delivery, the property in the merchandise is not to be transferred to the buyer unless and until payment in full is made by him, and unless this contract is amended, qualified, or in some manner changed, the only way which the buyer could rightfully come into title or property of this merchandise is by payment pursuant to the terms of the agreement. Panhandle Pipe & Supply Co. v. S. W. Pressey & Son, 25 Colo. 355, 243 P.2d 756 (1952).

Delivery of automobiles sufficient to pass title. Delivery of automobiles to buyer who had made payment by check which subsequently was returned for insufficient funds was sufficient to pass title to the buyer, although the seller failed to provide certificates of title. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), aff'd, 184 Colo. 166, 519 P.2d 354 (1974).

Nondelivery of a certificate of title does not prevent a change of ownership, and delivery of possession constitutes a transfer of ownership as between the parties involved. Retention of an inchoate security interest in a vehicle does not compel a different outcome. Kerns v. Nat'l Union Fire Ins. Co., 281 F. Supp. 3d 1126 (D. Colo. 2017).

Failure to deliver bill of sale after giving buyer possession of assets. Where plaintiffs' testimony revealed that it was their intent to sell the business and its assets to the buyer, the failure to deliver the bill of sale after giving the buyer possession of the assets was, at most, a reservation of title, and as such acted as a reservation of a security interest in the property. Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977).

Passage of title to livestock. The livestock bill of sale laws are not superseded by the UCC, and passage of title to livestock in Colorado is accomplished by compliance

with article 54 of title 35. When neither party has complied with the livestock bill of sale laws, however, the law merchant, as embodied in the UCC provisions governing passage of title, applies. Rochester Ranch Co. v. Stubblefield, 640 P.2d 267 (Colo. App. 1981); Cugnini v. Reynolds Cattle Co., 648 P.2d 159 (Colo. App. 1981), aff'd, 687 P.2d 962 (Colo. 1984).

Application of UCC provisions to aspects of a livestock transaction other than passage of title is not inconsistent with the additional requirements of compliance with the livestock bill of sale laws. Cugnini v. Reynolds Cattle Co., 648 P.2d 159 (Colo. App. 1981), aff'd, 687 P.2d 962 (Colo. 1984).

Applied in Rancher & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313 (1976); John Deere Indus. Equip. Co. v. Moorehead, 38 Colo. App. 220, 556 P.2d 91 (1976); Mari v. Wagner Equipment Co., Inc., 721 P.2d 1208 (Colo. App. 1986); Brink v. McNeil, 761 P.2d 271 (Colo. App. 1988).

4-2-402. Rights of seller's creditors against sold goods.

(1) Except as provided in subsections (2) and (3) of this section, 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 4-2-502 and 4-2-716).

(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 of this title); 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 preexisting 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.

Source: L. 65: p. 1320, § 1. **C.R.S. 1963:** § 155-2-402.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Applied in Western Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979).

4-2-403. 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.

(1.5) Notwithstanding any other provision of this section, when livestock have been delivered under a transaction of purchase and on the accompanying brand inspection certificate or memorandum of brand inspection certificate the seller has conspicuously noted that payment of the consideration for the transaction has not been received, the buyer does not have power to transfer good title to a good faith purchaser for value until payment is made.

(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 of this title) and documents of title (article 7 of this title).

Source: L. 65: p. 1320, § 1. **C.R.S. 1963:** § 155-2-403. **L. 75:** (1.5) added, p. 232, § 3, effective June 20. **L. 91:** (4) amended, p. 270, § 4, effective July 1.

Editor's note - Colorado legislative change: Colorado added subsection (1.5). There is no counterpart to subsection (1.5) in the uniform act. Colorado adopted Revised Article 6 - Bulk Sales (Alternative B) which was repealed in 1991 and the corresponding reference to "bulk sales" was deleted in subsection (4) in 1991.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Commercial Law", see 58 Den. L.J. 279 (1981).

Annotator's note. Since § 4-2-403 is similar to repealed § 121-1-24, CRS 53, and CSA, C. 143A, § 23 (uniform sales act), cases construing this provision have been included in the annotations to this section.

Section conflicts with § 18-4-405 which holds that a good faith purchaser of stolen property does not divest the original owner of his or her right to the property. UCC section prevails because it was later in time and because original owner was in a better position to protect his or her interests than the subsequent good faith purchaser. West v. Roberts, 143 P.3d 1037 (Colo. 2006).

The concept of good faith purchaser for value does not require that the purchaser buy from a merchant or dealer. West v. Roberts, 143 P.3d 1037 (Colo. 2006).

The test of a bona fide purchaser is purchase without notice of the defect in the title of the person from whom he purchased and without notice of the right of the original seller to avoid or rescind the sale. General Credit Corp. v. Bill Olsen's Motor, Inc., 147 Colo. 227, 363 P.2d 489 (1961).

Mere possession of personalty fraudulently obtained was held not alone enough to protect a good faith purchaser against the demands of the defrauded owner where the authorities indicated that possession had to be accompanied by indicia of title. Panhandle Pipe & Supply Co. v. S. W. Pressey & Son, 125 Colo. 355, 243 P.2d 756 (1952).

Effect of right to reclaim on title. The right to reclaim goods sold in a cash sale transaction is a right to undo that transaction; until reclamation is completed, title, as well as the power to pass good title, remains in the purchaser. Ranchers & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313 (1976).

The voidable title which a purchaser receives when payment is made by check is dependent upon the seller's power to transfer an interest in the goods conveyed. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Lender receives enforceable right to security interest as purchaser. Unless there is some showing of conduct amounting to bad faith, a lender receives an enforceable right to its security interest as a purchaser, even though the seller of the security interest has only a voidable title to the underlying

goods. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

After certificates of title of some automobiles were delivered to a bank, the purchaser acquired a voidable title and could convey an enforceable right in the automobile to the lending bank as a good faith purchaser for value, even though check to the seller was later dishonored. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Purchaser clothed with voidable title on proper transfer of title certificates. Where before the seller presented the purchaser's check for collection, the certificates of title to automobiles were delivered to a bank as security for the bank's loan to the purchaser, in accordance with a security agreement between the purchaser and bank, it could be implied that the bank took possession of the certificates of title as the purchaser's agent. At the moment the seller delivered the certificates of title to the purchaser, through the bank as its agent, the requirements of § 42-6-108 were satisfied. Moreover, once the certificates of title were properly transferred, the purchaser was clothed with voidable title and could legally encumber the automobiles. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Leaving property with a merchant who customarily sells that kind of goods clothes the merchant with either apparent ownership or apparent authority to sell the goods. The overall policy underlying this provision is to restrict impediments to the free flow of commerce when buyers in the ordinary course of business are involved. Keybank, Nat'l Ass'n v. Mascarenas, 17 P.3d 209 (Colo. App. 2000).

When an entrustment occurs within the meaning of the statute, the fact that the entrustee procured the entrustment through larceny, trick, or fraud punishable under the criminal law does not defeat the ability of a merchant-trustee to transfer title to the goods to a buyer in the ordinary course of business. Keybank, Nat'l Ass'n v. Mascarenas, 17 P.3d 209 (Colo. App. 2000).

Applied in Rochester Ranch Co. v. Stubblefield, 640 P.2d 267 (Colo. App. 1981); Cugnini v. Reynolds Cattle Co., 648 P.2d 159 (Colo. App. 1981), aff'd, 687 P.2d 962 (Colo. 1984).

PART 5

PERFORMANCE

4-2-501. 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) of this subsection, when goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers; or

(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.

Source: L. 65: p. 1321, § 1. **C.R.S. 1963:** § 155-2-501.

ANNOTATION

Identification of fungible goods in a contract for the sale of goods already existing and identified occurs at the time of contract, so this is sufficient to satisfy the statute and allow the seller to recover under the contract. Great Western Sugar v. Pennant Prods., 748 P.2d 1359 (Colo. App. 1987).

Applied in Mari v. Wagner Equipment Co., Inc., 721 P.2d 1208 (Colo. App. 1986).

4-2-502. Buyer's right to goods on seller's insolvency - repudiation - failure to deliver.

(1) Subject to subsections (2) and (3) of this section 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 or she has a special property under the provisions of section 4-2-501 may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) In all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under paragraph (a) of subsection (1) of this section vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating his or her special property has been made by the buyer, he or she acquires the right to recover the goods only if they conform to the contract for sale.

Source: L. 65: p. 1322, § 1. **C.R.S. 1963:** § 155-2-502. **L. 2001:** Entire section amended, p. 1437, § 21, effective July 1.

Cross references: For insurable interest in goods, see § 4-2-501; for secured transactions, see article 9 of this title.

4-2-503. 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 section 4-2-504 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) of this section 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 record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, and except as otherwise provided in article 9 of this title, 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 4-2-323); and

(b) Tender through customary banking channels is sufficient and dishonor of a draft accompanying or associated with the documents constitutes nonacceptance or rejection.

Source: L. 65: p. 1322, § 1. **C.R.S. 1963:** § 155-2-503. **L. 2006:** (4)(b) and (5)(b) amended, p. 491, § 10, effective September 1.

4-2-504. 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 subsection (c) of this section or to make a proper contract under subsection (a) of this section is a ground for rejection only if material delay or loss ensues.

Source: L. 65: p. 1323, § 1. **C.R.S. 1963:** § 155-2-504.

4-2-505. 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 the seller or the seller's nominee reserves possession of the goods as security, but except in a case of conditional delivery (subsection (2) of section 4-2-507), a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession or control 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 section 4-2-504, 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 of title.

Source: L. 65: p. 1323, § 1. **C.R.S. 1963:** § 155-2-505. **L. 2006:** (1)(b) and (2) amended, p. 492, § 11, effective September 1.

4-2-506. 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 that 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 that was apparently regular.

Source: L. 65: p. 1324, § 1. **C.R.S. 1963:** § 155-2-506. **L. 2006:** (2) amended, p. 492, § 12, effective September 1.

4-2-507. 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.

Source: L. 65: p. 1324, § 1. **C.R.S. 1963:** § 155-2-507.

ANNOTATION

The operator of a livestock ring is a "seller" within the meaning of the UCC. Ranchers & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313 (1976).

Right to reclaim not right to secure payment. The right to reclaim created by subsection (2) of this section is a right to undo the transaction, not a right to "secure" payment of the price as required by the definition of "security interest" under § 4-1-201 (37). Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Right to reclaim was not intended to be security interest. The right to reclaim goods sold in a cash sale transaction, as set forth in the UCC, is not and was not intended to be a security interest. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

The right to reclaim is not a species of interest in the goods which is the result of a transaction "intended to create a security interest" and is not created by contract as contemplated within the meaning of § 4-9-102. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Creation of security interest might allow more than mere recovery of goods. Section 4-2-702(3) states that successful reclamation "excludes all other remedies", and the creation of a security interest out of the right to reclaim might allow recovery which would be greater than the mere recovery of goods originally transferred. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Right not interest listed as having priority over unperfected security interest. The right to reclaim goods conveyed as part of a cash sale transaction is not one of the interests which is listed as having priority over an unperfected security interest. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Normally, purchaser may retain or dispose of goods once purchase price tendered. Normally, a seller's demand for payment upon delivery in a cash sale transaction would allow a purchaser of goods to retain or dispose of the goods as he saw fit once the agreed-to purchase price was tendered. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Where payment is due and is demanded on delivery of documents of title to the buyer of goods, his right as against the seller to retain or dispose of them is conditioned upon his making the payment due. Ranchers & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313 (1976).

When seller presented buyer's check, which was dishonored, buyer no longer had the right to retain or dispose of the goods, and seller had the right to reclaim. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), aff'd, 184 Colo. 166, 519 P.2d 354 (1974).

Under this section a seller may reclaim goods which he has sold to the buyer when the latter's check has been dishonored. Ranchers & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313 (1976).

Payment by check is only conditional and is defeated by dishonor of the check on due presentment. Ranchers & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313 (1976).

4-2-508. 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.

Source: L. 65: p. 1324, § 1. **C.R.S. 1963:** § 155-2-508.

4-2-509. 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 4-2-505); 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 the buyer's receipt of possession or control 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 the buyer's receipt of possession or control of a nonnegotiable document of title or other direction to deliver in a record, as provided in subsection (4)(b) of section 4-2-503.

(3) In any case not within subsection (1) or (2) of this section, 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 4-2-327) and on effect of breach on risk of loss (section 4-2-510).

Source: L. 65: p. 1325, § 1. **C.R.S. 1963:** § 155-2-509. **L. 2006:** (2)(a) and (2)(c) amended, p. 492, § 13, effective September 1.

4-2-510. 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.

Source: L. 65: p. 1325, § 1. **C.R.S. 1963:** § 155-2-510.

4-2-511. Tender of payment by buyer; payment by check; certification of payment in livestock transactions.

(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 chapter on the effect of an instrument on an obligation (section 4-3-310), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

(4) (a) When livestock have been delivered under a transaction of purchase and on the accompanying brand inspection certificate or memorandum of brand inspection certificate the seller has conspicuously noted that payment of the consideration for the transaction has not been received, the seller shall send a certificate of payment stating that payment has been made either within ten days after receipt of a check drawn and payable within the United States or, in any other case, within three business days after payment has been made.

(b) Unless otherwise agreed, when payment has been made, the buyer shall have a specifically enforceable right to the unqualified certification of payment from the seller and, where the seller has failed to provide the certification of payment in accordance with the provisions of this subsection (4), the seller will be deemed to have failed to make delivery of the livestock.

Source: L. 65: p. 1326, § 1. **C.R.S. 1963:** § 155-2-511. **L. 75:** (4) added, p. 233, § 4, effective June 20. **L. 94:** (3) amended, p. 905, § 5, effective January 1, 1995.

Editor's note - Colorado legislative change: Colorado added subsection (4). There is no counterpart to subsection (4) in the uniform act.

ANNOTATION

Purchaser receives voidable title when he pays by check. Under the UCC, the purchaser of goods in a cash sale transaction normally acquires full title to the goods which he purchases after payment is made, but the purchaser is limited to receiving a voidable title when the purchase price is conveyed in the form of a check. Guy

Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Payment by check is conditional upon the check being honored at presentment. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), aff'd, 184 Colo. 166, 519 P.2d 354 (1974).

Payment by check is only conditional and is defeated by dishonor of the check on due presentment. Ranchers & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313 (1976).

Payment by check is conditional only and does not discharge the liability for which payment is given, unless there is an express or implied agreement that the check be accepted as absolute payment. Bolz v. Sec. Mut. Life Ins. Co., 721 P.2d 1216 (Colo. App. 1986).

Such title dependent upon seller's power to transfer an interest in goods. The voidable title which a purchaser receives when payment is made by check is dependent upon the seller's power to transfer an interest in the goods conveyed. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Purchaser took voidable title on proper transfer of title certificates. Where before the seller presented the purchaser's check for collection, the certificates of title to automobiles were delivered to a bank as security for the bank's loan to the purchaser, in accordance with a security agreement between the purchaser and bank, it could be implied that the bank took possession of the certificates of title as the purchaser's agent. At the moment the seller delivered the certificates of title to the purchaser, through the bank as its agent, the requirements of § 42-6-108 were satisfied. Moreover, once the certificates of title were properly transferred, the purchaser was clothed with voidable title and could legally encumber the automobiles. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

4-2-512. 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 this title (section 4-5-109 (b)).

(2) Payment pursuant to subsection (1) of this section does not constitute an acceptance of goods or impair the buyer's right to inspect or impair any of his remedies.

Source: L. 65: p. 1326, § 1. **C.R.S. 1963:** § 155-2-512. **L. 96:** (1)(b) amended, p. 234, § 5, effective July 1.

4-2-513. Buyer's right to inspection of goods.

(1) Unless otherwise agreed and subject to subsection (3) of this section, 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 4-2-321), 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.

Source: L. 65: p. 1326, § 1. **C.R.S. 1963:** § 155-2-513.

ANNOTATION

Applied in Hummel v. Skyline Dodge, Inc., 41 Colo. App. 572, 589 P.2d 73 (1978).

4-2-514. 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.

Source: L. 65: p. 1327, § 1. **C.R.S. 1963:** § 155-2-514.

4-2-515. 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 litigation or adjustment.

Source: L. 65: p. 1327, § 1. **C.R.S. 1963:** § 155-2-515.

PART 6

BREACH, REPUDIATION, AND EXCUSE

4-2-601. Buyer's rights on improper delivery.

Subject to the provisions of this article on breach in installment contracts (section 4-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 4-2-718 and 4-2-719), 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.

Source: L. 65: p. 1327, § 1. **C.R.S. 1963:** § 155-2-601.

ANNOTATION

Buyer bound to accept undamaged part of goods. Where a minor part of the goods consigned to the buyer are damaged, but the entire shipment is rejected, the buyer is bound to accept such of the goods as are undamaged. Denver-Chicago Trucking Co. v. Republic Drug Co., 134 Colo. 461, 306 P.2d 1076 (1957) (decided under repealed § 121-1-69(1), CRS 53, uniform sales act).

Applied in Eccher v. Small Bus. Admin., 643 F.2d 1388 (10th Cir. 1981); Western Conference Resorts, Inc. v. Pease, 668 P.2d 973 (Colo. App. 1983); Mari v. Wagner Equipment Co., Inc., 721 P.2d 1208 (Colo. App. 1986).

4-2-602. 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 4-2-603 and 4-2-604):

(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 4-2-711), 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 4-2-703).

Source: L. 65: p. 1328, § 1. **C.R.S. 1963:** § 155-2-602.

ANNOTATION

Purpose of subsection (2)(a) is to insure that the seller may regain possession of the goods in order to resell the goods or utilize them in order to minimize his loss. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974); Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

What serves as effective notice of rejection depends on the nature, purpose, and circumstances of such notice. Western

Conference Resorts, Inc. v. Pease, 668 P.2d 973 (Colo. App. 1983).

Notice of rejection is sufficient if it gives the seller an opportunity to correct the defect and prepare for negotiations and litigation, and if it protects the seller against claims asserted after it is too late to investigate. Western Conference Resorts, Inc. v. Pease, 668 P.2d 973 (Colo. App. 1983).

Retention of goods for an unreasonable amount of time is not justified. No more than six months can be justified as a reasonable period for inspection and testing, and retaining the goods after demand for payment and even after filing of suit is not a holding in good faith or good faith conduct. Surplus Electronics Corp. v. Gallin, 653 P.2d 752 (Colo. App. 1982).

A failure to reject is acceptance. Purchaser's failure seasonably to notify seller of the ultimate rejection of such of the goods as purchaser deemed unusable renders any claim of rejection ineffective and constitutes an acceptance. Surplus Electronics Corp. v. Gallin, 653 P.2d 752 (Colo. App. 1982).

After rejection of goods, any exercise of dominion and ownership rights is considered wrongful as against the seller. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974); Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

Buyer who asserts a right to revoke acceptance has the same duties as a buyer who asserts a right to reject goods prior to acceptance. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974).

4-2-603. Merchant buyer's duties as to rightfully rejected goods.

(1) Subject to any security interest in the buyer (subsection (3) of section 4-2-711), 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) of this section, 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.

Source: L. 65: p. 1328, § 1. **C.R.S. 1963:** § 155-2-603.

ANNOTATION

Retention of goods for an unreasonable amount of time is not justified. No more than six months can be justified as a reasonable period for inspection and testing, and retaining the goods after demand for payment and even after filing of suit is not a holding in good faith or good faith conduct. Surplus Electronics Corp. v. Gallin, 653 P.2d 752 (Colo. App. 1982).

Statute as basis for jurisdiction. See Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

4-2-604. Buyer's options as to salvage of rightfully rejected goods.

Subject to the provisions of section 4-2-603 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 said section. Such action is not acceptance or conversion.

Source: L. 65: p. 1329, § 1. **C.R.S. 1963:** § 155-2-604.

ANNOTATION

Seller was entitled to offset of fair and reasonable use value. Where the evidence showed that plaintiffs used mobile home for a considerable length of time after they should have acted under this section, it follows that this use reduced the value of the home, and accordingly, defendants are entitled to an offset of a fair and reasonable use value of the mobile home for this period. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

4-2-605. 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 in the documents.

Source: L. 65: p. 1329, § 1. **C.R.S. 1963:** § 155-2-605. **L. 2006:** (2) amended, p. 493, § 14, effective September 1.

4-2-606. 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 4-2-602), 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.

Source: L. 65: p. 1329, § 1. **C.R.S. 1963:** § 155-2-606.

ANNOTATION

Acceptance presumed after five days. Under this section where goods ordered were delivered to the buyer who took physical possession and control of them, stored them, and retained them for five days, such buyer was presumed to have accepted them. Vanadium Corp. of Am. v. Wesco Stores Co., 135 Colo. 77, 308 P.2d 1011 (1957) (decided under repealed § 121-1-48, CRS 53, uniform sales act).

Failure to reject constitutes acceptance. Purchaser's failure seasonably to notify seller of the ultimate rejection of such of the goods as purchaser deemed unusable renders any claim of rejection ineffective, and constitutes an acceptance. Surplus Electronics Corp. v. Gallin, 653 P.2d 752 (Colo. App. 1982).

Applied in Hummel v. Skyline Dodge, Inc., 41 Colo. App. 572, 589 P.2d 73 (1978); Eccher v. Small Bus. Admin., 643 F.2d 1388

(10th Cir. 1981); Western Conference Resorts, Inc. v. Pease, 668 P.2d 973 (Colo. App. 1983).

4-2-607. 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 4-2-312) 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 4-2-312), 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) of this section apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of section 4-2-312).

Source: L. 65: p. 1329, § 1. **C.R.S. 1963:** § 155-2-607.

ANNOTATION

Annotator's note. Since § 4-2-607 is similar to repealed § 121-1-49, CRS 53, and CSA, C. 143A, § 49 (uniform sales act), relevant cases construing this provision have been included in the annotations to this section.

The giving of notice is a condition precedent to a buyer's right to recover for any claimed damage. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963); Hoffman's Double Bar Pine Nursery v. Fyke, 633 P.2d 516 (Colo. App. 1981); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

Notice of breach of warranty is in the nature of a condition precedent to recovery, and generally no remedy is available to the buyer unless notice is given. Rich's Restaurant, Inc. v. McFann Enters., Inc., 39 Colo. App. 545, 570 P.2d 1305 (1977).

Failure to notify seller until after the goods are sold effectively prevents seller from investigating and attempting to cure the alleged defect in the goods. White v. Miss. Order Buyers, Inc., 648 P.2d 682 (Colo. App. 1982).

Failure to notify seller results in dismissal of breach of warranty claims as a matter of law. Schultz v. Linden-Alimak, Inc., 734 P.2d 146 (Colo. App. 1986).

Whether the notice was given within a reasonable time is a question of fact to be measured by all the circumstances of the case. White v. Miss. Order Buyers, Inc., 648 P.2d 682 (Colo. App. 1982).

Notice must be within a reasonable time after acceptance. This section provides that if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any warranty within a reasonable time when the buyer knows of the breach, the seller shall not be liable therefor. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

The determination of what is a reasonable time for notice of breach depends on the circumstances of each case. Fiberglass Component Prod. v. Reichhold Chems., Inc., 983 F. Supp. 948 (D. Colo. 1997).

The giving of notice may not be after repeated written promises to pay over period of time. Where a purchaser of goods accepts delivery and, after full knowledge of the quality thereof, repeatedly makes written unqualified promises to pay the contract price, which promises continue over a period of time, such a purchaser cannot thereafter be heard to claim damage for late delivery or for breach of warranty as to quality. E. J. Scarry & Co. v. Paper Prods. Co., 122 Colo. 589, 224 P.2d 940 (1950) (period of 90 days); Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963); Cooley v. Big Horn Harvestore Sys., 813 P.2d 736 (Colo. 1991).

There is danger of fraud and false claims even where there is an express warranty, when notice is not early given of the defect; it leads the buyer into temptation.

Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

Notice requirement of subsection (3)(a) serves three purposes: It provides the seller with an opportunity to correct any defect, to prepare for negotiation and litigation, and to protect itself against stale claims asserted after it is too late for the seller to investigate them. White v. Miss. Order Buyers, Inc., 648 P.2d 682 (Colo. App. 1982); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984); Fiberglass Component Prod. v. Reichhold Chems., Inc., 983 F. Supp. 948 (D. Colo. 1997).

The entire purpose of giving notice is to protect the seller; to give him an opportunity to check the complaints. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

The basis for the requirement of notice is to provide an opportunity for the seller to determine whether there is a shortage, to correct the defect, or to effect settlement through negotiation. Rich's Restaurant, Inc. v. McFann Enters., Inc., 39 Colo. App. 545, 570 P.2d 1305 (1977).

In the law governing breach of warranty, the notice requirement serves three useful purposes: First, notice provides the seller a chance to correct any defect; second, notice affords the seller an opportunity to prepare for negotiation and litigation; and third, notice provides the seller a safeguard against stale claims being asserted after it is too late for the manufacturer or seller to investigate them. Prutch v. Ford Motor Co., 618 P.2d 657 (Colo. 1980).

Fairness requires that a buyer should inform the seller if he considers the contract breached and wishes to preserve any remedies; such notice informs the seller the transaction is troublesome and provides him the opportunity to settle the dispute through negotiations. MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1971).

The buyer has the burden of proof of establishing the fact that notice of a breach of warranty was given to the seller within a reasonable time after he knew, or should have known, that performance of the seller was objectionable. E. J. Scarry & Co. v. Paper Prods. Co., 122 Colo. 589, 224 P.2d 940 (1950); Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

The buyer has the burden of proof that the notice was given within a reasonable time. White v. Miss. Order Buyers, Inc., 648 P.2d 682 (Colo. App. 1982).

There is adequate and timely notice of the breach where the seller is contacted immediately after an item is installed and told that it is not working. Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 343, 483 P.2d 980 (1971).

Where there is no suggestion that the seller suffered any prejudice as a result of not being notified of a breach of warranty at an earlier date, the harsh rule of forfeiture should not be applied. Schlottman v. Pressey, 195 F.2d 343 (10th Cir. 1952).

Notice of breach due to late delivery given prior to delivery is sufficient to preserve the buyer's remedies, and a second

notice after acceptance of delivery is not required under the uniform commercial code. This construction best effectuates the purpose of § 4-2-607 and the general obligation of good faith which the uniform commercial code imposes upon the performance and enforcement of contracts in § 4-1-203. MacGregor v. McReki, Inc., 30 Colo. App. 196, 494 P.2d 1297 (1971).

This section does not prescribe the kind or the form of the notice. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

There is no requirement that the notice be formal. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

Communication of defects and of recourse to attorney suffices. Although a formal notice was not given, where the buyer communicated with the seller and notified him of the defects in the goods and the seller acquired firsthand knowledge, the seller could scarcely have concluded that these were mere protests in view of the fact that the buyer had told him that the matter was in the hands of his attorney. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

Where buyer relied on filing of lawsuit for notice to seller under subsection (3)(a), it was error for court to grant seller's motion for summary judgment where federal food and drug administration had sought to ban sale of product and press releases on problems with the product had been issued. Wallman v. Kelley, 976 P.2d 330 (Colo. App. 1998).

There is a distinction between notice of breach under § 4-2-607 (3) and notice of revocation of acceptance under § 4-2-608 (2). Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 343, 483 P.2d 980 (1971).

Burden on buyer to prove defects existed at time of sale. The burden is on the buyer seeking to recover damages for defects in quality, or setting up such defects as an affirmative defense in an action for the price, to prove that the defects existed at the time of sale and did not result from deterioration after shipment or from the buyer's negligence after he came into possession of the property, since there is no presumption that the defects discovered after delivery existed at the time of sale. Vanadium Corp. of Am. v. Wesco Stores Co., 135 Colo. 77, 308 P.2d 1011 (1957).

Where seller may have indirect notice of claim, trial court erred in finding, as a matter of law, that delay in giving notice of breach of warranty was unreasonable. Cheyenne Mtn. Bank v. Whetstone, 787 P.2d 210 (Colo. App. 1990).

There is no statutorily prescribed format for notice of breach. Hoffman's Double Bar Pine Nursery v. Fyke, 633 P.2d 516 (Colo. App. 1981); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984); Hawkinson v. A.H. Robins Co., Inc., 595 F. Supp. 1290 (D. Colo. 1984).

Subsection (3)(a) requires notice adequate to permit cure. Hoffman's Double Bar Pine Nursery v. Fyke, 633 P.2d 516 (Colo. App. 1981).

Adequacy of notice is question of fact. Hoffman's Double Bar Pine Nursery v. Fyke,

633 P.2d 516 (Colo. App. 1981); Int'l Tech. Instruments v. Eng'g Measurements, Inc., 678 P.2d 558 (Colo. App. 1983).

Where seller may have indirect notice of claim, trial court erred in finding, as a matter of law, that delay in giving notice of breach of warranty was unreasonable. Cheyenne Mtn. Bank v. Whetstone, 787 P.2d 210 (Colo. App. 1990).

Notice of breach of warranty to remote manufacturer not a condition precedent to purchaser's initiation of litigation against such manufacturer. Cooley v. Big Horn Harvestore Sys., 813 P.2d 736 (Colo. 1991).

Word "seller", as used in subsection (3)(a), construed to refer only to the immediate seller who tendered the goods to the buyer. So long as buyer has given notice of the defect to his immediate seller, no further notification to those distributors beyond the immediate seller is required. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

Timely notice of the breach to the immediate seller is all that is required. Separate notice to the seller's supplier or the manufacturer is not necessary. Hawkinson v. A.H. Robins Co., Inc., 595 F. Supp. 1290 (D. Colo. 1984).

Notice of breach given by buyer complied with time parameters of contract notice provision. Myers v. Koop, 757 P.2d 162 (Colo. App. 1988).

Patient gave sufficient notice to physician of defective character of product and such notice "came to the attention" of the physician within the meaning of § 4-1-201 (26), when the patient presented herself to the physician in a life-threatening condition. Palmer v. A.H. Robins Co. Inc., 684 P.2d 187 (Colo. 1984); Hawkinson v. A.H. Robins Co., Inc., 595 F. Supp. 1290 (D. Colo. 1984).

Notice provision not technical procedural barrier to litigation. When the purposes of the notice requirement have been fully served by actual notice, the notice provision should not operate as a technical procedural barrier to deny claimants the opportunity to litigate the case on the merits. Prutch v. Ford Motor Co., 618 P.2d 657 (Colo. 1980).

Notice of breach is legally sufficient when it provides the seller with an opportunity to investigate the buyer's complaint, to correct the alleged defect, or to effect a settlement through negotiation. Int'l Tech. Instruments v. Eng'g Measurements, Inc., 678 P.2d 558 (Colo. App. 1983).

Failure to provide adequate security agreement constitutes breach. Where the failure of the seller to provide a proper and adequate security agreement directly caused the unconscionable delay in buyer's acquiring titles for vehicles sold, this constituted a breach of the sales contract. Eccher v. Small Bus. Admin., 643 F.2d 1388 (10th Cir. 1981).

Statute as basis for jurisdiction. See Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 129, 574 P.2d 102 (1977).

Applied in Four Sons Bakery v. Dulman, 542 F.2d 829 (10th Cir. 1976); Surplus

Elecs. Corp. v. Gallin, 653 P.2d 752 (Colo. App. 1982).

4-2-608. 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.

Source: L. 65: p. 1330, § 1. **C.R.S. 1963:** § 155-2-608.

ANNOTATION

I. General Consideration.

II. Buyer May Revoke Acceptance.

III. Reasonable Time.

IV. Same as if Goods Rejected.

I. GENERAL CONSIDERATION.

Annotator's note. Since § 4-2-608 is similar to repealed § 121-1-69 (1)(e), (3), (4), and (5), C.R.S. 1963, § 121-1-69 (1)(e), (3), (4), and (5), CRS 53, and CSA, C. 143A, §§ 69(1)(e), (3), (4), and (5) (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

Notice of revocation of acceptance is a recognition by buyer that property belongs to seller. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

Buyer's counterclaim properly treated as claim to revoke acceptance. A buyer's counterclaim requesting, inter alia, rescission of the contract was properly treated as a claim to revoke acceptance as provided for in this section. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974).

Recovery of purchase price by buyer could not be upheld on theory that buyer had revoked acceptance where sole theory of recovery at trial was based on fraud. Wagner v. Dan Unfug Motors, Inc., 35 Colo. App. 102, 529 P.2d 656 (1974).

Applied in Eccher v. Small Bus. Admin., 643 F.2d 1388 (10th Cir. 1981); Glen Peck, Ltd. v. Fritsche, 651 P.2d 414 (Colo. App. 1981).

II. BUYER MAY REVOKE ACCEPTANCE.

Where a seller of chattels is guilty of a breach of an implied warranty of title, and the purchaser relying upon such warranty has sold or disposed of a minor portion of the chattels, the purchaser, upon learning of the defect of title, may elect to rescind the entire transaction. Koscove v. Brunger, 143 Colo. 354, 352 P.2d 961 (1960); Rudd v. Rogerson, 162 Colo. 103, 424 P.2d 776 (1967).

False representation of material fact, even though innocently made, may merit rescission of a contract or revocation of acceptance. Keen v. Modern Trailer Sales, Inc., 40 Colo. App. 527, 578 P.2d 668 (1978).

Buyer's duty to investigate. A buyer may not revoke acceptance based upon defects which were not known to him at the time of acceptance because of his own failure to make a reasonable investigation which was readily available. Hummel v. Skyline Dodge, Inc., 41 Colo. App. 572, 589 P.2d 73 (1978).

Acceptance of nonconforming articles may be revoked. Revocation of acceptance may occur when the article specified in the contract is so nonconforming that its value to the buyer is substantially impaired. Regents of Univ. of Colo. v. Pac. Pump & Supply, Inc., 35 Colo. App. 36, 528 P.2d 941 (1974).

Buyer may revoke his acceptance of a commercial unit where the nonconformity of the unit substantially impaired its value and the revocation was made in a timely manner. Homier v. Faricy Truck & Equipment Co., 784 P.2d 798 (Colo. App. 1988).

Nonconformity cannot be viewed as a question of the quantity and quality of goods alone, but of the performance of the totality of the seller's contractual undertaking. Regents of Univ. of Colo. v. Pac. Pump & Supply, Inc., 35 Colo. App. 36, 528 P.2d 941 (1974).

Question of impairment under this section turns upon whether the nonconformity is such as will in fact cause a substantial impairment of value to the buyer, regardless of the seller's knowledge of buyer's needs and circumstances. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

In determining whether goods are substantially impaired, reference must be made to the effect of the goods' nonconformities upon the particular buyer asserting a right of revocation. Jackson v. Rocky Mtn. Datsun, Inc., 693 P.2d 391 (Colo. App. 1984).

Buyer must be able to transfer unencumbered title. In order to exercise the remedy of revocation after acceptance, the buyer must, as of the date seller offers to return the purchase price and expenses, or if seller makes no such offer, as of the date the trial court awards buyer this remedy, be in a position to transfer an unencumbered title to the seller. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974).

There is no requirement under the provisions of the UCC that on revocation of acceptance a buyer must deliver title to the goods to the seller. Under § 4-2-711 (3), a buyer retains a security interest in goods in his possession for any payment made on their price and may resell the goods in the same manner as an aggrieved seller. And, where a buyer does not exercise his right of resale, generally all that is required is that the buyer assign to the seller all of his interest in the goods. Jackson v. Rocky Mtn. Datsun, Inc., 693 P.2d 391 (Colo. App. 1984).

Remedy is for damages under § 4-2-714. When the buyer has encumbered the title and is not able effectively to transfer the goods to the seller, then buyer's remedy is for damages pursuant to § 4-2-714. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974).

Buyer vested with security interest upon revocation. If a revocation of acceptance of a mobile home is justifiable under this section, § 4-2-711 (3) vests the buyer with a security interest in the home, and such an interest authorizes continued possession to preserve the collateral, pursuant to § 4-9-207 (1) and (4), subject to the seller's right to an offset for the rental value of the home. Keen v. Modern Trailer Sales, Inc., 40 Colo. App. 527, 578 P.2d 668 (1978).

Buyer may revoke acceptance if he accepts goods on the reasonable assumption that a nonconformity will be cured by the seller and the nonconformity is not "seasonably cured". Buyer is not required to provide the seller with an unlimited number of opportunities to cure a nonconformity before revoking acceptance. Jackson v. Rocky Mtn. Datsun, Inc., 693 P.2d 391 (Colo. App. 1984).

When the buyer reaccepts goods with the understanding that the seller will cure the defect, the buyer must then afford the seller an opportunity to cure the defect before revoking acceptance or claiming a breach of warranty. Ranta Constr., Inc. v. Anderson, 190 P.3d 835 (Colo. App. 2008).

Buyer was not required to set out in detail the car's nonconformities in her notice of revocation where the buyer had repeatedly notified the dealer of the defective performance of the car and the dealer had made repeated attempts to repair it. Jackson v. Rocky Mtn. Datsun, Inc., 693 P.2d 391 (Colo. App. 1984).

Contrary to trial court's determination, there is no "formal notice of revocation" requirement under this section, nor does it exist under § 4-2-607. This section does not require that a revocation of acceptance assume any particular format, but rather that the content of the notice be determined by "considerations of good faith, prevention of surprise, and reasonable adjustment." The

notice of revocation, to be sufficient, should fairly apprise the seller that the buyer wants to give back the goods and receive a substitute or money in return. Here, letter that described in detail dryers' alleged defects, attempted to reject acceptance of the dryers, demanded that seller remove the machines from the premises, and requested that damages be paid to buyer and the laundromat owner provided adequate notice of revocation. Cissell Mfg. Co. v. Park, 36 P.3d 85 (Colo. App. 2001).

To prove a valid revocation of acceptance, a buyer must show, among other things, that the goods were nonconforming. Determination of an item's nonconformity hinges on whether it substantially impairs its value to the buyer. Whether goods are nonconforming requires reference to the terms of the contract and the law of warranty. If the goods are contracted for and as warranted, they cannot be nonconforming. Cissell Mfg. Co. v. Park, 36 P.3d 85 (Colo. App. 2001).

III. REASONABLE TIME.

Rescission must be timely and exercised with dispatch upon discovery of the grounds giving rise to the right. Eggen v. M. & K. Trailers, 29 Colo. App. 177, 482 P.2d 435 (1971).

For revocation to be effective, it must occur within a reasonable time. Regents of Univ. of Colo. v. Pac. Pump & Supply, Inc., 35 Colo. App. 36, 528 P.2d 941 (1974); Graham Hydraulic v. Stewart & Stevenson, 797 P.2d 835 (Colo. App. 1990).

What constitutes a reasonable time depends upon the facts of the particular case. Eggen v. M. & K. Trailers, 29 Colo. App. 177, 482 P.2d 435 (1971).

What is a "reasonable time" during which a buyer can revoke his acceptance is a question of fact to be measured by all the circumstances of the case. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

Determination of reasonableness of time for revocation is one of fact, to be made on the unique circumstances of each case. Four Sons Bakery v. Dulman, 542 F.2d 829 (10th Cir. 1976).

Sellers cannot complain that rescission is untimely when the delay is caused by their own procrastination and refusal to honor their commitments. Eggen v. M. & K. Trailers, 29 Colo. App. 177, 482 P.2d 435 (1971).

Delay on the part of the buyer will be excused in exercising his right to rescind if it is due to the promises of the seller that the defect will be remedied, or to his requests that further trial be made, or to other acts or declarations of the seller tending to induce delay. Eggen v. M. & K. Trailers, 29 Colo. App. 177, 482 P.2d 435 (1971).

There is a distinction between notice of breach under § 4-2-607(3) and notice of revocation of acceptance under § 4-2-608(2). Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 343, 483 P.2d 980 (1971).

Where a buyer gives seller an opportunity to repair an item and withholds revoking acceptance until it

became apparent that seller cannot or will not perform its contract, then under such circumstances, a delay in the notice in no way prejudices the seller and is not unreasonable. Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 383 P.2d 980 (1971). See Duncan v. Bd. of County Comm'rs, 154 Colo. 447, 391 P.2d 368 (1964).

Buyer was justified in withholding revocation of acceptance until it was apparent that the seller could not perform its obligations under the contract. Regents of Univ. of Colo. v. Pac. Pump & Supply, Inc., 35 Colo. App. 36, 528 P.2d 941 (1974).

Where purchaser kept an automobile and drove it for almost a year after his offer to return it to seller for purchase price and incidental expenses was refused, he lost his right to rescind and recover the full purchase price. Elwood Edwards Auto Sales v. Kinsey, 123 Colo. 52, 225 P.2d 59 (1950).

Delay of one year from date of purchase to date of revocation of acceptance held reasonable. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

Purchaser's occupancy of mobile home during pendency of suit for rescission does not affect the legitimacy of an attempted revocation of acceptance. Keen v. Modern Trailer Sales, Inc., 40 Colo. App. 527, 578 P.2d 668 (1978).

IV. SAME AS IF GOODS REJECTED.

A rescission renders the contract a nullity, and the parties are put in the position they were in immediately prior to entering into the contract. Eggen v. M. & K. Trailers, 29 Colo. App. 177, 482 P.2d 435 (1971).

Same duties and obligations as if rejected before acceptance. Buyer who asserts a right to revoke acceptance has the same duties and obligations as a buyer who asserts a right to reject the goods before acceptance. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974); Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

After rejection of goods, any exercise of ownership rights is considered wrongful as against the seller. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974).

Purpose of this requirement is to insure that the seller may regain possession of the goods in order to resell the same and minimize his loss. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974).

After revocation buyer holds goods as bailee. Where a buyer is entitled to rescind the sale and elects to do so, the buyer shall thereafter be deemed to hold the goods as a bailee for the seller. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

Buyer becomes liable for the value of their use. If the buyer after revocation of acceptance uses the goods while he holds them as a bailee, he becomes liable for the value of that use. Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

Deterioration of goods' condition not basis for denying revocation. Deterioration in condition of the goods occurring during the period when seller was attempting to cure defects is not a basis for denying buyer's remedy of revocation. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974).

Where the buyer utilizes the goods as security for a loan which remains unpaid after revocation, this prevents the seller, upon refund of the purchase price and expenses, from reselling the goods to minimize his loss. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974).

4-2-609. 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.

Source: L. 65: p. 1331, § 1. **C.R.S. 1963:** § 155-2-609.

ANNOTATION

Law reviews. For article, "Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain", see 54 U. Colo. L. Rev. 507 (1983).

A seller could not suspend performance where his behavior was not such as to bring him within the provisions of this section. Scott v. Crown, 765 P.2d 1043 (Colo. App. 1988).

Whether a party to a contract has reasonable grounds for insecurity and the adequacy of any assurance of performance are questions of fact for the jury. Colo. Interstate Gas Co. v. Chemco, Inc., 854 P.2d 1232 (Colo. 1993).

4-2-610. 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 4-2-703 or section 4-2-711), 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 4-2-704).

Source: L. 65: p. 1331, § 1. **C.R.S. 1963:** § 155-2-610.

ANNOTATION

Applied in Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981); Stone v. Caroselli, 653 P.2d 754 (Colo. App. 1982); Albright v. McDermond, 14 P.3d 318 (Colo. 2000).

4-2-611. 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 canceled 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 4-2-609).

(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.

Source: L. 65: p. 1332, § 1. **C.R.S. 1963:** § 155-2-611.

4-2-612. "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 may 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 document; but if the nonconformity does not fall within subsection (3) of this section 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 aggrieved 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.

Source: L. 65: p. 1332, § 1. **C.R.S. 1963:** § 155-2-612.

ANNOTATION

Law reviews. For article, "Installment Selling in Colorado and Needed Legislation", see 29 Dicta 81 (1952).

4-2-613. 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 4-2-324), 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.

Source: L. 65: p. 1332, § 1. **C.R.S. 1963:** § 155-2-613.

4-2-614. 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.

Source: L. 65: p. 1333, § 1. **C.R.S. 1963:** § 155-2-614.

4-2-615. Excuse by failure of presupposed conditions.

Except so far as a seller may have assumed a greater obligation and subject to section 4-2-614 on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) of this section 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) of this section 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 a delay or nondelivery and, when allocation is required under paragraph (b) of this section, of the estimated quota thus made available for the buyer.

Source: L. 65: p. 1333, § 1. **C.R.S. 1963:** § 155-2-615.

4-2-616. Procedure on notice claiming excuse.

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under section 4-2-615, 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 4-2-612), 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 section 4-2-615.

Source: L. 65: p. 1334, § 1. **C.R.S. 1963:** § 155-2-616.

PART 7

REMEDIES

Law reviews: For article, "An Introduction to the Economic Analysis of Contract Remedies", see 57 U. Colo. L. Rev. 683 (1986).

4-2-701. 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.

Source: L. 65: p. 1334, § 1. **C.R.S. 1963:** § 155-2-701.

4-2-702. 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 4-2-705).

(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 (2), 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) of this section is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article (section 4-2-403). Successful reclamation of goods excludes all other remedies with respect to them.

Source: L. 65: p. 1334, § 1. **C.R.S. 1963:** § 155-2-702. **L. 77:** (3) amended, p. 313, § 7, effective January 1, 1978.

ANNOTATION

Law reviews. For article, "Commercial Law", see 58 Den. L.J. 279 (1981). For article, "Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain", see 54 U. Colo. L. Rev. 507 (1983).

This section is not applicable where there was no credit transaction. Ranchers & Farmers Livestock Auction Co. v. Honey, 38 Colo. App. 69, 552 P.2d 313 (1976).

Necessary prerequisite to the right to reclaim under this section is a demand for the return of the goods made within 10 days of their receipt. In re Colacci's of Am., 490 F.2d 1118 (10th Cir. 1974).

If the credit seller does not follow up on his rights as to possession, there is a waiver. In re Colacci's of Am., Inc., 490 F.2d 1118 (10th Cir. 1974).

"Follow up" by person seeking to be reclaiming seller means regaining of possession or bona fide attempt to do so. In re Colacci's of Am., Inc., 490 F.2d 1118 (10th Cir. 1974).

Creation of a security interest out of the right to reclaim might allow recovery which would be greater than the mere recovery of goods originally transferred. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Seller was not "reclaiming seller". Where the seller did not act, and instead acquiesced in the buyer's retention of the

goods for some four months after they were delivered, although not without some argument and without an expressed consent, and the insistent demands were for payment, and the seller hoped to be paid for the goods during the stalling, and so allowed them to remain at the buyer's, and only after two creditors' meetings did the seller take action to "follow up" its demand, the seller did not become a "reclaiming seller". In re Colacci's of Am., Inc., 490 F.2d 1118 (10th Cir. 1974).

4-2-703. 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 4-2-612), 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 4-2-705);

(c) Proceed under section 4-2-704 respecting goods still unidentified to the contract;

(d) Resell and recover damages as hereafter provided (section 4-2-706);

(e) Recover damages for nonacceptance (section 4-2-708) or in a proper case the price (section 4-2-709);

(f) Cancel.

Source: L. 65: p. 1335, § 1. **C.R.S. 1963:** § 155-2-703.

ANNOTATION

Law reviews. For article, "Mechanics' Liens Relative to Oil and Gas Operations — Part II", see 34 Dicta 373 (1957).

Paragraph (f) as a "remedy" of the seller is unrealistic in the face of the filing of the petition for bankruptcy within four months thereafter. The "cancellation" by retaking the goods could not be effective because whatever the action is called, it was still a "transfer" within the meaning of the bankruptcy act "for or on account of an antecedent debt" within four months of the filing of the bankruptcy petition, therefore a preferential transfer. In re Colacci's of Am., Inc., 490 F.2d 1118 (10th Cir. 1974).

Applied in Stone v. Caroselli, 653 P.2d 754 (Colo. App. 1982).

4-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

(1) An aggrieved seller under section 4-2-703 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.

Source: L. 65: p. 1335, § 1. **C.R.S. 1963:** § 155-2-704.

ANNOTATION

For giving notice as condition precedent to seller's recovery, see B. J. Shelton Co. v. Muckle Eng'r Co., 121 Colo. 509, 218 P.2d 1057 (1950) (decided under repealed CSA, C. 143A, § 64(3), uniform sales act).

4-2-705. 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 4-2-702), 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 a warehouse; 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 possession or control 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.

Source: L. 65: p. 1336, § 1. **C.R.S. 1963:** § 155-2-705. **L. 2006:** (2)(c) and (3)(c) amended, p. 493, § 15, effective September 1.

4-2-706. Seller's resale including contract for resale.

(1) Under the conditions stated in section 4-2-703 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 4-2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) of this section 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 4-2-707) 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 4-2-711).

Source: L. 65: p. 1336, § 1. **C.R.S. 1963:** § 155-2-706.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Annotator's note. Since § 4-2-706 is similar to repealed § 121-1-60, CRS 53 (uniform sales act), a relevant case construing this provision of § 4-2-706 has been included in the annotations to this section.

The seller in possession may sell the goods on the buyer's account where the property in the goods has passed to the buyer who then wrongfully refuses to pay for them. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

When seller sells good on buyer's account, the measure of damage is the contract price less the amount of recovery on the resale. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Measure of damage based on contract price less the amount of recovery on resale may differ from damages for nonacceptance. The measure of the seller's claim when based on the contract price less the net proceeds of a resale may in fact be different from the measure of damages provided in the case of nonacceptance of the goods under § 4-2-708 where the measure is the difference between the contract price and the fair market price at the time when the goods ought to have been accepted. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

The seller is bound to exercise reasonable care and judgment in reselling the goods. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

The statutory requirement of reasonable care and judgment is a codification of the common law. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Buyer may not select disadvantageous time to resell. Although a difference in the amount of recovery under this section providing for resale and that of § 4-2-708 providing damages for nonacceptance of goods may exist, it is clear that the statute does not contemplate putting the seller in the position of being able to penalize the buyer by selecting a disadvantageous time to resell the goods. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Initially the burden is on the seller to prove that the resale was made with reasonable care and judgment. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Once the seller has introduced evidence establishing that fairness and good faith was observed, the buyer has the burden of showing that it was not fair and in good faith. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Issue determined by trier of facts. Determination of the issue of whether the resale was made with reasonable care and judgment is for the trier of the facts. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285, (1960).

Proper measure of trade-in upon resale of repossessed vehicle is discussed in A & P Trucking v. Phil Long Ford, Inc., 676 P.2d 1267 (Colo. App. 1984).

4-2-707. "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 4-2-705) and resell (section 4-2-706) and recover incidental damages (section 4-2-710).

Source: L. 65: p. 1337, § 1. **C.R.S. 1963:** § 155-2-707.

4-2-708. Seller's damages for nonacceptance or repudiation.

(1) Subject to subsection (2) of this section and to the provisions of this article with respect to proof of market price (section 4-2-723), 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 4-2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) of this section 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 4-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

Source: L. 65: p. 1338, § 1. **C.R.S. 1963:** § 155-2-708.

ANNOTATION

Annotator's note. Since § 4-2-708 is similar to repealed § 121-1-64, CRS 53, and CSA, C. 143A, 64 (uniform sales act), relevant cases construing these provisions have been included in the annotations to this section.

The measure of damages provided in the case of nonacceptance of the goods is the difference between the contract price and the fair market price at the time when the goods ought to have been accepted. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Where buyer wrongfully refuses to accept delivery, the seller's right to retain a down payment is for application on the damages and not addition to them, so if the damages are in excess of such a down payment, only the excess is recoverable. Thach v. Durham, 120 Colo. 253, 208 P.2d 1159 (1949).

Seller's right to apply down payment on damages is not controlling where the seller exercises the right to resell in good faith. Dolfin v. Bruesselbach, 111 Colo. 525, 143 P.2d 1014 (1943).

Seller's recovery by resale under § 4-2-706 may differ from that of this section. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

Where a contract provides for alternative performances, the remedy for its breach is not determined exclusively by the Uniform Commercial Code. The parties to a contract may vary the provisions of the Uniform Commercial Code by agreement, and may provide for remedies in addition to or in substitution for those provided by the Uniform Commercial Code. Colo. Interstate Gas Co. v. Chemco, Inc., 854 P.2d 1232 (Colo. 1993).

4-2-709. 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 section 4-2-710, 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 4-2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under section 4-2-708.

Source: L. 65: p. 1338, § 1. **C.R.S. 1963:** § 155-2-709.

ANNOTATION

Annotator's note. Since § 4-2-709 is similar to repealed § 121-1-63, CRS 53, and CSA, C. 143A, § 63 (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

This section provides that where the property in the goods has passed to the buyer who then wrongfully refuses to pay for them, the seller may maintain an action for the price of the goods. Howse v. Crumb, 143 Colo. 90, 352 P.2d 285 (1960).

For the giving notice that seller holds goods as "bailee", see B. J. Shelton Co. v. Muckle Eng'r Co., 121 Colo. 509, 218 P.2d 1057 (1950).

Record showing status of sugar market and seller's inventory during relevant period shows efforts to resell would have been unavailing. Great Western Sugar v. Pennant Prods., 748 P.2d 1359 (Colo. App. 1987).

Award of damages using downside pricing was in effect specific performance of the contracts and not a penalty. Great

Western Sugar v. Pennant Prods., 748 P.2d 1359 (Colo. App. 1987).

In an action for the price, the seller is entitled to recovery of the price of "goods accepted." However, the Uniform Commercial Code limits the definition of "goods accepted" to "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 the seller's rights under this section." Thus, a procedurally effective rejection or revocation bars acceptance, and revocation of acceptance, like rejection, allows the buyer to avoid the obligation to pay the price. To the extent the trial court determined otherwise in its summary judgment rulings, it was incorrect. Cissell Mfg. Co. v. Park, 36 P.3d 85 (Colo. App. 2001).

Applied in Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973); Nations Enters., Inc. v. Process Equip. Co., 40 Colo. App. 390, 579 P.2d 655 (1978).

4-2-710. 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.

Source: L. 65: p. 1339, § 1. **C.R.S. 1963:** § 155-2-710.

ANNOTATION

Cancellation and carrying costs commercially reasonable. Trial court erred in upholding jury award to seller because the jury could have concluded that the seller's charge to the buyer for carrying and cancellation was a reasonable one arising under the express terms of the contract as an expense incurred as a result of the buyer's request to delay shipment. Murray Equipment Co. v. Curtis, Inc., 725 P.2d 35 (Colo. App. 1986).

Absent other statutory or contractual provisions to the contrary, attorney fees are not incidental damages under this section. Jelen and Son, Inc. v. Bandimere, 801 P.2d 1182 (Colo. 1990).

Seller's damages were not incidental to buyer's refusal to accept delivery of chemicals, but instead were incurred as a result of improper storage, handling, and transportation of hazardous materials and subsequent dealings with a third party. Jelen and Son, Inc. v. Bandimere, 801 P.2d 1182 (Colo. 1990).

The focus of this section is upon damages arising within the scope of the immediate contract. Damages must arise as a result of the breach to be characterized as incidental under this section. Jelen and Son, Inc. v. Bandimere, 801 P.2d 1182 (Colo. 1990).

4-2-711. 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 4-2-612), 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 section 4-2-712 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 4-2-713).

(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 4-2-502); or

(b) In a proper case, obtain specific performance or replevy the goods as provided in this article (section 4-2-716).

(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 4-2-706).

Source: L. 65: p. 1339, § 1. **C.R.S. 1963:** § 155-2-711.

ANNOTATION

Law reviews. For article, "One Year Review of Contracts", see 38 Dicta 161 (1961). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Buyer may recover amount paid. This section provides that where the buyer justifiably revokes acceptance, the buyer may recover so much of the price as he has paid. Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 343, 483 P.2d 980 (1971).

The section provides that the buyer has a security interest in goods in his possession or control for any payments made. Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 343, 483 P.2d 980 (1971).

Because of buyer's security interest, the buyer is not required to return the goods or to hold them for seller's disposition. Irrigation Motor & Pump Co. v. Belcher, 29 Colo. App. 343, 483 P.2d 980 (1971).

Buyer vested with security interest upon revocation of acceptance. If a revocation of acceptance of a mobile home under § 4-2-608 is justifiable, subsection (3) vests the buyer with a security interest in the home, and such an interest authorizes continued possession to preserve the collateral, pursuant to § 4-9-207 (1) and (4), subject to the seller's right to an offset for the rental value of the home. Keen v. Modern Trailer Sales, Inc., 40 Colo. App. 527, 578 P.2d 668 (1978).

There is no requirement under the provisions of the UCC that on revocation of acceptance a buyer must deliver title to the goods to the seller. Under this section, a buyer retains a security interest in goods in his possession for any payment made on their price and may resell the goods in the same manner as an aggrieved seller. And, where a buyer does not exercise his right of resale, generally all that is required is that the buyer assign to the seller all of his interest in the goods. Jackson v. Rocky Mtn. Datsun, Inc., 693 P.2d 391 (Colo. App. 1984).

Failure properly to reject bars recovery of expenses. Where, by failure properly to reject, purchaser is deemed to have accepted the goods, there is no basis for recovery of expenses incident to rejection. Surplus Elecs. Corp. v. Gallin, 653 P.2d 752 (Colo. App. 1982).

Statute as basis for jurisdiction. See Stroh v. Am. Recreation & Mobile Home Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

Applied in Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977); Danburg v. Realties, Inc., 677 P.2d 439 (Colo. App. 1984).

4-2-712. "Cover" - buyer's procurement of substitute goods.

(1) After a breach within section 4-2-711, 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 4-2-715), 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.

Source: L. 65: p. 1339, § 1. **C.R.S. 1963:** § 155-2-712.

ANNOTATION

Law reviews. For article, "Commercial Law", see 55 Den. L.J. 425 (1978).

Applied in Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977).

4-2-713. Buyer's damages for nondelivery or repudiation.

(1) Subject to the provisions of this article with respect to proof of market price (section 4-2-723), 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 4-2-715), 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.

Source: L. 65: p. 1340, § 1. **C.R.S. 1963:** § 155-2-713.

ANNOTATION

Law reviews. For article, "One Year Review of Contracts", see 39 Dicta 161 (1962). For article, "Commercial Law", see 55 Den. L.J. 425 (1978).

Annotator's note. Since § 4-2-713 is similar to repealed § 121-1-67, CRS 53, and CSA, C. 143A, § 67 (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

Where a corporation refuses to deliver stock pursuant to an option agreement, the price paid for the option is not the measure of damages, and where the stock is available on the market at a much lesser price than that in the option agreement, dismissal for lack of damages is appropriate. Colo. Mgt. Corp. v. Am. Founders Life Ins. Co., 148 Colo. 519, 367 P.2d 335 (1961).

Where there is no mutual rescission of a contract for sale, the buyer cannot recover a down payment if he wrongfully

refuses to accept redelivery. Thack v. Durham, 120 Colo. 253, 208 P.2d 1159 (1949).

"Time when buyer learned of the breach" means "time of performance" in anticipatory repudiation cases. Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977).

Damages normally measured from time performance is due. Under this section damages normally should be measured from the time when performance is due and not from the time when the buyer learns of repudiation. Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977).

Under this section a buyer may urge continued performance for a reasonable time. Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977).

After reasonable period, buyer should cover. At the end of a reasonable period during which the buyer may urge continued performance he should cover if substitute goods are readily available. Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977).

Calculation of damages if buyer cannot cover. If a valid reason exists for failure or refusal to cover after the reasonable time for urging continued performance is over, damages may be calculated from the time when performance is due. Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977).

Calculation if buyer could but does not cover. If after a reasonable time during which a buyer urges continued performance substitution is readily available and buyer does not cover within a reasonable time, damages should be based on the price at the end of that reasonable time rather than on the price when performance is due. Cargill, Inc. v. Stafford, 553 F.2d 1222 (10th Cir. 1977).

Applied in William B. Tanner Co. v. Mesa Broad. Co., 575 F. Supp. 1501 (D. Colo. 1983).

4-2-714. Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of section 4-2-607), 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 section 4-2-715 may also be recovered.

Source: L. 65: p. 1340, § 1. **C.R.S. 1963:** § 155-2-714.

ANNOTATION

I. General Consideration.

II. Buyer May Recover.

III. Measure of Damages.

I. GENERAL CONSIDERATION.

Annotator's note. Since § 4-2-714 is similar to repealed §§ 121-1-69(1)(c), (6), and (7), C.R.S. 1963, §§ 121-1-69(1)(b), (6), and (7), CRS 53, and CSA, C. 143A, §§ 69(1)(b), (6), and (7)(uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

Applied in Duncan v. Schuster-Graham Homes, Inc., 194 Colo. 441, 578 P.2d 637 (1978); Western Conference Resorts, Inc. v. Pease, 668 P.2d 973 (Colo. App. 1983).

II. BUYER MAY RECOVER.

The acceptance and retention of goods by a purchaser does not defeat his action for damages for breach of warranty. Platte Valley Motor Co. v. Wagner, 130 Colo. 365, 278 P.2d 870 (1954).

This section permits acceptance and retention of the goods and maintenance of an action for breach of warranty. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

Seller still liable for misrepresentation. Acceptance of goods does not relieve seller from liability for damages caused by misrepresentation where there is an express warranty. Schlottman v. Pressey, 195 F.2d 343 (10th Cir. 1952), rev'g 96 F. Supp. 979 (D. Colo. 1951).

When a buyer's claim is based exclusively upon an express warranty, the measure of damages is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty as provided in subsection (1) of this section. Schlottman v. Pressey, 195 F.2d 343 (10th Cir. 1952).

Seller is bound to foresee injuries which follow a breach of contract in the usual course of events, and it is not necessary for a buyer to show specifically that the seller had knowledge of the facts. Thus when the goods are sold for consumption and use, the seller is then held to foresee and anticipate injuries which may result from breach of the contract of sale if the goods are put to their customary consumption and use; such injuries are said to be the natural result of the breach. Schlottman v. Pressey, 195 F.2d 343 (10th Cir. 1952).

A buyer is within his rights in asserting a recoupment remedy for those damages which are directly and naturally attributable to the deficiencies of the goods; other damages directly and naturally resulting from the breach of warranty can be claimed by way of counterclaim. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

When the buyer has encumbered the title and is not able effectively to transfer the goods to the seller, then buyer's remedy is for damages pursuant to this section. Moeller Mfg., Inc. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974).

Award of replacement cost of defective part insufficient. Where there is a "latent defect" which cannot be corrected simply by replacing a defective part and awarding the costs of replacing that part would not make the aggrieved party whole, an award of the entire value of the product damaged is appropriate. Gibbons v. Windish, Inc., 662 P.2d 500 (Colo. App. 1983).

Under "special circumstances", consequential damages may be recovered. Prutch v. Ford Motor Co., 40 Colo. App. 129, 574 P.2d 102 (1977), rev'd on other grounds, 618 P.2d 657 (Colo. 1980).

Where a buyer's use of a product which he knows is defective is foreseeable, the seller's liability for consequential damages is not cut off. Prutch v. Ford Motor Co., 40 Colo. App. 129, 574 P.2d 102 (1977), rev'd on other grounds, 618 P.2d 657 (Colo. 1980).

III. MEASURE OF DAMAGES.

The proper measure for breach of warranty of quality is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had had they complied with the warranty. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963); Converse v. Zinke, 635 P.2d 882 (Colo. 1981).

The basic measure of damages for breach of warranty under subsection (2) is the difference between the value of the goods accepted and the value of the goods as warranted. Prutch v. Ford Motor Co., 40 Colo. App. 129, 574 P.2d 102 (1977), rev'd on other grounds, 618 P.2d 657 (Colo. 1980).

Any duty buyers may have to mitigate their damages is fully discharged by repeated efforts to persuade the seller to repair the goods. Cherokee Inv. Co. v. Voiles, 166 Colo. 270, 443 P.2d 727 (1968).

Buyer may recover full obligation while retaining goods where no salvage value. The argument that buyers, by recovering their full obligation while still retaining inoperative goods, are placed in a better position than they contracted for is not supported where there is not any evidence indicating that the goods in their present condition have any salvage value. Cherokee Inv. Co. v. Voiles, 166 Colo. 270, 443 P.2d 727 (1968).

Section clearly permits approximations as to extent of damage, providing the fact of damage or lost profits is certain. Eccher v. Small Bus. Admin., 643 F.2d 1388 (10th Cir. 1981).

Court's determination of damages will not be disturbed on appeal unless clearly erroneous. Eccher v. Small Bus. Admin., 643 F.2d 1388 (10th Cir. 1981).

Applied in Pawa Box Sales Grp. v. Roofer Elecs. Tech. (Shanwei) Co., 754 F. Supp. 3d 1081 (D. Colo. 2024).

4-2-715. 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.

Source: L. 65: p. 1340, § 1. **C.R.S. 1963:** § 155-2-715.

ANNOTATION

Annotator's note. Since § 4-2-715 is similar to repealed § 121-1-70, C.R.S. 1963, and § 121-1-70, CRS 53 (uniform sales act), relevant cases construing those provisions have been included in the annotations to this section.

Interest and carrying charges are consequential damages. Where the goods purchased are entirely worthless and the only way buyer can be made whole is by awarding him the full amount of the obligation he undertook to pay at the time he purchased the goods, then the interest and carrying charges incurred at the time the sale was made are clearly consequential damages directly resulting from the breach of warranty. Cherokee Inv. Co. v. Voiles, 166 Colo. 270, 443 P.2d 727 (1968).

Special damages where machine is unsuitable. Where there is a breach of a special warranty whereby a seller undertakes to build a machine suitable for a mass production purpose, the buyer is entitled to special damages for its expenditure in the manufacture of the tools and dies to be used with the machine and to those expenditures reasonably attributed to efforts to adjust and repair the machine before the date when notice of breach of warranty was given to the buyer. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

The claim of a buyer for damages for loss of profits cannot be allowed where these were not sufficiently proven and where they are in law remote. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963).

Code rejects "tacit agreement" test. The Colorado statutory scheme rejects the "tacit agreement" test that would permit consequential damages only if the seller

specifically contemplated or actually assumed the risk of such damages. Prutch v. Ford Motor Co., 618 P.2d 657 (Colo. 1980).

The element which triggers recovery of consequential damages under subsection (2)(a) is foreseeability. Subsection (2)(a) means that consequential damages are recoverable whenever those damages were reasonably foreseeable by the seller when he entered the contract. Prutch v. Ford Motor Co., 40 Colo. App. 129, 574 P.2d 102 (1977), rev'd on other grounds, 618 P.2d 657 (Colo. 1980).

Where a buyer's use of a product which he knows is defective is foreseeable, the seller's liability for consequential damages is not cut off. Prutch v. Ford Motor Co., 40 Colo. App. 129, 574 P.2d 102 (1977), rev'd on other grounds, 618 P.2d 657 (Colo. 1980).

A manufacturer knowing that its products will be used for crop production reasonably can be expected to foresee that defects in those products may cause crop losses. Prutch v. Ford Motor Co., 618 P.2d 657 (Colo. 1980).

"Reason to know" formulation not exclusive remedy in fraud suits. The code does not require that the "reason to know" formulation be applied in fraud suits to the exclusion of other remedies; it only provides that the remedies available under the "reason to know" formulation are included among the remedies available to a defrauded purchaser. Wagner v. Dan Unfug Motors, Inc., 35 Colo. App. 102, 529 P.2d 656 (1974).

Attempt to mitigate losses not intervening cause of damages. Where plaintiffs, in deciding to continue farming with the knowledge that their equipment might continue to malfunction, actually mitigated their losses, their decision to try to produce at least part of a normal crop, rather than no crop at all, was required by their "duty to lessen, rather than increase", their damages and was not an intervening cause of damages. Prutch v. Ford Motor Co., 618 P.2d 657 (Colo. 1980).

Section clearly permits approximations as to extent of damage, providing the fact of damage or lost profits is certain. Eccher v. Small Bus. Admin., 643 F.2d 1388 (10th Cir. 1981).

Proof of true value of the goods as compared to the contract price is relevant where a warranty remedy is sought. Power Equip. Co. v. Fulton, 32 Colo. App. 430, 513 P.2d 234 (1973).

Court's determination of damages will not be disturbed on appeal unless clearly erroneous. Eccher v. Small Bus. Admin., 643 F.2d 1388 (10th Cir. 1981).

Error of omission in instructing on warranty theory of liability. Where the jury specifically rejected a warranty theory of liability, any error of omission in instructing on this theory is harmless error. Power Equip. Co. v. Fulton, 32 Colo. App. 430, 513 P.2d 234 (1973).

Evidence of loss of profit is admissible in determining amount of consequential damages if the prospective loss has been shown with reasonable certainty. Cope v. Vermeer Sales, 650 P.2d 1307 (Colo. App. 1982); Int'l Tech. Instruments v. Eng'g

Measurements, Inc., 678 P.2d 558 (Colo. App. 1983).

But the absence of prior profits in a newly established business does not create a "per se" exclusion of loss of profit as an item of damages if sufficient competent evidence is proffered. Cope v. Vermeer Sales, 650 P.2d 1307 (Colo. App. 1982); Int'l Tech. Instruments v. Eng'g Measurements, Inc., 678 P.2d 558 (Colo. App. 1983).

This section specifically allows buyers to recover consequential damages resulting from the seller's breach. There is no corresponding provision in the code allowing the seller to recover consequential damages. Jelen & Son, Inc. v. Bandimere, 801 P.2d 1182 (Colo. 1990).

Applied in Caldwell v. Kats, 38 Colo. App. 156, 555 P.2d 190 (1976); Duncan v. Schuster-Graham Homes, Inc., 194 Colo. 441, 578 P.2d 637 (1978); Cement Asbestos Prods. Co. v. Hartford Accident & Indem. Co., 592 F.2d 1144 (10th Cir. 1979); W. Conference Resorts, Inc. v. Pease, 668 P.2d 973 (Colo. App. 1983).

4-2-716. 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 or she 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. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

Source: L. 65: p. 1341, § 1. **C.R.S. 1963:** § 155-2-716. **L. 2001:** (3) amended, p. 1438, § 22, effective July 1.

ANNOTATION

Applied in Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981).

4-2-717. 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.

Source: L. 65: p. 1341, § 1. **C.R.S. 1963:** § 155-2-717.

ANNOTATION

This section allows the buyer to accept the goods and to assert a breach of warranty by way of recoupment in diminution or extinction of the price. Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963) (decided under repealed § 121-1-69(1)(a), CRS 53, uniform sales act).

4-2-718. 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) of this section; 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 five hundred dollars, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) of this section 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) of this section, 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) of this section; 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 4-2-706).

Source: L. 65: p. 1341, § 1. **C.R.S. 1963:** § 155-2-718.

ANNOTATION

Law reviews. For article, "Exclusion and Modification of Warranty under the U.C.C. — How to Succeed in Business Without Being Liable for Not Really Trying", see 46 Den. L.J. 579 (1969).

4-2-719. Contractual modification or limitation of remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of section 4-2-718 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 title.

(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.

Source: L. 65: p. 1342, § 1. **C.R.S. 1963:** § 155-2-719.

ANNOTATION

Law reviews. For article, "Exclusion and Modification of Warranty under the U.C.C.

— How to Succeed in Business Without Being Liable for Not Really Trying", see 46 Den. L.J. 579 (1969).

Issues of fact must be determined before the applicability of the doctrines of failure of essential purpose and unconscionability can be ruled upon. Wenner Petro. v. Mitsui & Co., 748 P.2d 356 (Colo. App. 1987).

Whether failure of essential purpose doctrine applies requires a two-tiered evaluation: (1) Identification of the essential purpose of the limited remedy; and (2) whether the remedy in fact failed to accomplish such purpose. Cooley v. Big Horn Harvestore Sys., 813 P.2d 736 (Colo. 1991).

A remedy fails of its essential purpose if it operates to deprive a party of the substantial value of the contract. Cooley v. Big Horn Harvestore Sys., 813 P.2d 736 (Colo. 1991); Curragh Queensland Mining v. Dresser Indus., 55 P.3d 235 (Colo. App. 2002).

When the seller cannot cure the defects by repeated attempts to repair, a limitation of remedy to repair fails of its essential purpose and the buyer is then free to revoke acceptance of the goods. Rose v. Colo. Factory Homes, 10 P.3d 680 (Colo. App. 2000).

Consequential damages are available as a remedy under subsection (2) where contract remedy of replacement or repair of defective parts failed of its essential purpose. Such damages are available despite fact that parties' contract contained a provision which excluded remedy of consequential damages resulting from liability. Cooley v. Big Horn Harvestore Sys., 813 P.2d 736 (Colo. 1991).

The parties to a contract may vary the provisions of the Uniform Commercial Code by agreement, and may provide for remedies in addition to or in substitution for those provided by the Uniform Commercial Code. Colo. Interstate Gas Co. v. Chemco, Inc., 854 P.2d 1232 (Colo. 1993).

Parties may enter into an agreement that the remedy of consequential damages shall not be available in the event the remedy of a suit for breach of a limited warranty to repair or replace fails of its essential purpose; however, such agreement must be expressly stated in clear and unambiguous language. Cooley v. Big Horn Harvestore Sys., 813 P.2d 736 (Colo. 1991).

When a purchase agreement establishing that the only warranty provided is a warranty to repair or replace defective parts contains no separate provision unambiguously recording the intent of parties to prohibit a buyer's recovery of consequential damages even when such sole remedy fails of its essential purpose, the buyer is entitled to the statutory remedy of consequential damages notwithstanding a general contractual disclaimer to the contrary. Cooley v. Big Horn Harvestore Sys., 813 P.2d 736 (Colo. 1991).

Applied in Leprino v. Intermountain Brick Co., 759 P.2d 835 (Colo. App. 1988); Molina v. Ford Motor Co., 441 F. Supp. 3d 1176 (D. Colo. 2020).

4-2-720. 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.

Source: L. 65: p. 1342, § 1. **C.R.S. 1963:** § 155-2-720.

4-2-721. 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.

Source: L. 65: p. 1342, § 1. **C.R.S. 1963:** § 155-2-721.

ANNOTATION

"Reason to know" formulation not exclusive remedy in fraud suits. The code does not require that the "reason to know" formulation be applied in fraud suits to the exclusion of other remedies; it only provides that the remedies available under the "reason to know" formulation are included among the remedies available to a defrauded purchaser. Wagner v. Dan Unfug Motors, Inc., 35 Colo. App. 102, 529 P.2d 656 (1974).

False representation of a material fact, even though innocently made, may merit rescission of a contract or revocation of acceptance. Keen v. Modern Trailer Sales, Inc., 40 Colo. App. 527, 578 P.2d 668 (1978).

Right to consequential damages. Since a party's right to consequential damages is presumably a "remedy" within the meaning of this section, application of the code to the question of the availability of damages for loss of use of a personal vehicle is warranted. Wagner v. Dan Unfug Motors, Inc., 35 Colo. App. 102, 529 P.2d 656 (1974).

Burden of proof. When fraud is pleaded, it is incumbent upon plaintiff to prove that defendant made the false representation with knowledge of its falsity or with utter disregard for its truth and falsity. Caldwell v. Kats, 38 Colo. App. 156, 555 P.2d 190 (1976), rev'd, 193 Colo. 384, 567 P.2d 371 (1977).

4-2-722. 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.

Source: L. 65: p. 1343, § 1. **C.R.S. 1963:** § 155-2-722.

4-2-723. 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 4-2-708 or section 4-2-713) 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.

Source: L. 65: p. 1343, § 1. **C.R.S. 1963:** § 155-2-723.

4-2-724. 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.

Source: L. 65: p. 1343, § 1. **C.R.S. 1963:** § 155-2-724.

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under The Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979).

4-2-725. Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within the time period prescribed in section 13-80-101, C.R.S. This period of limitation may not be varied by agreement of the parties.

(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) of this section 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 title becomes effective.

Source: L. 65: p. 1344, § 1. **C.R.S. 1963:** § 155-2-725. **L. 86:** (1) amended, p. 702, § 5, effective July 1.

Editor's note - Colorado legislative change: In subsection (1), Colorado substituted the three-year statute of limitations in § 13-80-101 for the four-year statute of limitations in the uniform act. The official text also provided that the parties could reduce the period of limitation to a minimum of one year, but they could not extend the period. Colorado has provided that the period of limitation may not be reduced or extended.

ANNOTATION

Subsection (1) prohibits shortening of limitation period. Avedon Eng'g, Inc. v. Seatex, 112 F. Supp. 2d 1090 (D. Colo. 2000).

Whether arbitration is an "action" subject to limitation period does not control the outcome, if a unilateral term shortening limitation period to one year creates surprise and hardship. Avedon Eng'g, Inc. v. Seatex, 112 F. Supp. 2d 1090 (D. Colo. 2000).

Running of statute of limitations for breach of express warranty. In an explicit warranty of a roof for five years the statute begins to run, not when the first leak is discovered, but when the party discovered or should have discovered that the roofer was unable or unwilling to maintain the roof as warranted. Smith v. Union Supply Co., 675 P.2d 333 (Colo. App. 1983).

Breach defined. When performance of a duty under a contract is due, any non-performance is a breach. D.O.M. Farms v. Nakamoto, 718 P.2d 262 (Colo. App. 1986).

Claims for breach of warranty governed by this section and not former § 13-80-127.5 since such claims are causes of action based upon contract. Ayala v. Joy Mfg. Co., 580 F. Supp. 521 (D. Colo. 1984).

Actions or claims for breach of express and implied warranties under the UCC are governed by this section and not former § 13-80-127.5. Wieser v. Firestone Tire & Rubber Co., 596 F. Supp. 1473 (D. Colo. 1984).

Persons not parties to the sale are still subject to the limitations period of this section. Wieser v. Firestone Tire & Rubber Co., 596 F. Supp. 1473 (D. Colo. 1984); Anderson v. Deere & Co., 622 F. Supp. 290 (D. Colo. 1985).

For the future performance exception of statute to apply, there must be a warranty that explicitly extends to future performance of the goods. Smith v. Union Supply Co., 675 P.2d 333 (Colo. App. 1983); Boyd v. A.O. Smith Harvestore Prods., 776 P.2d 1125 (Colo. App. 1989).

Warranty did not extend to future performance of goods and buyer's cause of action accrued when tender of delivery was made where manufacturer, by provisions of sale contract, did not explicitly promise that the product would not malfunction, only that, if it did, it would be

repaired or replaced. Boyd v. A.O. Smith Harvestore Prods., 776 P.2d 1125 (Colo. App. 1989).

Actions of seller toll statute of limitations. Where a seller delivered a good, made repeated assurances that the product would be repaired to meet contract performance requirements and made efforts to improve the product, those promises and efforts tolled the statute of limitations in subsection (1) until the seller denied liability and refused to make further efforts to improve the product. Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981).

Where seller guaranteed buyer that product would perform at a certain level of reliability for successive intervals until a specified time, this guarantee effectively delayed commencement of the limitations period for seeking a "true fix" remedy until that time. Curragh Queensland Mining v. Dresser Indus., 55 P.3d 235 (Colo. App. 2002).

Because this section contains no specific tolling provision and does not otherwise indicate to the contrary, the general tolling provisions of § 13-81-103 apply. Haberkorn by Haberkorn v. ROHM-GMBH, 709 P.2d 44 (Colo. App. 1985).

Applied in Glen Peck, Ltd. v. Fritsche, 651 P.2d 414 (Colo. App. 1981); Hawkinson v. A.H. Robins, Co., Inc., 595 F. Supp. 1290 (D. Colo. 1984); Richard O'Brien Companies v. Challenge-Cook Bros., 672 F. Supp. 466 (D. Colo. 1987).

ARTICLE 2.5

Leases

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PART 1

GENERAL PROVISIONS

4-2.5-101. Short title.

This article shall be known and may be cited as the "Uniform Commercial Code - Leases".

Source: L. 91: Entire article added, p. 272, § 1, effective July 1, 1992.

ANNOTATION

Law reviews. For article, "Personal Property Leases and the New UCC Article 2.5", see 21 Colo. Law. 1101 (1992).

4-2.5-102. Scope.

(1) This article 2.5 applies to any transaction, regardless of form, that creates a lease, and, in the case of a hybrid lease, this article 2.5 applies to the extent provided in subsection (2) of this section.

(2) In a hybrid lease:

(a) If the lease-of-goods aspects do not predominate:

(i) Only the provisions of this article 2.5 which relate primarily to the lease-of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply;

(ii) Section 4-2.5-209 applies if the lease is a finance lease; and

(iii) Section 4-2.5-407 applies to the promises of the lessee in a finance lease to the extent the promises are consideration for the right to possession and use of the leased goods; and

(b) If the lease-of-goods aspects predominate, this article 2.5 applies to the transaction but does not preclude application in appropriate circumstances of other law to aspects of the lease which do not relate to the lease of goods.

Source: L. 91: Entire article added, p. 272, § 1, effective July 1, 1992. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 528, § 12, effective August 7.

4-2.5-103. Definitions and index of definitions.

(1) In this article 2.5, unless the context otherwise requires:

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

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

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

(d) "Conforming" goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed twenty-five thousand dollars.

(f) "Fault" means wrongful act, omission, breach, or default.

(g) "Finance lease" means a lease with respect to which:

(i) The lessor does not select, manufacture or supply the goods;

(ii) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and

(iii) One of the following occurs:

(A) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

(B) The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

(C) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, of liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and

complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (section 4-2.5-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(h.5) "Hybrid lease" means a single transaction involving a lease of goods and:

(i) The provision of services;

(ii) A sale of other goods; or

(iii) A sale, lease, or license of property other than goods.

(i) "Installment lease contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each delivery is a separate lease" or its equivalent.

(j) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(k) "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this article. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(l) "Lease contract" means the total legal obligation that results from the lease agreement as affected by this article and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) "Leasehold interest" means the interest of the lessor or the lessee under a lease contract.

(n) "Lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.

(o) "Lessee in ordinary course of business" means a person who in good faith and without knowledge that the lease to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination, or cancellation of the lease contract.

(r) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

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

(t) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.

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

(v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.

(w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this article and the sections in which they appear are:

"Accessions".	Section 4-2.5-310 (1).
"Construction mortgage".	Section 4-2.5-309 (1)(d).
"Encumbrance".	Section 4-2.5-309 (1)(e).
"Fixtures".	Section 4-2.5-309 (1)(a).
"Fixture filing".	Section 4-2.5-309 (1)(b).
"Purchase money lease".	Section 4-2.5-309 (1)(c).

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

"Account".	Section 4-9-102 (a)(2).
"Between merchants".	Section 4-2-104 (3).
"Buyer".	Section 4-2-103 (1)(a).
"Chattel paper".	Section 4-9-102 (a)(11).
"Consumer goods".	Section 4-9-102 (a)(23).
"Document".	Section 4-9-102 (a)(30).
"Entrusting".	Section 4-2-403 (3).
"General intangible".	Section 4-9-102 (a)(42).
"Good faith".	Section 4-2-103 (1)(b).
"Instrument".	Section 4-9-102 (a)(47).
"Merchant".	Section 4-2-104 (1).
"Mortgage".	Section 4-9-102 (a)(55).
"Pursuant to commitment".	Section 4-9-102 (a)(71).
"Receipt".	Section 4-2-103 (1)(c).
"Sale".	Section 4-2-106 (1).
"Sale on approval".	Section 4-2-326.
"Sale or return".	Section 4-2-326.
"Seller".	Section 4-2-103 (1)(d).

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

Source: L. 91: Entire article added, p. 272, § 1, effective July 1, 1992. **L. 2001:** (3) amended, p. 1438, § 23, effective July 1. **L. 2002:** (3) amended, p. 1011, § 1, effective June 1. **L. 2006:** (1)(a) and (1)(o) amended, p. 493, § 16, effective September 1. **L. 2023:** IP(1) amended and (1)(h.5) added, (SB 23-090), ch. 136, p. 529, § 13, effective August 7.

Editor's note - Colorado legislative change: Colorado inserted the amount of "twenty-five thousand dollars" in the definition of "consumer lease" in paragraph (e) of subsection (1) of this section.

4-2.5-104. Leases subject to other law.

(1) A lease, although subject to this article, is also subject to any applicable:

(a) Certificate of title statute of this state (including vessels under article 13 of title 33, C.R.S., snowmobiles under article 14 of title 33, C.R.S., mobile homes under article 29 of title 38, C.R.S., aircraft under article 2 of title 41, C.R.S., and motor vehicles under article 6 or 12 of title 42, C.R.S.);

(b) Certificate of title statute of another jurisdiction (section 4-2.5-105); or

(c) Consumer protection statute of this state, or final consumer protection decision of a court of this state existing on July 1, 1991.

(2) In case of conflict between this article, other than sections 4-2.5-105, 4-2.5-304 (3) and 4-2.5-305 (3), and a statute or decision referred to in subsection (1) of this section, the statute or decision controls.

(3) Failure to comply with an applicable law has only the effect specified therein.

Source: L. 91: Entire article added, p. 277, § 1, effective July 1, 1992. **L. 2011:** (1)(a) amended, (SB 11-031), ch. 86, p. 242, § 2, effective August 10.

4-2.5-105. Territorial application of article to goods covered by certificate of title.

Subject to the provisions of sections 4-2.5-304 (3) and 4-2.5-305 (3), with respect to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (a) surrender of the certificate, or (b) four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

Source: L. 91: Entire article added, p. 277, § 1, effective July 1, 1992.

4-2.5-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

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

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

Source: L. 91: Entire article added, p. 278, § 1, effective July 1, 1992.

ANNOTATION

Private parties cannot enter into a forum selection clause simply to deprive a court of its subject matter jurisdiction. Vanderbeek v. Vernon Corp., 25 P.3d 1242 (Colo. App. 2000), aff'd, 50 P.3d 866 (Colo. 2002); Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155 (Colo. App. 2006).

4-2.5-107. Waiver or renunciation of claim or right after default.

Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a waiver or renunciation in a signed record delivered by the aggrieved party.

Source: L. 91: Entire article added, p. 278, § 1, effective July 1, 1992. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 529, § 14, effective August 7.

4-2.5-108. Unconscionability.

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

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that

unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2) of this section, the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2) of this section, the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) of this section is not controlling.

Source: L. 91: Entire article added, p. 278, § 1, effective July 1, 1992.

4-2.5-109. Option to accelerate at will.

(1) A term providing that one party or his or her successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he or she deems himself or herself insecure" or in words of similar import must be construed to mean that he or she has power to do so only if he or she in good faith believes that the prospect of payment or performance is impaired.

(2) With respect to a consumer lease, the burden of establishing good faith under subsection (1) of this section is on the party who exercised the power; otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised.

Source: L. 91: Entire article added, p. 279, § 1, effective July 1, 1992.

PART 2

FORMATION AND CONSTRUCTION OF LEASE CONTRACT

4-2.5-201. Statute of frauds.

(1) A lease contract is not enforceable by way of action or defense unless:

(a) The total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than one thousand dollars; or

(b) There is a record, signed by the party against whom enforcement is sought or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

(2) Any description of leased goods or of the lease term is sufficient and satisfies subsection (1)(b) of this section, whether or not it is specific, if it reasonably identifies what is described.

(3) A record is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subsection (1)(b) of this section beyond the lease term and the quantity of goods shown in the record.

(4) A lease contract that does not satisfy the requirements of subsection (1) of this section, but which is valid in other respects, is enforceable:

(a) If the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) With respect to goods that have been received and accepted by the lessee.

(5) The lease term under a lease contract referred to in subsection (4) of this section is:

(a) If there is a record signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court a lease term, the term so admitted; or

(c) A reasonable lease term.

Source: L. 91: Entire article added, p. 279, § 1, effective July 1, 1992. **L. 2023:** (1)(b), (3), and (5)(a) amended, (SB 23-090), ch. 136, p. 529, § 15, effective August 7.

4-2.5-202. Final written expression: Parol or extrinsic evidence.

(1) Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a record 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 or by course of performance; and

(b) By evidence of consistent additional terms unless the court finds the record to have been intended also as a complete and exclusive statement of the terms of the agreement.

Source: L. 91: Entire article added, p. 280, § 1, effective July 1, 1992. **L. 2023:** IP(1) and (1)(b) amended, (SB 23-090), ch. 136, p. 530, § 16, effective August 7.

4-2.5-203. Seals inoperative.

The affixing of a seal to a record evidencing a lease contract or an offer to enter into a lease contract does not render the record a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer.

Source: L. 91: Entire article added, p. 280, § 1, effective July 1, 1992. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 530, § 17, effective August 7.

4-2.5-204. Formation in general.

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

(2) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.

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

Source: L. 91: Entire article added, p. 281, § 1, effective July 1, 1992.

4-2.5-205. Firm offers.

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

Source: L. 91: Entire article added, p. 281, § 1, effective July 1, 1992. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 530, § 18, effective August 7.

4-2.5-206. Offer and acceptance in formation of lease contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.

(2) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

Source: L. 91: Entire article added, p. 281, § 1, effective July 1, 1992.

4-2.5-207. Course of performance or practical construction.

(1) If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.

(2) The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance,

course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.

(3) Subject to the provisions of section 4-2.5-208 on modification and waiver, course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

Source: L. 91: Entire article added, p. 281, § 1, effective July 1, 1992.

4-2.5-208. Modification, rescission, and waiver.

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

(2) A signed lease agreement that excludes modification or rescission except by a signed record may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.

(3) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) of this section, it may operate as a waiver.

(4) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Source: L. 91: Entire article added, p. 282, § 1, effective July 1, 1992. **L. 2023:** (2) amended, (SB 23-090), ch. 136, p. 530, § 19, effective August 7.

4-2.5-209. Lessee under finance lease as beneficiary of supply contract.

(1) The benefit of the supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as a part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.

(2) The extension of the benefit of a supplier's promises and of warranties to the lessee (section 4-2.5-209 (1)) does not: (i) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or (ii) impose any duty or liability under the supply contract on the lessee.

(3) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.

(4) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection (1) of this section, the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

Source: L. 91: Entire article added, p. 282, § 1, effective July 1, 1992.

4-2.5-210. Express warranties.

(1) Express warranties by the lessor are created as follows:

(a) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

(c) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty.

Source: L. 91: Entire article added, p. 283, § 1, effective July 1, 1992.

4-2.5-211. Warranties against interference and against infringement; lessee's obligation against infringement.

(1) There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest.

(2) Except in a finance lease there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.

(3) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications.

Source: L. 91: Entire article added, p. 283, § 1, effective July 1, 1992.

4-2.5-212. Implied warranty of merchantability.

(1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the description in the lease agreement;

(b) in the case of fungible goods, are of fair average quality within the description;

(c) are fit for the ordinary purposes for which goods of that type are used;

(d) run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within each unit and among all units involved;

(e) are adequately contained, packaged, and labeled as the lease agreement may require; and

(f) conform to any promises or affirmations of fact made on the container or label.

(3) Other implied warranties may arise from course of dealing or usage of trade.

Source: L. 91: Entire article added, p. 284, § 1, effective July 1, 1992.

4-2.5-213. Implied warranty of fitness for particular purpose.

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

Source: L. 91: Entire article added, p. 284, § 1, effective July 1, 1992.

4-2.5-214. Exclusion or modification of warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of section 4-2.5-202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

(2) Subject to subsection (3) of this section, to exclude or modify the implied warranty of merchantability or any part of it the language must mention "merchantability", be by a writing, and be conspicuous. Subject to subsection (3) of this section, to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose".

(3) Notwithstanding subsection (2) of this section, but subject to subsection (4) of this section,

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", or "with all faults", or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, and if in writing conspicuous;

(b) if the lessee before entering into the lease contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed; and

(c) an implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade.

(4) To exclude or modify a warranty against interference or against infringement (section 4-2.5-211) or any part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing, or usage of trade,

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

Source: L. 91: Entire article added, p. 284, § 1, effective July 1, 1992.

4-2.5-215. Cumulation and conflict of warranties express or implied.

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention the following rules apply:

(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.

Source: L. 91: Entire article added, p. 285, § 1, effective July 1, 1992.

4-2.5-216. Third-party beneficiaries of express and implied warranties.

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

Source: L. 91: Entire article added, p. 286, § 1, effective July 1, 1992.

Editor's note - Colorado legislative change: The uniform act provides three alternatives for this section. Colorado chose "ALTERNATIVE C" to parallel the changes previously made by Colorado in section 4-2-318.

4-2.5-217. Identification.

Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

(a) When the lease contract is made if the lease contract is for a lease of goods that are existing and identified;

(b) When the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or

(c) When the young are conceived, if the lease contract is for a lease of unborn young of animals.

Source: L. 91: Entire article added, p. 286, § 1, effective July 1, 1992.

4-2.5-218. Insurance and proceeds.

(1) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.

(2) If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.

(3) Notwithstanding a lessee's insurable interest under subsections (1) and (2) of this section, the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.

(4) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

(5) The parties by agreement may determine that one or more parties have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance.

Source: L. 91: Entire article added, p. 286, § 1, effective July 1, 1992.

4-2.5-219. Risk of loss.

(1) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.

(2) Subject to the provisions of this article on the effect of default on risk of loss (section 4-2.5-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(a) If the lease contract requires or authorizes the goods to be shipped by carrier

(i) and it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but

(ii) if it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.

(b) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods.

(c) In any case not within paragraph (a) or (b) of this subsection (2), the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

Source: L. 91: Entire article added, p. 287, § 1, effective July 1, 1992.

4-2.5-220. Effect of default on risk of loss.

(1) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(a) If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

(b) If the lessee rightfully revokes acceptance, he or she, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

(2) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract,

the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his or her effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

Source: L. 91: Entire article added, p. 287, § 1, effective July 1, 1992.

4-2.5-221. Casualty to identified goods.

If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to the lease agreement or section 4-2.5-219, then:

(a) If the loss is total, the lease contract is avoided; and

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

Source: L. 91: Entire article added, p. 288, § 1, effective July 1, 1992.

PART 3

EFFECT OF LEASE CONTRACT

4-2.5-301. Enforceability of lease contract.

Except as otherwise provided in this article, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods and against creditors of the parties.

Source: L. 91: Entire article added, p. 288, § 1, effective July 1, 1992.

4-2.5-302. Title to and possession of goods.

Except as otherwise provided in this article, each provision of this article applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee, or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent.

Source: L. 91: Entire article added, p. 288, § 1, effective July 1, 1992.

4-2.5-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.

(1) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to article 9 of this title by reason of section 4-9-109 (a)(3).

(2) Except as provided in subsection (3) of this section and section 4-9-407, a provision in a lease agreement that (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4) of this section, but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement that (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (4) of this section.

(4) Subject to subsection (3) of this section and section 4-9-407:

(a) If a transfer is made that is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in section 4-2.5-501 (2);

(b) If paragraph (a) of this subsection (4) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract,

(i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

(5) A transfer of "the lease" or of "all my rights under the lease", or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

(6) Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default.

(7) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous.

Source: L. 91: Entire article added, p. 288, § 1, effective July 1, 1992. **L. 2001:** Entire section R&RE, p. 1439, § 24, effective July 1.

4-2.5-304. Subsequent lease of goods by lessor.

(1) Subject to section 4-2.5-303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsection (2) of this section and section 4-2.5-527 (4), takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase, the lessor has that power even though:

(a) The lessor's transferor was deceived as to the identity of the lessor;

(b) The delivery was in exchange for a check which is later dishonored;

(c) It was agreed that the transaction was to be a "cash sale"; or

(d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that

lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor's and the existing lessee's rights to the goods, and takes free of the existing lease contract.

(3) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

Source: L. 91: Entire article added, p. 290, § 1, effective July 1, 1992.

4-2.5-305. Sale or sublease of goods by lessee.

(1) Subject to the provisions of section 4-2.5-303, a person claiming as a buyer or sublessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the transferor to that person had or had power to transfer, and except as provided in subsection (2) of this section and section 4-2.5-511 (4), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

(a) The lessor was deceived as to the identity of the lessee;

(b) The delivery was in exchange for a check which is later dishonored; or

(c) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(3) A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

Source: L. 91: Entire article added, p. 291, § 1, effective July 1, 1992.

Editor's note - Colorado legislative change: In the first sentence of subsection (1) of this section, Colorado made the following changes: 1) After the reference to "section 4-2.5-303,", inserted the words "a person claiming as"; 2) After the word "sublessee", deleted the words "from the lessee"; and 3) After the words "goods that the", deleted the word "lessee" and substituted the words "transferor to that person".

4-2.5-306. Priority of certain liens arising by operation of law.

If a person in the ordinary course of his [or her] business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest arising under the lease contract or this article of the party to the lease contract at whose instance the services or materials were furnished, but does not take priority over any such interest of the other party to the lease contract unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

Source: L. 91: Entire article added, p. 292, § 1, effective July 1, 1992.

Editor's note - Colorado legislative change: After the word "interest", Colorado deleted the words "of the lessor or lessee under the lease contract or this article" and substituted the words "arising under the lease contract or this article of the party to the lease contract at whose instance the services or materials were furnished, but does not take priority over any such interest of the other party to the lease contract".

4-2.5-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.

(1) Except as otherwise provided in section 4-2.5-306, a creditor of a lessee takes subject to the lease contract.

(2) Except as otherwise provided in subsection (3) of this section and in sections 4-2.5-306 and 4-2.5-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(3) Except as otherwise provided in sections 4-9-317, 4-9-321, and 4-9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.

Source: L. 91: Entire article added, p. 292, § 1, effective July 1, 1992. **L. 2001:** Entire section R&RE, p. 1440, § 25, effective July 1.

4-2.5-308. Special rights of creditors.

(1) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.

(2) Nothing in this article impairs the rights of creditors of a lessor if the lease contract (a) becomes enforceable, 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 (b) is made under circumstances which under any statute or rule of law apart from this article would constitute the transaction a fraudulent transfer or voidable preference.

(3) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

Source: L. 91: Entire article added, p. 293, § 1, effective July 1, 1992.

4-2.5-309. Lessor's and lessee's rights when goods become fixtures.

(1) In this section:

(a) Goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;

(b) A "fixture filing" is the filing, in the office where a record of a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of section 4-9-502 (a) and (b);

(c) A lease is a "purchase money lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;

(d) A mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates; and

(e) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

(2) Under this article a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this article of ordinary building materials incorporated into an improvement on land.

(3) This article does not prevent creation of a lease of fixtures pursuant to real estate law.

(4) The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

(a) The lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

(b) The interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.

(5) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:

(a) The fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable; or

(b) The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable; or

(c) The encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or

(d) The lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

(6) Notwithstanding subsection (4)(a) of this section but otherwise subject to subsections (4) and (5) of this section, the interest of a lessor of fixtures, including the lessor's residual interest,

is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

(7) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.

(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and this article, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this article, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

(9) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the article on secured transactions, article 9 of this title.

Source: L. 91: Entire article added, p. 293, § 1, effective July 1, 1992. **L. 2001:** (1)(b) amended, p. 1441, § 26, effective July 1.

4-2.5-310. Lessor's and lessee's rights when goods become accessions.

(1) Goods are "accessions" when they are installed in or affixed to other goods.

(2) The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in subsection (4) of this section.

(3) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection (4) of this section but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

(4) The interest of a lessor or a lessee under a lease contract described in subsection (2) or (3) of this section is subordinate to the interest of:

(a) A buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or

(b) A creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.

(5) When under subsections (2) or (3) and (4) of this section a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this article, or (b) if necessary to enforce his or her other rights and remedies under this article, remove the goods from the whole, free and clear of all interests in the whole, but he or she must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

Source: L. 91: Entire article added, p. 296, § 1, effective July 1, 1992.

4-2.5-311. Priority subject to subordination.

Nothing in this article prevents subordination by agreement by any person entitled to priority.

Source: L. 91: Entire article added, p. 297, § 1, effective July 1, 1992.

PART 4

PERFORMANCE OF LEASE CONTRACT: REPUDIATED, SUBSTITUTED AND EXCUSED

4-2.5-401. Insecurity: Adequate assurance of performance.

(1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he or she has not already received the agreed return.

(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed thirty days after receipt of a demand by the other party.

(4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.

(5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

Source: L. 91: Entire article added, p. 297, § 1, effective July 1, 1992.

4-2.5-402. Anticipatory repudiation.

If either party repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may:

(a) For a commercially reasonable time, await retraction of repudiation and performance by the repudiating party;

(b) Make demand pursuant to section 4-2.5-401 and await assurance of future performance adequate under the circumstances of the particular case; or

(c) Resort to any right or remedy upon default under the lease contract or this article, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction. In addition, whether or not the aggrieved party is pursuing one of the foregoing remedies, the aggrieved party

may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this article on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (section 4-2.5-524).

Source: L. 91: Entire article added, p. 297, § 1, effective July 1, 1992.

4-2.5-403. Retraction of anticipatory repudiation.

(1) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has canceled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under section 4-2.5-401.

(3) Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

Source: L. 91: Entire article added, p. 298, § 1, effective July 1, 1992.

4-2.5-404. Substituted performance.

(1) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:

(a) The lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent; and

(b) If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory.

Source: L. 91: Entire article added, p. 298, § 1, effective July 1, 1992.

4-2.5-405. Excused performance.

Subject to section 4-2.5-404 on substituted performance, the following rules apply:

(a) Delay in delivery or nondelivery in whole or in part by lessor or a supplier who complies with paragraphs (b) and (c) is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(b) If the causes mentioned in paragraph (a) affect only part of the lessor's or the supplier's capacity to perform, he or she shall allocate production and deliveries among his or her customers but at his or her option may include regular customers not then under contract for sale or lease as well as his or her own requirements for further manufacture. He or she may so allocate in any manner that is fair and reasonable.

(c) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under paragraph (b), of the estimated quota thus made available for the lessee.

Source: L. 91: Entire article added, p. 299, § 1, effective July 1, 1992.

4-2.5-406. Procedure on excused performance.

(1) If the lessee receives notification of a material or indefinite delay or an allocation justified under section 4-2.5-405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 4-2.5-510):

(a) Terminate the lease contract (section 4-2.5-505 (2)); or

(b) Except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(2) If, after receipt of a notification from the lessor under section 4-2.5-405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding thirty days, the lease contract lapses with respect to any deliveries affected.

Source: L. 91: Entire article added, p. 299, § 1, effective July 1, 1992.

4-2.5-407. Irrevocable promises: Finance leases.

(1) In the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.

(2) A promise that has become irrevocable and independent under subsection (1) of this section:

(a) Is effective and enforceable between the parties, by or against third parties including assignees of the parties; and

(b) Is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.

(3) This section does not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods.

Source: L. 91: Entire article added, p. 300, § 1, effective July 1, 1992.

PART 5

DEFAULT

SUBPART A

IN GENERAL

4-2.5-501. Default: Procedure.

(1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this article.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this article and, except as limited by this article, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this article.

(4) Except as otherwise provided in section 4-1-305 (a) or this article or the lease agreement, the rights and remedies referred to in subsections (2) and (3) of this section are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this part 5 as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this part 5 does not apply.

Source: L. 91: Entire article added, p. 300, § 1, effective July 1, 1992. **L. 2006:** (4) amended, p. 493, § 17, effective September 1.

4-2.5-502. Notice after default.

Except as otherwise provided in this article or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement.

Source: L. 91: Entire article added, p. 301, § 1, effective July 1, 1992.

4-2.5-503. Modification or impairment of rights and remedies.

(1) Except as otherwise provided in this article, the lease agreement may include rights and remedies for default 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.

(2) Resort to a remedy provided under this article or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this article.

(3) Consequential damages may be liquidated under section 4-2.5-504, or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation, alteration, or exclusion of damages where the loss is commercial is not prima facie unconscionable.

(4) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this article.

Source: L. 91: Entire article added, p. 301, § 1, effective July 1, 1992.

4-2.5-504. Liquidation of damages.

(1) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

(2) If the lease agreement provides for liquidation of damages, and such provision does not comply with subsection (1) of this section, or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this article.

(3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (section 4-2.5-525 or 4-2.5-526), the lessee is entitled to restitution of any amount by which the sum of his or her payments exceeds:

(a) The amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (1) of this section; or

(b) In the absence of those terms, twenty percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or five hundred dollars.

(4) A lessee's right to restitution under subsection (3) of this section is subject to offset to the extent the lessor establishes:

(a) A right to recover damages under the provisions of this article other than subsection (1) of this section; and

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

Source: L. 91: Entire article added, p. 302, § 1, effective July 1, 1992.

4-2.5-505. Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

(1) On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the canceling party also retains any remedy for default of the whole lease contract or any unperformed balance.

(2) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.

(3) Unless the contrary intention clearly appears, expressions of "cancellation", "rescission", or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.

(4) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this article for default.

(5) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

Source: L. 91: Entire article added, p. 302, § 1, effective July 1, 1992.

4-2.5-506. Statute of limitations.

(1) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within the time period prescribed in section 13-80-101, C.R.S. This period of limitation may not be varied by agreement of the parties.

(2) A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.

(3) If an action commenced within the time limited by subsection (1) of this section is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time

limited and within 6 months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before this article becomes effective.

Source: L. 91: Entire article added, p. 303, § 1, effective July 1, 1992.

Editor's note - Colorado legislative change: In the first sentence of subsection (1) of this section, after the words "must be commenced within", Colorado deleted the words "4 years after the cause of action accrued." and substituted the words "the time period prescribed in section 13-80-101, C.R.S.". Colorado deleted the second sentence (which read: "By the original lease contract the parties may reduce the period of limitation to not less than one year.") and substituted the following sentence: "This period of limitation may not be varied by agreement of the parties.". These changes parallel the changes that Colorado had previously made to section 4-2-725 (1).

4-2.5-507. Proof of market rent: time and place.

(1) Damages based on market rent (section 4-2.5-519 or 4-2.5-528) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times specified in sections 4-2.5-519 and 4-2.5-528.

(2) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this article is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.

(3) Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in this article offered by one party is not admissible unless and until he or she has given the other party notice the court finds sufficient to prevent unfair surprise.

(4) If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The

circumstances of the preparation of the report may be shown to affect its weight but not its admissibility.

Source: L. 91: Entire article added, p. 303, § 1, effective July 1, 1992.

SUBPART B

DEFAULT BY LESSOR

4-2.5-508. Lessee's remedies.

(1) If a lessor fails to deliver the goods in conformity to the lease contract (section 4-2.5-509) or repudiates the lease contract (section 4-2.5-402), or a lessee rightfully rejects the goods (section 4-2.5-509) or justifiably revokes acceptance of the goods (section 4-2.5-517), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 4-2.5-510), the lessor is in default under the lease contract and the lessee may:

(a) Cancel the lease contract (section 4-2.5-505 (1));

(b) Recover so much of the rent and security as has been paid and is just under the circumstances;

(c) Cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (sections 4-2.5-518 and 4-2.5-520), or recover damages for nondelivery (sections 4-2.5-519 and 4-2.5-520);

(d) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:

(a) If the goods have been identified, recover them (section 4-2.5-522); or

(b) In a proper case, obtain specific performance or replevy the goods (section 4-2.5-521).

(3) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in section 4-2.5-519 (3).

(4) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (section 4-2.5-519 (4)).

(5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to section 4-2.5-527 (5).

(6) Subject to the provisions of section 4-2.5-407, a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

Source: L. 91: Entire article added, p. 304, § 1, effective July 1, 1992.

4-2.5-509. Lessee's rights on improper delivery; rightful rejection.

(1) Subject to the provisions of section 4-2.5-510 on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.

(2) Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor.

Source: L. 91: Entire article added, p. 305, § 1, effective July 1, 1992.

4-2.5-510. Installment lease contracts: rejection and default.

(1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (2) of this section and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.

(2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

Source: L. 91: Entire article added, p. 305, § 1, effective July 1, 1992.

4-2.5-511. Merchant lessee's duties as to rightfully rejected goods.

(1) Subject to any security interest of a lessee (section 4-2.5-508 (5)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his or her possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) If a merchant lessee (subsection (1)) or any other lessee (section 4-2.5-512) disposes of goods, he or she is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding ten percent of the gross proceeds.

(3) In complying with this section or section 4-2.5-512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(4) A purchaser who purchases in good faith from a lessee pursuant to this section or section 4-2.5-512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this article.

Source: L. 91: Entire article added, p. 306, § 1, effective July 1, 1992.

4-2.5-512. Lessee's duties as to rightfully rejected goods.

(1) Except as otherwise provided with respect to goods that threaten to decline in value speedily (section 4-2.5-511) and subject to any security interest of a lessee (section 4-2.5-508 (5)):

(a) The lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;

(b) If the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in section 4-2.5-511; but

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

(2) Action by the lessee pursuant to subsection (1) of this section is not acceptance or conversion.

Source: L. 91: Entire article added, p. 306, § 1, effective July 1, 1992.

4-2.5-513. Cure by lessor of improper tender or delivery; replacement.

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

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

Source: L. 91: Entire article added, p. 307, § 1, effective July 1, 1992.

4-2.5-514. Waiver of lessee's objections.

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

(a) If, stated seasonably, the lessor or the supplier could have cured it (section 4-2.5-513); or

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

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

Source: L. 91: Entire article added, p. 307, § 1, effective July 1, 1992. **L. 2006:** (2) amended, p. 494, § 18, effective September 1.

4-2.5-515. Acceptance of goods.

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

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

(b) The lessee fails to make an effective rejection of the goods (section 4-2.5-509 (2)).

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

Source: L. 91: Entire article added, p. 308, § 1, effective July 1, 1992.

4-2.5-516. Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over.

(1) A lessee must pay rent for any goods accepted in accordance with the lease contract with due allowance for goods rightfully rejected or not delivered.

(2) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this article or the lease agreement for nonconformity.

(3) If a tender has been accepted:

(a) Within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified;

(b) Except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (section 4-2.5-211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

(c) The burden is on the lessee to establish any default.

(4) If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over the following apply:

(a) The lessee may give the lessor or the supplier, or both, written notice of the litigation. If the notice states that the person notified may come in and defend and that if the person notified does not do so that person will be bound in any action against that person by the lessee by any determination of fact common to the two litigations, then unless the person notified after seasonable receipt of the notice does come in and defend that person is so bound.

(b) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (section 4-2.5-211) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over control the lessee is so barred.

(5) Subsections (3) and (4) of this section apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (section 4-2.5-211).

Source: L. 91: Entire article added, p. 308, § 1, effective July 1, 1992.

4-2.5-517. Revocation of acceptance of goods.

(1) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if he or she has accepted it:

(a) Except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) Without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

(2) Except in the case of a finance lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee.

(3) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.

(4) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(5) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

Source: L. 91: Entire article added, p. 309, § 1, effective July 1, 1992.

4-2.5-518. Cover; substitute goods.

(1) After a default by a lessor under the lease contract of the type described in section 4-2.5-508 (1), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 4-2.5-504) or otherwise determined pursuant to agreement of the parties (sections 4-1-302 and 4-2.5-503), if a lessee's cover is by lease agreement substantially similar to the original lease agreement and the lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term that is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, (ii) interest on the amount computed under clause (i) of this subsection (2) from the date of the commencement of the term of the new lease agreement until the date of entry of judgment at the same rate used in computing present value, and (iii) any incidental or consequential damages less expenses saved in consequence of the lessor's default.

(3) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2) of this section, or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and section 4-2.5-519 governs.

Source: L. 91: Entire article added, p. 310, § 1, effective July 1, 1992. **L. 2006:** (2) amended, p. 494, § 19, effective September 1.

Editor's note - Colorado legislative change. In subsection (2) of this section, after the words "term of the original lease agreement,", Colorado inserted a new clause as follows: "(ii) interest on the amount computed under clause (i) of this subsection (2) from the date of the commencement of the term of the new lease agreement until the date of entry of judgment at the

same rate used in computing present value,". The second clause was then relettered as clause "(iii)".

4-2.5-519. Lessee's damages for nondelivery, repudiation, default and breach of warranty in regard to accepted goods.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 4-2.5-504) or otherwise determined pursuant to agreement of the parties (sections 4-1-302 and 4-2.5-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under section 4-2.5-518 (2), or is by purchase or otherwise, the lessee may recover from the lessor as damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, plus interest on the remainder so computed from the date of default until the date of entry of judgment at the same rate used in computing present value, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed if the lessee has accepted goods and given notification (section 4-2.5-516 (3)), the measure of damages for non-conforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

Source: L. 91: Entire article added, p. 310, § 1, effective July 1, 1992. **L. 2006:** (1) amended, p. 494, § 20, effective September 1.

Editor's note: Colorado legislative change. In subsection (1) of this section, after the words "by purchase or otherwise,", Colorado deleted the words "the measure of" and substituted the

words "the lessee may recover from the lessor as", and, after the words "original lease agreement,", Colorado inserted the words "plus interest on the remainder so computed from the date of default until the date of entry of judgment at the same rate used in computing present value,".

4-2.5-520. Lessee's incidental and consequential damages.

(1) Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.

(2) Consequential damages resulting from a lessor's default include:

(a) Any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

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

Source: L. 91: Entire article added, p. 311, § 1, effective July 1, 1992.

4-2.5-521. Lessee's right to specific performance or replevin.

(1) Specific performance may be decreed if the goods are unique or in other proper circumstances.

(2) A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.

(3) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

Source: L. 91: Entire article added, p. 312, § 1, effective July 1, 1992.

4-2.5-522. Lessee's right to goods on lessor's insolvency.

(1) Subject to subsection (2) of this section and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (section 4-2.5-217) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within ten days after receipt of the first installment of rent and security.

(2) A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract.

Source: L. 91: Entire article added, p. 312, § 1, effective July 1, 1992.

SUBPART C

DEFAULT BY LESSEE

4-2.5-523. Lessor's remedies.

(1) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 4-2.5-510), the lessee is in default under the lease contract and the lessor may:

(a) Cancel the lease contract (section 4-2.5-505 (1));

(b) Proceed respecting goods not identified to the lease contract (section 4-2.5-524);

(c) Withhold delivery of the goods and take possession of goods previously delivered (section 4-2.5-525);

(d) Stop delivery of the goods by any bailee (section 4-2.5-526);

(e) Dispose of the goods and recover damages (section 4-2.5-527), or retain the goods and recover damages (section 4-2.5-528), or in a proper case recover rent (section 4-2.5-529);

(f) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under subsection (1) of this section, the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default.

(3) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract:

(a) If the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in subsections (1) or (2) of this section; or

(b) If the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided in subsection (2) of this section.

Source: L. 91: Entire article added, p. 312, § 1, effective July 1, 1992.

4-2.5-524. Lessor's right to identify goods to lease contract.

(1) A lessor aggrieved under section 4-2.5-523 (1) may:

(a) Identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and

(b) Dispose of goods (section 4-2.5-527 (1)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

(2) If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner.

Source: L. 91: Entire article added, p. 313, § 1, effective July 1, 1992.

4-2.5-525. Lessor's right to possession of goods.

(1) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(2) After a default by the lessee under the lease contract of the type described in section 4-2.5-523 (1) or 4-2.5-523 (3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render

unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (section 4-2.5-527).

(3) The lessor may proceed under subsection (2) of this section without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

Source: L. 91: Entire article added, p. 314, § 1, effective July 1, 1992.

4-2.5-526. Lessor's stoppage of delivery in transit or otherwise.

(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under subsection (1) of this section, the lessor may stop delivery until:

(a) Receipt of the goods by the lessee;

(b) Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or

(c) Such an acknowledgment to the lessee by a carrier via reshipment or as a warehouse.

(3) (a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

Source: L. 91: Entire article added, p. 314, § 1, effective July 1, 1992. **L. 2006:** (2) amended, p. 494, § 21, effective September 1.

4-2.5-527. Lessor's rights to dispose of goods.

(1) After a default by a lessee under the lease contract of the type described in section 4-2.5-523 (1) or 4-2.5-523 (3)(a) or after the lessor refuses to deliver or takes possession of goods (section 4-2.5-525 or 4-2.5-526), or if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale, or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 4-2.5-504) or otherwise determined pursuant to agreement of the parties (sections 4-1-302 and 4-2.5-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term that is comparable to the then remaining term of the original lease agreement, (iii) interest on the amount computed under clause (ii) of this subsection (2) from the date of the commencement of the term of the new lease agreement until the date of entry of judgment at the same rate used in computing present value, and (iv) any incidental damages allowed under section 4-2.5-530, less expenses saved in consequence of the lessee's default.

(3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2) of this section, or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and section 4-2.5-528 governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this article.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (section 4-2.5-508 (5)).

Source: L. 91: Entire article added, p. 315, § 1, effective July 1, 1992. **L. 2006:** (2) amended, p. 495, § 22, effective September 1.

Editor's note - Colorado legislative change. In subsection (2) of this section, after the words "term of the original lease agreement,", Colorado inserted a new clause as follows: "(iii) interest

on the amount computed under clause (ii) of this subsection (2) from the date of the commencement of the term of the new lease agreement until the date of entry of judgment at the same rate used in computing present value,". The third clause was then relettered as clause "(iv)".

4-2.5-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (section 4-2.5-504) or otherwise determined pursuant to agreement of the parties (sections 4-1-302 and 4-2.5-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under section 4-2.5-527 (2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in section 4-2.5-523 (1) or 4-2.5-523 (3)(a), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, (iii) interest on the sum of the amounts described in clauses (i) and (ii) of this subsection (1) from the date of default to the date of entry of judgment at the same rate used in computing present value, and (iv) any incidental damages allowed under section 4-2.5-530, less expenses saved in consequence of the lessee's default.

(2) At his or her option, the lessor may recover from the lessee as damages for a default of the type described in subsection (1) of this section, in lieu of the damages recoverable under said subsection (1), the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under section 4-2.5-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

Source: L. 91: Entire article added, p. 316, § 1, effective July 1, 1992. **L. 2006:** (1) amended, p. 495, § 23, effective September 1.

Editor's note: Colorado legislative changes. (1) In subsection (1) of this section, after the words "the same lease term,", Colorado inserted a new clause as follows: "(iii) interest on the sum of the amounts described in clauses (i) and (ii) of this subsection (1) from the date of default

to the date of entry of judgment at the same rate used in computing present value,". The third clause was then relettered as clause "(iv)".

(2) In subsection (2) of this section, Colorado deleted the words "If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is" and substituted the words "At his or her option, the lessor may recover from the lessee as damages for a default of the type described in subsection (1) of this section, in lieu of the damages recoverable under said subsection (1),".

4-2.5-529. Lessor's action for the rent.

(1) After default by the lessee under the lease contract of the type described in section 4-2.5-523 (1), or 4-2.5-523 (3)(a) or, if agreed, after other default by the lessee, if the lessor complies with subsection (2) of this section, the lessor may recover from the lessee as damages:

(a) For goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (section 4-2.5-219), (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the total rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under section 4-2.5-530, less expenses saved in consequence of the lessee's default; and

(b) For goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under section 4-2.5-530, less expenses saved in consequence of the lessee's default.

(2) Except as provided in subsection (3) of this section, the lessor shall hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control.

(3) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (1) of this section. If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages is governed by section 4-2.5-527 or section 4-2.5-528 and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to section 4-2.5-527 or 4-2.5-528.

(4) Payment of the judgment for damages obtained pursuant to subsection (1) of this section entitles the lessee to the use and possession of the goods not then disposed of for the remaining lease term of and in accordance with the lease agreement.

(5) After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (section 4-2.5-402), a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for non-acceptance under sections 4-2.5-527 and 4-2.5-528.

Source: L. 91: Entire article added, p. 316, § 1, effective July 1, 1992.

4-2.5-530. Lessor's incidental damages.

Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.

Source: L. 91: Entire article added, p. 318, § 1, effective July 1, 1992.

4-2.5-531. Standing to sue third parties for injury to goods.

(1) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract (a) the lessor has a right of action against the third party, and (b) the lessee also has a right of action against the third party if the lessee:

(i) Has a security interest in the goods;

(ii) Has an insurable interest in the goods; or

(iii) Bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.

(2) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, his or her suit or settlement, subject to his or her own interest, is as a fiduciary for the other party to the lease contract.

(3) Either party with the consent of the other may sue for the benefit of whom it may concern.

Source: L. 91: Entire article added, p. 318, § 1, effective July 1, 1992.

4-2.5-532. Lessor's rights to residual interest.

In addition to any other recovery permitted by this article or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee.

Source: L. 91: Entire article added, p. 318, § 1, effective July 1, 1992.

4-2.5-533. Other measures of damages.

Notwithstanding any other provision of this article, except as otherwise provided with respect to damages liquidated in the lease agreement (section 4-2.5-504) or otherwise determined pursuant to agreement of the parties (sections 4-1-302 and 4-2.5-503), a party to a lease contract, at his or her option, may recover for the other party's default, in addition to or in lieu of the damages expressly authorized by this article, such additional or different damages as may be necessary to put such party in as good a position as if the other party had performed in accordance with the lease contract, determined in any reasonable manner.

Source: L. 91: Entire article added, p. 318, § 1, effective July 1, 1992. **L. 2006:** Entire section amended, p. 496, § 24, effective September 1.

Editor's note - Colorado legislative change. This section was added by Colorado; it has no counterpart in the uniform act.

ARTICLE 3

Negotiable Instruments

PART 1
GENERAL PROVISIONS AND DEFINITIONS

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PART 1

GENERAL PROVISIONS AND DEFINITIONS

4-3-101. Short title.

This article may be cited as "Uniform Commercial Code -- Negotiable Instruments".

Source: L. 94: Entire article R&RE, p. 839, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-101 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "Formal Requisites of Negotiability — The Negotiable Instruments Law Compared With the Proposed Commercial Code", see 26 Rocky Mt. L. Rev. 1 (1953). For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965). For article, "Article 3 of the Uniform Commercial Code and Colorado Negotiable Instruments Law", see 38 U. Colo. L. Rev. 22 (1965).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

The primary purpose of the adoption of this article was to remove the confusion of local laws and decisions by making the law uniform in the different states. Winton v. Sullivan, 104 Colo. 450, 91 P.2d 996 (1939) (decided under repealed CSA, C. 112, § 1 et seq., negotiable instruments law).

4-3-102. Subject matter.

(a) This article applies to negotiable instruments. It does not apply to money, to payment orders governed by article 4.5 of this title, or to securities governed by article 8 of this title.

(b) If there is conflict between this article and article 4 or 9 of this title, articles 4 and 9 govern.

(c) Regulations of the board of governors of the federal reserve system and operating circulars of the federal reserve banks supersede any inconsistent provision of this article to the extent of the inconsistency.

Source: L. 94: Entire article R&RE, p. 839, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-103 as it existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Negotiable instruments law is applicable only to negotiable instruments and the rights and duties arising thereunder. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954) (decided under repealed CSA, C. 112, § 1, negotiable instruments law).

N.I.L. did not apply to negotiable instruments made and delivered before it took effect. Hickman-Lunbeck Grocery Co. v. Hager, 75 Colo. 554, 227 P. 829 (1924) (decided under repealed laws antecedent to CSA, C. 112, § 195, negotiable instruments law).

Applied in Hollemon v. Murray, 666 P.2d 1107 (Colo. App. 1982).

4-3-103. Definitions.

(a) In this article:

(1) "Acceptor" means a drawee who has accepted a draft.

(2) "Drawee" means a person ordered in a draft to make payment.

(3) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.

(4) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(5) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.

(6) "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

(7) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an

instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this article or article 4 of this title.

(8) "Party" means a party to an instrument.

(9) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(10) "Prove" with respect to a fact means to meet the burden of establishing the fact (section 4-1-201 (b)(8)).

(11) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(b) Other definitions applying to this article and the sections in which they appear are:

"Acceptance"	Section 4-3-409
"Accommodated party"	Section 4-3-419
"Accommodation party"	Section 4-3-419
"Alteration"	Section 4-3-407
"Anomalous indorsement"	Section 4-3-205
"Blank indorsement"	Section 4-3-205
"Cashier's check"	Section 4-3-104
"Certificate of deposit"	Section 4-3-104
"Certified check"	Section 4-3-409
"Check"	Section 4-3-104
"Consideration"	Section 4-3-303
"Demand draft"	Section 4-3-104
"Draft"	Section 4-3-104
"Holder in due course"	Section 4-3-302
"Incomplete instrument"	Section 4-3-115
"Indorsement"	Section 4-3-204

"Indorser"	Section 4-3-204
"Instrument"	Section 4-3-104
"Issue"	Section 4-3-105
"Issuer"	Section 4-3-105
"Negotiable instrument"	Section 4-3-104
"Negotiation"	Section 4-3-201
"Note"	Section 4-3-104
"Payable at a definite time"	Section 4-3-108
"Payable on demand"	Section 4-3-108
"Payable to bearer"	Section 4-3-109
"Payable to order"	Section 4-3-109
"Payment"	Section 4-3-602
"Person entitled to enforce"	Section 4-3-301
"Presentment"	Section 4-3-501
"Reacquisition"	Section 4-3-207
"Special indorsement"	Section 4-3-205
"Teller's check"	Section 4-3-104
"Transfer of instrument"	Section 4-3-203
"Traveler's check"	Section 4-3-104
"Value"	Section 4-3-303

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

"Bank"	Section 4-4-105
"Banking day"	Section 4-4-104
"Clearing house"	Section 4-4-104
"Collecting bank"	Section 4-4-105
"Depositary bank"	Section 4-4-105
"Documentary draft"	Section 4-4-104

"Intermediary bank"	Section 4-4-105
"Item"	Section 4-4-104
"Payor bank"	Section 4-4-105
"Suspends payments"	Section 4-4-104

(d) In addition, article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article.

Source: L. 94: Entire article R&RE, p. 840, § 1, effective January 1, 1995. **L. 2001:** (b) amended, p. 865, § 2, effective August 8. **L. 2006:** (a)(10) amended, p. 496, § 25, effective September 1.

Editor's note: This section is similar to former § 4-3-102 as it existed prior to 1994.

Cross references: For the legislative declaration contained in the 2001 act amending subsection (b), see section 1 of chapter 244, Session Laws of Colorado 2001.

ANNOTATION

Annotator's note. Since § 4-3-103 is similar to § 4-3-102 and 4-3-118 as they existed prior to the repeal and reenactment of this article, effective January 1, 1995, see the annotations under former § 4-3-102 and § 4-3-118 in the 1992 replacement volume.

Negotiable instruments law is applicable only to negotiable instruments and the rights and duties arising thereunder. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954) (decided under repealed CSA, C. 112, § 1, negotiable instruments law).

N.I.L. did not apply to negotiable instruments made and delivered before it took effect. Hickman-Lunbeck Grocery Co. v. Hager, 75 Colo. 554, 227 P. 829 (1924) (decided under repealed laws antecedent to CSA, C. 112, § 195, negotiable instruments law).

Bad faith. For purposes of subsection (5), bad faith means actions in knowing or reckless disregard of customer's contractual rights and negligence alone does not constitute bad faith. Peregrine Homes v. Jefferson Bank & Trust, 713 P.2d 1342 (Colo. App. 1985).

Applied in Hollemon v. Murray, 666 P.2d 1107 (Colo. App. 1982).

4-3-104. Negotiable instrument.

(a) Except as provided in subsections (c) and (d) of this section, "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain: (i) an undertaking or power to give, maintain, or protect collateral to secure payment; (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor; (iv) a term that specifies the law that governs the promise or order; or (v) an undertaking to resolve in a specified forum a dispute concerning the promise or order.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a) of this section, except paragraph (1), and otherwise falls within the definition of "check" in subsection (f) of this section is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this article.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank, (ii) a cashier's check or teller's check, or (iii) a demand draft. An instrument may be a check even though it is described on its face by another term, such as "money order."

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.

(i) "Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term "traveler's check" or by a

substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

(k) (i) "Demand draft" means a writing not signed by the customer that is created by a third party under the purported authority of the customer for the purpose of charging the customer's account with a bank. A demand draft shall contain the customer's account number and shall contain any or all of the following:

(1) The customer's printed or typewritten name;

(2) A notation that the customer authorized the draft; or

(3) The statement "No signature required" or words to that effect.

(ii) A demand draft shall not include a check purportedly drawn by and bearing the signature of a fiduciary, as defined in section 4-3-307 (a)(1).

Source: L. 94: Entire article R&RE, p. 843, § 1, effective January 1, 1995. **L. 2001:** (f) amended and (k) added, p. 866, § 3, effective August 8. **L. 2023:** (a)(3) amended, (SB 23-090), ch. 136, p. 530, § 20, effective August 7.

Editor's note: This section is similar to former § 4-3-104 as it existed prior to 1994.

Cross references: (1) For other agreements affecting instrument, see § 4-3-117.

(2) For the legislative declaration contained in the 2001 act amending subsection (f) and enacting subsection (k), see section 1 of chapter 244, Session Laws of Colorado 2001.

ANNOTATION

I. General Consideration.

II. Negotiable Instrument - Requirements.

III. Negotiable Instrument - Types.

IV. Attorney Fees.

I. GENERAL CONSIDERATION.

Law reviews. For comment on Steward v. Pub. Indus. Bank appearing below, see 2 Rocky Mt. L. Rev. 200 (1930). For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2107 (1988).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Conditional language in promissory note referencing conditions in the bill of sale and covenants not to compete renders it nonnegotiable but does not make the note unenforceable. DBA Enter., Inc. v. Findlay, 923 P.2d 298 (Colo. App. 1996).

A note authorizing confession of judgment in the event of nonpayment does not render the note nonnegotiable. Axelson v. Dailey Coop. Co., 88 Colo. 555, 298 P. 957 (1931).

The authority to confess judgment is construed strictly against the party in whose favor it is given. Stewart v. Pub. Indus. Bank, 85 Colo. 546, 277 P. 782 (1929).

"Owing" construed as "due". Where a note was made payable on or before 12 months after date, to be paid in monthly installments, a provision permitting a judgment for amounts then "owing", was construed to permit a judgment for amounts then "due". Stewart v. Pub. Indus. Bank, 85 Colo. 546, 277 P. 782 (1929).

Note payable in installments is negotiable. A promissory note made payable on or before 12 months after date to be paid in monthly installments is negotiable, inasmuch as principal of note payable one year from date is "owing" when note is given but is not then "due". Stewart v. Pub. Indus. Bank, 85 Colo. 546, 277 P. 782 (1929).

A line of credit is not a negotiable instrument because it does not meet the "fixed amount" requirement under this section. Because the credit agreement at issue allows the borrowers to draw below and above the credit limit by repaying and re-borrowing, the amount the borrowers promised to pay could not be determined from the credit agreement. Therefore, the credit agreement does not reflect a promise or order to pay a "fixed amount" and is not a negotiable instrument. CadleRock Joint Venture v. Esperanza, 2021 COA 119, 500 P.3d 402.

Where the holder of a note payable in installments agrees to postpone subsequent installments upon the payment of pending interim installments, thereby extending the time of the installments, there is an accord and satisfaction without regard to the question of consideration for an extension where the debtor fulfills the requirements. French v. Commercial Credit Co., 99 Colo. 447, 64 P.2d 127 (1936).

Principal not altered as basis of interest. Provision in note that upon a contingency a portion of the note should be cancelled does not alter the principal amount of the note as the basis of interest computation. Colo. Herald Publ'g Co. v. Neuhaus, 117 Colo. 172, 184 P.2d 1011 (1947).

Renewal notes given by administratrix held not to change character of original indebtedness. Haley v. Austin, 74 Colo. 571, 223 P. 43 (1924).

Applied in State ex rel. State Banking Bd. v. First Nat'l Bank, 394 F. Supp. 979 (D.

Colo. 1975); W. Greeley Nat'l Bank v. Wygant, 650 P.2d 1339 (Colo. App. 1982).

II. NEGOTIABLE INSTRUMENT - REQUIREMENTS.

Construction of promissory note should be adopted which is favorable to validity of instrument. Metro. State Bank v. McNutt, 73 Colo. 291, 215 P. 151 (1923).

For a promissory note to be negotiable, and to pass to an indorsee thereof the protections afforded to a "holder in due course", it must contain both an unconditional promise to pay and a fixed or determinable date of payment. Bank of Kimball v. Rostek, 161 Colo. 584, 423 P.2d 579 (1967).

To be a negotiable instrument subject to the statutes governing such instruments, an instrument must contain an unconditional promise to pay a fixed amount of money on demand or at a definite time. If a written agreement makes an obligation to pay subject to an express condition, not payable on demand, the agreement is not a negotiable instrument, and the statutory provisions relating to negotiable instruments are inapplicable to the transaction. Reid v. Pyle, 51 P.3d 1064 (Colo. App. 2002).

Where plaintiff's obligation to pay was expressly conditioned on "the sale or transference" of the property, the promissory note was not a negotiable instrument. Reid v. Pyle, 51 P.3d 1064 (Colo. App. 2002).

A note conditioned on its face on services to be rendered and which is not to be paid until the object of the services is secured is nonnegotiable. Mulligan v. Smith, 13 Colo. App. 231, 57 P. 731 (1899).

Recitation that note is secured does not render a note nonnegotiable. A promissory note containing an unconditional promise to pay a definite amount on demand is not rendered nonnegotiable because it recites that it is secured by a quitclaim deed. First Nat'l Bank v. Mineral Farm Co., 17 Colo. App. 452, 68 P. 981 (1902).

Provisions for foreclosure. Where a negotiable note is secured by a deed of trust, provisions in the deed providing for foreclosure upon the grantor's failure to pay taxes and insurance do not render the note uncertain as to amount or time of payment. Frost v. Fisher, 13 Colo. App. 322, 58 P. 872 (1899).

Uncertainty as to time of payment of a note does not affect it as an enforceable contract between the parties thereto, although it makes it nonnegotiable. Simpson v. Baber, 74 Colo. 175, 220 P. 235 (1923).

The fact that a note does not contain the words "to order" or "to bearer" does not affect its negotiability. Patent Title Co. v. Stratton, 89 F. 174 (D. Colo. 1898).

III. NEGOTIABLE INSTRUMENT - TYPES.

A check is a species of bill of exchange, viz., that particular kind of a bill which is drawn on a bank and payable on demand. Van Buskirk v. State Bank, 35 Colo. 142, 83 P. 778 (1905).

A check is considered a thing of value. Updike v. People, 92 Colo. 125, 18 P.2d 472 (1933).

Where one issues a check there is an implied representation that there are sufficient funds in bank at the time to cover the check. Kilbourn v. W. Surety Co., 187 F.2d 567 (10th Cir. 1951).

A bank certificate of deposit is a negotiable instrument and subject to transfer. LeZotte v. Bank of Del Norte, 86 Colo. 136, 278 P. 606 (1929).

Instrument acknowledging existing debt is not promissory note. Shearer v. Shearer, 84 Colo. 234, 269 P. 19 (1928).

For purposes of a cashier's check, since the issuing bank is both the drawer and the drawee, the check becomes a promise by the bank to draw the amount of the check from its own resources and to pay the check upon demand. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

Thus, the issuance of a cashier's check constitutes an acceptance by the issuing bank and the cashier's check itself becomes the primary obligation of the bank. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

Once the bank issues and delivers the cashier's check to the payee, the transaction is complete as far as the payee is concerned. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

Because the issuing bank is obligated to pay the cashier's check upon presentment, a cashier's check is essentially the same as cash. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

Cashier's checks represent the unconditional obligation of the issuing bank to pay, and therefore, banks may not dishonor their cashier's checks once issued. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

IV. ATTORNEY FEES.

A negotiable instrument is not rendered nonnegotiable by provisions for attorney fees if not paid at maturity. Cowing v. Cloud, 16 Colo. App. 326, 65 P. 417 (1901).

A stipulation for attorney's fees is intended to protect the holder against loss, if the maker fails to fulfill his undertaking, and there is no reason why the latter may not contract to bear the result occasioned by his own default. Florence Oil Ref. Co. v. Hiawatha Gas, Oil, & Ref. Co., 55 Colo. 378, 135 P. 454 (1913).

Indemnification for collection expenses. A provision for a fixed amount for attorney fees is an agreement to indemnify the holder against expenses incurred in the employing of an attorney for the enforcement of collection when the maker fails to keep his agreement. Florence Oil Ref. Co. v. Hiawatha Gas, Oil, & Ref. Co., 55 Colo. 378, 135 P. 454 (1913).

The holder can only recover such part thereof as will reimburse him for the reasonable and necessary attorney fees he has been compelled to pay, or has become liable for, in enforcing the collection of the note. Florence Oil Ref. Co. v. Hiawatha Gas,

Oil, & Ref. Co., 55 Colo. 378, 135 P. 454 (1913).

Reasonableness of attorney fees is implicit in such an agreement. Where under the terms of a note, the holder is authorized to collect attorney fees for collection costs in case of default, implicit in such agreement is the recognition that such attorney fees will be reasonable, that is, commensurate with the actual labor and time expended by the attorney. Haffke v. Linker, 30 Colo. App. 61, 489 P.2d 1050 (1971).

Expenses incurred must be actual and bona fide expenses. Where a note provides for an attorney fee, and the holder of the note employs counsel, who successfully brings suit on the note, a reasonable fee fixed by the court may be included in the judgment. Such a provision amounts to an agreement to indemnify the holder of the note against expenses actually incurred, and the payment or obligation must be actual, bona fide, and reasonable. Luby v. Jefferson County Bank, 28 Colo. App. 441, 476 P.2d 292 (1970).

Attorney fees must be shown to have been incurred and reasonable. The holder of a note providing for the payment of reasonable attorney fees upon collection is entitled to the recovery of such a fee only upon a showing that the fee actually has been paid or incurred, and that the amount of the fee is reasonable. Haffke v. Linker, 30 Colo. App. 76, 489 P.2d 1047 (1971).

Necessity to prove that fees were actually incurred. Proof that attorney fees provided for by a promissory note have actually been paid or incurred is a material matter to be proven, because recompense is justified only as indemnity to the note holder; absent proof of payment or obligation, there is nothing to indemnify, and hence there can be no recovery. Reese v. Lietzan, 160 Colo. 253, 419 P.2d 959 (1966).

Fact of agreement does not establish reasonableness. Merely because there is an agreement as to a contingent fee between the holder and an attorney does not mean that the sum agreed upon is a reasonable fee to be assessed against the maker in an action to collect the balance due on default. Haffke v. Linker, 30 Colo. App. 61, 489 P.2d 1050 (1971).

Testimony of usual fee does not establish reasonableness. Testimony relating only to the usual fee arrangement between the holder of a note and an attorney employed by the holder to collect the note does not establish the reasonableness of an attorney fee which a holder is entitled to recover from the maker in a suit on a promissory note. Haffke v. Linker, 30 Colo. App. 76, 489 P.2d 1047 (1971).

4-3-105. Issue of instrument.

(a) "Issue" means:

(1) The first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person; or

(2) If agreed by the payee, the first transmission by the drawer to the payee of an image of an item and information derived from the item that enables the depositary bank to collect the item by transferring or presenting under federal law an electronic check.

(b) An unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker or drawer, but nonissuance is a defense. An instrument that is conditionally issued or is issued for a special purpose is binding on the maker or drawer, but failure of the condition or special purpose to be fulfilled is a defense.

(c) "Issuer" applies to issued and unissued instruments and means a maker or drawer of an instrument.

Source: L. 94: Entire article R&RE, p. 844, § 1, effective January 1, 1995. **L. 2023:** (a) amended, (SB 23-090), ch. 136, p. 531, § 21, effective August 7.

Editor's note: This section is similar to former § 4-3-102 as it existed prior to 1994.

ANNOTATION

Annotator's note. Since § 4-3-105 is similar to §§ 4-3-102 and 4-3-306 as they existed prior to the repeal and reenactment of this article, effective January 1, 1995, see the annotations under former §§ 4-3-102 and 4-3-106 in the 1992 replacement volume.

If a note is conditional no recovery can be had unless the condition has been performed or the performance waived. Abercrombie v. Bear Canon Coal Co., 86 Colo. 169, 279 P. 42 (1929); Bank of Kimball v. Rostek, 161 Colo. 584, 423 P.2d 579 (1967).

Evidence may be introduced to show that there was a conditional delivery of a check that has not been fulfilled where payee brings an action against the drawer, as such does not vary the terms of the written instrument, but shows want of an element essential to its character — unconditional delivery. Norman v. McCarthy, 56 Colo. 290, 138 P. 28 (1914).

Maker may show that note was never made or delivered unconditionally with the intention that it should be binding in all events according to its terms. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

A parol agreement made contemporary with the execution of a note that it is to be paid only from the maker's share of dividends of a corporate payee is a valid defense in an action on the note by an assignee after maturity. George v. Williams, 27 Colo. App. 400, 149 P. 837 (1915).

Applied in West Greeley Nat'l Bank v. Wygant, 650 P.2d 1339 (Colo. App. 1982).

4-3-106. Unconditional promise or order.

(a) Except as provided in this section, for the purposes of section 4-3-104 (a), a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.

(b) A promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

(c) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of section 4-3-104 (a). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of section 4-3-104 (a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

Source: L. 94: Entire article R&RE, p. 844, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-105 as it existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

If a note is conditional no recovery can be had unless the condition has been performed or the performance waived. Abercrombie v. Bear Canon Coal Co., 86 Colo. 169, 279 P. 42 (1929); Bank of Kimball v. Rostek, 161 Colo. 584, 423 P.2d 579 (1967).

Statement in a promissory note providing that the maker's obligation

under the note was subject to the conditions of the bill of sale and covenants not to compete rendered the note nonnegotiable but not unenforceable. DBA Enter., Inc. v. Findlay, 923 P.2d 298 (Colo. App. 1996).

Evidence may be introduced to show that there was a conditional delivery of a check that has not been fulfilled where payee brings an action against the drawer, as such does not vary the terms of the written instrument, but shows want of an element essential to its character — unconditional delivery. Norman v. McCarthy, 56 Colo. 290, 138 P. 28 (1914).

Maker may show that note was never made or delivered unconditionally with the intention that it should be binding in all events according to its terms. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

A parol agreement made contemporary with the execution of a note that it is to be paid only from the maker's share of dividends of a corporate payee is a valid defense in an action on the note by an assignee after maturity. George v. Williams, 27 Colo. App. 400, 149 P. 837 (1915).

Applied in West Greeley Nat'l Bank v. Wygant, 650 P.2d 1339 (Colo. App. 1982).

4-3-107. Instrument payable in foreign money.

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

Source: L. 94: Entire article R&RE, p. 844, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-107 as it existed prior to 1994.

4-3-108. Payable on demand or at definite time.

(a) A promise or order is "payable on demand" if it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment.

(b) A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of (i) prepayment, (ii)

acceleration, (iii) extension at the option of the holder, or (iv) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(c) If an instrument, payable at a fixed date, is also payable upon demand made before the fixed date, the instrument is payable on demand until the fixed date and, if demand for payment is not made before that date, becomes payable at a definite time on the fixed date.

Source: L. 94: Entire article R&RE, p. 845, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-108 and 4-3-109 as they existed prior to 1994.

ANNOTATION

I. General Consideration.

II. Acceleration.

III. Extension.

I. GENERAL CONSIDERATION.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

A note fixing no date for payment is payable on demand, as provided by this section. Thompson v. Hilleweart, 137 Colo. 107, 321 P.2d 623 (1958).

Suit may be filed and recovery had on a demand note without a formal demand, the filing of the suit constituting the demand. Thompson v. Hilleweart, 137 Colo. 107, 321 P.2d 623 (1958).

Where notes are payable on demand, the statute of limitations commences to run on the date of execution of such note. Kirby v. Bourg, 165 Colo. 500, 440 P.2d 151 (1968).

A note, secured by a chattel mortgage and payable "on demand after date", but containing a marginal notation when signed stating that note is due at a date six months later, is not due after date of execution, since the marginal notation must be construed with the mortgage as to a creditor with notice. Whittier v. First Nat'l Bank, 73 Colo. 153, 214 P. 536 (1923).

The words "temporary loan" following the word "due" do not fix a date for payment other than on demand, as such words are no part of the promise to pay, constituting nothing more than a reference for the holder, and, if omitted, would not impair or change the obligation. Thompson v. Hilleweart, 137 Colo. 107, 321 P.2d 623 (1958).

When a promissory note is payable on a future event that does not occur, the note is payable within a reasonable time. People v. Garnett, 725 P.2d 1149 (Colo. 1986).

Applied in West Greeley Nat'l Bank v. Wygant, 650 P.2d 1339 (Colo. App. 1982).

II. ACCELERATION.

A negotiable instrument is not rendered nonnegotiable by provisions for an option of payment before maturity. Cowing v. Cloud, 16 Colo. App. 326, 65 P. 417 (1901).

Provision for acceleration of maturity for nonpayment of installments or interest is recognized as valid by this section. Axelson v. Dailey Coop. Co., 88 Colo. 555, 298 P. 957 (1931).

Acceleration clauses premised upon default in payment are enforceable. Smith v. Certified Realty Corp., 41 Colo. App. 170, 585 P.2d 293 (1978), aff'd, 198 Colo. 222, 597 P.2d 1043 (1979).

Notice is required only where provided. Where a promissory note provides for acceleration in default of installments or interest payments, the maker is not entitled to notice of such a demand unless specifically provided for. Hendron v. Bolander, 101 Colo. 414, 74 P.2d 706 (1937).

Where a note contains an acceleration clause, the payee may waive this option by failing to exercise it or by accepting payments upon default in installments. Barday v. Steinbaugh, 130 Colo. 10, 272 P.2d 657 (1954).

Where a note contains an acceleration clause, the payee may be estopped. Where on an installment note with an acceleration clause, payments are customarily made and accepted after they are due, the holder is estopped to take advantage of the acceleration clause upon the failure to pay the remaining balance on the due date. Ashback v. Wenzel, 141 Colo. 35, 346 P.2d 295 (1959).

Acceleration clause in mortgage does not apply to note. A clause in a mortgage accelerating full payment of the principal upon failure to pay interest when due cannot be taken advantage of in an action on the note, inasmuch as such an acceleration clause accelerates the due date only in foreclosure proceedings. Spears v. Cook, 85 Colo. 318, 275 P. 907 (1929).

No right to cure default in suit on note only. Where suit after default in payment is on the note only and the creditor does not bring an action to foreclose on the security, the acceleration clause in the note is enforceable, and the debtor has no statutory or equitable right to cure the money default. Smith v. Certified Realty Corp., 41 Colo. App. 170, 585 P.2d 293 (1978), aff'd, 198 Colo. 222, 597 P.2d 1043 (1979).

III. EXTENSION.

Inclusion of an extension of time clause in a promissory note does not destroy the negotiable character of the note. Longmont Nat'l Bank v. Loukonen, 53 Colo. 489, 127 P. 947 (1912).

Where a note provides for an indefinite extension at the uncontrolled discretion of the maker, it is nonnegotiable. United States v. General Res., Ltd., 204 F. Supp. 872 (D. Colo. 1962).

Burden of proof where payee extends. Where a note contains a clause providing that the maker will agree to an extension of

time for payment and the payee executes an extension which tolls the statute of limitations, the payee has the burden of proving that the extension was made with the knowledge and consent of the maker. Am. Medical & Dental Ass'n v. Grant, 87 Colo. 183, 285 P. 1099 (1930).

Between the maker and payee of a note, an oral agreement for extending the time of payment is enforceable; such agreement is supported by sufficient consideration by a promise to pay interest during the time of extension. Drescher v. Fulham, 11 Colo. App. 62, 52 P. 685 (1898).

An oral agreement for extending the time of payment releases the surety from his obligation. Drescher v. Fulham, 11 Colo. App. 62, 52 P. 685 (1898).

4-3-109. Payable to bearer or to order.

(a) A promise or order is payable to bearer if it:

(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

(2) Does not state a payee; or

(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

(b) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person or (ii) to an identified person or order. A promise or order that is payable to order is payable to the identified person.

(c) An instrument payable to bearer may become payable to an identified person if it is specially indorsed pursuant to section 4-3-205 (a). An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to section 4-3-205 (b).

Source: L. 94: Entire article R&RE, p. 845, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-110 and 4-3-111 as they existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

A check payable to "the royal consulate of Italy" is not payable to bearer but to the foreign consul. Scala v. Miners & Merchants Bank, 64 Colo. 185, 171 P. 752 (1918) (decided under repealed laws antecedent to CSA, C. 112, § 9, negotiable instruments law).

Effect of treating order paper as bearer paper. When a drawer of a check names a specific payee, the check becomes order rather than bearer paper. If a bank chooses to treat such checks as bearer paper, it acts at its own peril and may be liable for negligence if it misapplies the proceeds of the check. Arvada Hardwood Floor Co. v. James, 638 P.2d 828 (Colo. App. 1981).

Applied in In re Miller, 666 F.3d 1255 (10th Cir. 2012).

4-3-110. Identification of person to whom instrument is payable.

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

(b) If the signature of the issuer of an instrument is made by automated means, such as a check-writing machine, the payee of the instrument is determined by the intent of the person who supplied the name or identification of the payee, whether or not authorized to do so.

(c) A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number. For the purpose of determining the holder of an instrument, the following rules apply:

(1) If an instrument is payable to an account and the account is identified only by number, the instrument is payable to the person to whom the account is payable. If an instrument is payable to an account identified by number and by the name of a person, the instrument is payable to the named person, whether or not that person is the owner of the account identified by number.

(2) If an instrument is payable to:

(i) A trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named;

(ii) A person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative;

(iii) A fund or organization that is not a legal entity, the instrument is payable to a representative of the members of the fund or organization; or

(iv) An office or to a person described as holding an office, the instrument is payable to the named person, the incumbent of the office, or a successor to the incumbent.

(d) If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.

Source: L. 94: Entire article R&RE, p. 845, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-116 and 4-3-117 as they existed prior to 1994.

ANNOTATION

I. General Consideration.

II. In Alternative.

III. Not in Alternative.

I. GENERAL CONSIDERATION.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

This section implies an exception to the parol evidence rule even if a negotiable instrument is clear on its face as to whom the payee is. Electrical Distribs., Inc. v. SFR, Inc., 166 F.3d 1074 (10th Cir. 1999).

A promissory note drawn to the order of "A or B" creates alternative and not joint payees. Reese v. Lietzan, 160 Colo. 253, 419 P.2d 959 (1966).

While there are cases in which the disjunctive "or" has been construed as the conjunctive "and" so as to create a joint rather than an alternative interest, unique and exceptional circumstances have always accompanied the result. Reese v. Leitzan, 160 Colo. 253, 419 P.2d 959 (1966).

Effect of treating order paper as bearer paper. When a drawer of a check names a

specific payee, the check becomes order rather than bearer paper. If a bank chooses to treat such checks as bearer paper, it acts at its own peril and may be liable for negligence if it misapplies the proceeds of the check. Arvada Hardwood Floor Co. v. James, 638 P.2d 828 (Colo. App. 1981).

II. IN ALTERNATIVE.

The phrase "and/or" in written instruments means either "and" or "or", or both. Denver-Metro Collections, Inc. v. Kleeman, 30 Colo. App. 218, 491 P.2d 64 (1971).

Where the payees of notes are listed as A "and/or" B, under the provisions of this section there would be no question of the authority of a singular payee to assign the notes, since where the phrase "and/or" is used, then either payee, or both, may enforce the note as written. Denver-Metro Collections, Inc. v. Kleeman, 30 Colo. App. 218, 491 P.2d 64 (1971).

III. NOT IN ALTERNATIVE.

Law reviews. For comment on Am. Nat'l Bank v. First Nat'l Bank appearing below, see 32 Dicta 185 (1955) and 27 Rocky Mt. L. Rev. 347 (1955).

Under common law and N.I.L. the negotiable instruments law adopted the common-law rule providing that where a check is payable to the order of two or more persons who are not partners, all of them had to indorse unless the one so doing had authority to indorse for the other payees, and this joint indorsement was necessary for a complete negotiation; where one of the payees failed to indorse, the negotiability of the check was completely destroyed. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954).

In the absence of a necessary indorsement by a co-payee the instrument is nonnegotiable and not subject to cashing. F. R. Orr Constr. Co. v. Ready Mixed Concrete Co., 28 Colo. App. 273, 472 P.2d 193 (1970).

Holder acquires only a chose in action. The failure of one of two joint payees to indorse destroys the negotiability of a check, and the holder of the check acquires only as an assignee of a nonnegotiable chose in action the interest of the payee who did indorse; as such an assignee, his interest in the proceeds of the check is to be determined. Skinner v. Mortgage Inv. Co., 165 Colo. 241, 438 P.2d 504 (1968). See Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954).

The drawee bank is authorized to pay out funds belonging to its depositor when, and only when, the check is indorsed by the payees therein, or by persons who have satisfied it or the bank to which the check is presented for payment of their right to the proceeds. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954).

In the absence of actual fault on the part of the drawee, its failure to observe the fact of the absence of the indorsement of one of the payees, due entirely to the fault or neglect of the holder, will not preclude its recovery. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954).

As a greater duty is imposed on the holder. The absence of an indorsement by

the holder is as serious, if not more so, than a forged indorsement; the first is easily discernible while the other is the result of an error in the identification of the payee. Consequently, if it is the duty of the bank cashing the check to know to a positive certainty the identity of the payee named therein and its failure so to do imposes a duty of reimbursing the drawee, it seems clear that the failure to secure the indorsement of all of the payees imposes an even greater duty on the holder. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954).

4-3-111. Place of payment.

Except as otherwise provided for items in article 4 of this title, an instrument is payable at the place of payment stated in the instrument. If no place of payment is stated, an instrument is payable at the address of the drawee or maker stated in the instrument. If no address is stated, the place of payment is the place of business of the drawee or maker. If a drawee or maker has more than one place of business, the place of payment is any place of business of the drawee or maker chosen by the person entitled to enforce the instrument. If the drawee or maker has no place of business, the place of payment is the residence of the drawee or maker.

Source: L. 94: Entire article R&RE, p. 847, § 1, effective January 1, 1995.

ANNOTATION

When a note is made payable at a bank, it is considered a sufficient presentment of it if it is actually in the bank at maturity, ready to be delivered to anyone who may be entitled to it on payment. Such is the general rule, whether the bank is the holder of the note or merely an agent for collection. De La Vergne v. Globe Printing Co., 27 Colo. App. 308, 148 P. 923 (1915) (decided under repealed laws antecedent to CSA, C. 112, § 87, negotiable instruments law).

4-3-112. Interest.

(a) Unless otherwise provided in the instrument, (i) an instrument is not payable with interest, and (ii) interest on an interest-bearing instrument is payable from the date of the instrument.

(b) Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest

payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues.

Source: L. 94: Entire article R&RE, p. 847, § 1, effective January 1, 1995.

4-3-113. Date of instrument.

(a) An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date. Except as provided in section 4-4-401 (c), an instrument payable on demand is not payable before the date of the instrument.

(b) If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder.

Source: L. 94: Entire article R&RE, p. 847, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-114 as it existed prior to 1994.

ANNOTATION

I. General Consideration.

II. Dating, Antedating, and Postdating.

III. Presumption as to Date.

I. GENERAL CONSIDERATION.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

II. DATING, ANTEDATING, AND POSTDATING.

Lack of timely presentment of check. Where stolen check bore a 1971 date and was not cashed until 1973, when the time for presentment had long since passed, the lack of timely presentment would not have destroyed its negotiability as the negotiability of an instrument is not affected by the fact that it is undated, antedated, or postdated. Thus, the stolen check indorsed by accused falls squarely within the terms of the forgery statute under which he was convicted. People v. Palmer, 189 Colo. 358, 540 P.2d 341 (1975).

The fact that an instrument is postdated does not render it void, but merely defers negotiability to a subsequent time. Gentry v. People, 166 Colo. 60, 441 P.2d 675 (1968) (decided under repealed § 95-1-12, C.R.S. 1963, negotiable instruments law).

Postdating of check does not make obligation conditional. The fact that a check is postdated does not qualify the check or make conditional the promissory obligation represented by the check. Esecson v. Bushnell, 663 P.2d 258 (Colo. App. 1983).

III. PRESUMPTION AS TO DATE.

Date presumption not applicable to fiduciary relationships. The general presumption of date of promissory notes is overcome by the specific presumption arising where there is a fiduciary relationship in which case the claimant must overcome, by evidence, the presumption of undue influence with which the transaction is tainted because of the existence of the fiduciary relationship. Arnold v. Abernethy, 134 Colo. 573, 307 P.2d 1106 (1957) (decided under repealed § 95-1-11, CRS 53, negotiable instruments law).

4-3-114. Contradictory terms of instrument.

If an instrument contains contradictory terms, type-written terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.

Source: L. 94: Entire article R&RE, p. 847, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-118 as it existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Parol evidence is admissible to determine if reformation of instrument is appropriate where misrepresentations of legal effect of contract by assignee's attorney was alleged. Boyles Bros. Drilling v. Orion Indus., Ltd., 761 P.2d 278 (Colo. App. 1988).

Applies only to terms of instrument itself and not to an extraneous matter appearing on a document. Pueblo Bank & Trust Co. v. McMartin, 31 Colo. App. 546, 506 P.2d 759 (1972).

Applicable where a single amount, such as an amount of principal, is intended to be expressed both in figures an in words and there is a conflict between the figures and the words, or an ambiguity in either the figures or the words used. Mees v. Canino, 31 Colo. App. 514, 503 P.2d 1036 (1972).

Where the word "renewed" is stamped across face of note, but handwritten words "stamped in error" appears next to stamp, and there is no evidence as to who made latter entry or when it was done, it is

error to instruct jury that written words on note are controlling. Pueblo Bank & Trust Co. v. McMartin, 31 Colo. App. 546, 506 P.2d 759 (1972).

When an installment note is written for $27,000 and the note states that the maker promises to pay "Two Hundred Twenty-Five" dollars, "said principal payable on the first day of each and every month commencing April 1, 1970," the amount is not controlled by the written figure but is in the principal amount of $27,000 and not $225. Mees v. Canino, 31 Colo. App. 514, 503 P.2d 1036 (1972).

4-3-115. Incomplete instrument.

(a) "Incomplete instrument" means a signed writing, whether or not issued by the signer, the contents of which show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers.

(b) Subject to subsection (c) of this section, if an incomplete instrument is an instrument under section 4-3-104, it may be enforced according to its terms if it is not completed, or according to its terms as augmented by completion. If an incomplete instrument is not an instrument under section 4-3-104, but, after completion, the requirements of section 4-3-104 are met, the instrument may be enforced according to its terms as augmented by completion.

(c) If words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument under section 4-3-407.

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

Source: L. 94: Entire article R&RE, p. 847, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-115 as it existed prior to 1994.

ANNOTATION

No ratification by principal. Where an agent gives a joint note of his principal and himself and deposits the money borrowed to the principal's credit, all without the principal's knowledge, to make good a shortage in the agent's account, there is no ratification by the principal, although the money is used for the principal's account. Rizzuto v. R. W. English Lumber Co., 44 Colo. 413, 98 P. 728 (1908) (decided under repealed laws antecedent to CSA, C. 112, § 15, negotiable instruments law).

4-3-116. Joint and several liability; contribution.

(a) Except as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

(b) Except as provided in section 4-3-419 (e) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

(c) Discharge of one party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection (b) of this section of a party having the same joint and several liability to receive contribution from the party discharged.

Source: L. 94: Entire article R&RE, p. 848, § 1, effective January 1, 1995.

ANNOTATION

Promissory note signed by two persons "I promise to pay" is joint and several. See Ullery v. Brohm, 20 Colo. App. 389, 79 P. 180 (1904) (decided under repealed laws antecedent to CSA, C. 112, § 17, negotiable instruments law).

4-3-117. Other agreements affecting instrument.

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

Source: L. 94: Entire article R&RE, p. 848, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-119 as it existed prior to 1994.

ANNOTATION

Reference to independent agreement used to be considered as destroying negotiability. Abercrombie v. Bear Canon Coal Co., 86 Colo. 169, 279 P. 42 (1929); Bank of Kimball v. Rostek, 161 Colo. 584, 423 P.2d 579 (1967) (decided under repealed § 95-1-1, C.R.S. 1963, and laws antecedent to CSA, C. 112, § 1, negotiable instruments law).

4-3-118. Statute of limitations.

(a) Except as provided in subsection (e) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.

(b) Except as provided in subsection (d) or (e) of this section, if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years.

(c) Except as provided in subsection (d) of this section, an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or ten years after the date of the draft, whichever period expires first.

(d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three years after demand for payment is made to the acceptor or issuer, as the case may be.

(e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within six years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within six years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this article and not governed by this section must be commenced within three years after the cause of action accrues.

Source: L. 94: Entire article R&RE, p. 848, § 1, effective January 1, 1995.

ANNOTATION

Law reviews. For article, "An Update of Appendices from Collecting Pre- and Post-Judgment Interest in Colorado", see 15 Colo. Law. 990 (1986).

A payable-on-demand promissory note that is a negotiable instrument is subject to the uniform commercial code's statute of limitations instead of § 13-80-103.5, which is a general statute of limitations on the enforcement of debts. This section is a more specific statute of limitations, reserved for negotiable instruments. Gunderson v. Weidner Holdings, LLC, 2019 COA 186, 463 P.3d 315.

Where there is a conflict over the applicable statute of limitations, the more specific statute of limitations should apply. Gunderson v. Weidner Holdings, LLC, 2019 COA 186, 463 P.3d 315.

Applied in Nagy v. Landau, 807 P.2d 1227 (Colo. App. 1990).

4-3-119. Notice of right to defend action.

In an action for breach of an obligation for which a third person is answerable over pursuant to this article or article 4 of this title, the defendant may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over. If the notice states (i) that the person notified may come in and defend and (ii) that failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the two litigations, the person notified is so bound unless after seasonable receipt of the notice the person notified does come in and defend.

Source: L. 94: Entire article R&RE, p. 849, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-803 as it existed prior to 1994.

ANNOTATION

Reference to independent agreement used to be considered as destroying negotiability. See Abercrombie v. Bear Canon Coal Co., 86 Colo. 169, 279 P. 42 (1929); Bank of Kimball v. Rostek, 161 Colo. 584, 423 P.2d 579 (1967) (decided

under repealed § 95-1-1, C.R.S. 1963, and laws antecedent to CSA, C. 112, § 1, negotiable instruments law).

PART 2

NEGOTIATION, TRANSFER, AND INDORSEMENT

4-3-201. Negotiation.

(a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

Source: L. 94: Entire article R&RE, p. 850, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-202 as it existed prior to 1994.

ANNOTATION

I. General Consideration.

II. Negotiation.

I. GENERAL CONSIDERATION.

Law reviews. For comment on Am. Nat'l Bank v. First Nat'l Bank appearing below, see 32 Dicta 185 (1955) and 27 Rocky Mt. L. Rev. 347 (1955). For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Former § 4-3-202 applied in Barclay Receivables v. Mtn. Majesty, Ltd., 903 P.2d 37 (Colo. App. 1995).

Applied in Pay Ctr., Inc. v. Milton, 632 P.2d 642 (Colo. App. 1981).

II. NEGOTIATION.

A promissory note payable to the order of a named person may be transferred by mere delivery; the assignee takes the legal title and may sue in his own name, but he takes subject to then-existing defenses of the maker. Best v. Rocky Mt. Nat'l Bank, 37 Colo. 149, 85 P. 1124 (1906); Bank of Bromfield v. McKinlay, 53 Colo. 279, 125 P. 493 (1912).

An allegation that the payee "indorsed and transferred" the note is a sufficient allegation of delivery. Louisville Coal Min. Co. v. Int'l Trust Co., 18 Colo. App. 345, 71 P. 898 (1903).

Where negotiated to third bank. Where one draws a check on a foreign bank and deposits it with his local bank, receiving credit therefor, and this bank in turn negotiates it to a third bank for a valuable consideration, there is a sale to the latter, and it can maintain suit on the check against the original drawer. See Union Nat'l Bank v. Maines-Hough Motor Co., 70 Colo. 132, 197 P. 753 (1921); Manatee County State Bank v. Bruen-Fisher Fruit Co., 70 Colo. 342, 201 P. 560 (1921); First Nat'l Bank v. Bruen-Fisher Fruit Co., 70 Colo. 345, 201 P. 561 (1921). But see First Nat'l Bank v. Fleming State Bank, 74 Colo. 309, 221 P. 891 (1923); Scully v. Denver Nat'l Bank, 76 Colo. 227, 230 P. 610 (1924).

Applied in Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954); In re Miller, 666 F.3d 1255 (10th Cir. 2012).

4-3-202. Negotiation subject to rescission.

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

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

Source: L. 94: Entire article R&RE, p. 850, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-207 as it existed prior to 1994.

4-3-203. Transfer of instrument; rights acquired by transfer.

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

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer,

directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

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

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

Source: L. 94: Entire article R&RE, p. 850, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-201 as it existed prior to 1994.

ANNOTATION

I. General Consideration.

II. Transfer.

I. GENERAL CONSIDERATION.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Applied in Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974); West Greeley Nat'l Bank v. Wygant, 650 P.2d 1339 (Colo. App. 1982); Hollemon v. Murray, 666 P.2d 1107 (Colo. App. 1982).

II. TRANSFER.

Transfer without indorsement vests same title as transferor. When no right of a creditor is involved, an instrument like a note may be transferred as a donation or for value by delivery without indorsement so as to vest in the transferee such title as the transferor had at least. Lane v. Lane, 57 Colo. 419, 140 P. 804 (1914). See Gumaer v. Sowers, 31 Colo. 164, 71 P. 1103 (1903); Bank of Bromfield v. McKinlay, 53 Colo. 279, 125 P. 493 (1912).

An indorsement by the payee is not a prerequisite to recovery by an assignee of a note, for if the transferor had a valid claim to the notes, the transferee would assume the same rights even though no formal indorsement by the transferor has taken place. Denver-Metro Collections, Inc. v. Kleeman, 30 Colo. App. 218, 491 P.2d 64 (1971); Pay Center, Inc. v. Milton, 632 P.2d 642 (Colo. App. 1981).

A transferee of a note may bring an action on the note even though unindorsed provided the note is delivered and he proves assignment of the note.

Denver-Metro Collections, Inc. v. Kleeman, 30 Colo. App. 218, 491 P.2d 64 (1971).

Assignment of guaranty. A guaranty that does not expressly forbid assignment is assignable without the guarantor's express consent. Republic Nat'l Bank v. Meridian Props., Inc., 530 F. Supp. 169 (D. Colo. 1982).

Although delivery is not made until trial date. An assignee can maintain its suit although the unindorsed notes are not delivered until the date of trial, as it would be elevating form over substance to require a new trial merely because the payee failed to deliver the notes before trial where he had assigned them to the assignee before such date. Denver-Metro Collections, Inc. v. Kleeman, 30 Colo. App. 218, 491 P.2d 64 (1971).

Uncontradicted testimony of oral assignment suffices. Where the payee specifically testifies that he had made an oral assignment to the assignee and no evidence is offered to contradict this testimony, such testimony is sufficient to support the trial court's finding that an assignment had been made to the assignee. Denver-Metro Collections, Inc. v. Kleeman, 30 Colo. App. 218, 491 P.2d 64 (1971).

Where a note is assigned by the payee after maturity and is thus shorn of immunity from all defenses which might have been urged against it before assignment, or notice thereof, by the maker while yet in the hands of the payee while it still retained its negotiable character, it is subject to any defense which would have been available had it been nothing more than a simple contract or chose in action, transferred by assignment First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914).

Transferee's rights on note. A transferee retains the right to sue on a note but is not aided by any presumption that he is entitled to recover and he takes the notes subject to all defenses and equities to which the notes were subject in the hands of the transferor. Pay Center, Inc. v. Milton, 632 P.2d 642 (Colo. App. 1981).

Applied in In re Miller, 666 F.3d 1255 (10th Cir. 2012).

4-3-204. Indorsement.

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

(b) "Indorser" means a person who makes an indorsement.

(c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

(d) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.

Source: L. 94: Entire article R&RE, p. 851, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-201, 4-3-202, and 4-3-203 as they existed prior to 1994.

ANNOTATION

Law reviews. For article, "One Year Review of Contracts", see 36 Dicta 19 (1959).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Under the negotiable instruments law an indorsement must have been written on the instrument or upon a paper attached thereto, and the signature of the indorser without additional words was a sufficient indorsement. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954).

Stapling indorsement to negotiable instrument is permanent attachment to checks so that it becomes "a part thereof". Lamson v. Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966 (1975).

It is not the written name of the payee on the note, but his "signature" which constitutes an indorsement. Marks v. Munson, 59 Colo. 440, 149 P. 440 (1915).

In an action on a note where an indorsement is denied by the answer, the mere production of the note by the plaintiff is insufficient; rather both the execution and indorsement must be proved. Marks v. Munson, 59 Colo. 440, 149 P. 440 (1915); Myrick v. Garcia, 138 Colo. 298, 332 P.2d 900 (1958).

Production of a note by the plaintiff is a prima facie title under a general denial. In an action on a promissory note by the indorsee, possession and production of the note by the plaintiff with an indorsement of the payee's name is prima facie evidence of title in the plaintiff where the title is at issue under a general denial. Gumaer v. Sowers, 31 Colo. 164, 71 P. 1103 (1903).

Indorsement must be written on behalf of holder. La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

The term "indorsement" is generally understood to mean the indorser's writing of his or her signature on the instrument or some designation identifying the indorsement on the instrument. A check simply inscribed "For deposit only" to an account other than the payee's account and without the payee's signature is not an effective "indorsement." Kelly v. Ctr. Bank & Trust Co., 794 P.2d 1037 (Colo. App. 1989).

A negotiable instrument may be indorsed by an authorized representative on behalf of the holder. First Nat. Bank v. Lohman, 827 P.2d 583 (Colo. App. 1992).

Former § 4-3-202 applied in Barclay Receivables v. Mtn. Majesty, Ltd., 903 P.2d 37 (Colo. App. 1995).

Allonge reflecting indorsement that was affixed to note constitutes an indorsement for purposes of subsection (a). In re Sandrin, 536 B.R. 309 (Bankr. D. Colo. 2015).

Where joint payees fail to indorse a check and a bank accepts such for deposit to the credit of one indorsing payee only, the negotiability of the check is destroyed, and subsequent holders are not holders in due course, but rather the relation of all parties thereafter is governed by rules of assignment. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954) (decided under repealed CSA, C. 112, § 32, negotiable instruments law).

Transferee for value, whether under transaction denoted an "assignment" or otherwise, was entitled to unqualified indorsement by the payee of the instrument transferred in absence of agreement to the contrary. Pierce v. DeZeeuw, 824 P.2d 97 (Colo. App. 1991).

Transferee for value, whether under transaction denoted an "assignment" or otherwise, was entitled to unqualified indorsement by the payee of the instrument transferred in absence of agreement to the contrary. Pierce v. DeZeeuw, 824 P.2d 97 (Colo. App. 1991).

A negotiable instrument may be indorsed by an authorized representative on behalf of the holder. First Nat. Bank v. Lohman, 827 P.2d 583 (Colo. App. 1992).

In an action on a note where an indorsement is denied by the answer, the mere production of the note by a party is insufficient; both the execution and indorsement must be proved. Marks v. Munson, 59 Colo. 440 (1915); Myrick v. Garcia, 138 Colo. 298, 332 P.2d 900 (1958).

Purported assignments of a note did not constitute negotiations of the note because the indorsements were not "made on" or "affixed to" the original note as required by subsection (a). In re Sandrin, 536 B.R. 309 (Bankr. D. Colo. 2015).

Indorsement "Demand, notice and protest waived. Payment guaranteed" held to be a surety or accommodation party. See Winton v. Sullivan, 104 Colo. 450, 91 P.2d 996 (1939).

4-3-205. Special indorsement; blank indorsement; anomalous indorsement.

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a "special indorsement." When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. The principles stated in section 4-3-110 apply to special indorsements.

(b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a "blank indorsement." When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

(c) The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable.

(d) "Anomalous indorsement" means an indorsement made by a person who is not the holder of the instrument. An anomalous indorsement does not affect the manner in which the instrument may be negotiated.

Source: L. 94: Entire article R&RE, p. 851, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-204 as it existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Where an agent who receives checks is authorized to indorse them in blank and deposit them to his principal's credit in the principal's bank and the bank has no knowledge of limitation upon the authority of the agent to indorse the checks only when deposited for the principal's credit, and the agent indorses and cashes a number of these checks for his own use appropriating the money, which checks the bank also pays, the bank is not liable to the principal for the checks thus appropriated by his agent. And that the fact that such checks are indorsed by other persons in blank following the indorsement by the agent for the principal while the checks deposited in bank to the principal's credit are indorsed only by the agent would not charge the bank with notice of the limitation upon the agent's authority. Wedge Mines Co. v. Denver Nat'l Bank, 19 Colo. App. 182, 73 P. 873 (1903).

The legal effect of a blank indorsement on a promissory note cannot be varied by

parol evidence, and all testimony in regard to a parol agreement between the indorser and indorsee contemporaneous with such indorsement is incompetent. Torbert v. Montague, 38 Colo. 325, 87 P. 1145 (1906).

Addition by holder of the words "deposit only" to indorser's blank indorsement neither changed blank indorsement into a special indorsement, nor altered the effect of the blank indorsement, but was in fact a restrictive indorsement by holder which imposed a duty upon depository bank to honor holder's restrictive indorsement. La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

4-3-206. Restrictive indorsement.

(a) An indorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument.

(b) An indorsement stating a condition to the right of the indorsee to receive payment does not affect the right of the indorsee to enforce the instrument. A person paying the instrument or taking it for value or collection may disregard the condition, and the rights and liabilities of that person are not affected by whether the condition has been fulfilled.

(c) If an instrument bears an indorsement (i) described in section 4-4-201 (b), or (ii) in blank or to a particular bank using the words "for deposit," "for collection," or other words indicating a purpose of having the instrument collected by a bank for the indorser or for a particular account, the following rules apply:

(1) A person, other than a bank, who purchases the instrument when so indorsed converts the instrument unless the amount paid for the instrument is received by the indorser or applied consistently with the indorsement.

(2) A depositary bank that purchases the instrument or takes it for collection when so indorsed converts the instrument unless the amount paid by the bank with respect to the instrument is received by the indorser or applied consistently with the indorsement.

(3) A payor bank that is also the depositary bank or that takes the instrument for immediate payment over the counter from a person other than a collecting bank converts the instrument unless the proceeds of the instrument are received by the indorser or applied consistently with the indorsement.

(4) Except as otherwise provided in paragraph (3) of this subsection (c), a payor bank or intermediary bank may disregard the indorsement and is not liable if the proceeds of the instrument are not received by the indorser or applied consistently with the indorsement.

(d) Except for an indorsement covered by subsection (c) of this section, if an instrument bears an indorsement using words to the effect that payment is to be made to the indorsee as

agent, trustee, or other fiduciary for the benefit of the indorser or another person, the following rules apply:

(1) Unless there is notice of breach of fiduciary duty as provided in section 4-3-307, a person who purchases the instrument from the indorsee or takes the instrument from the indorsee for collection or payment may pay the proceeds of payment or the value given for the instrument to the indorsee without regard to whether the indorsee violates a fiduciary duty to the indorser.

(2) A subsequent transferee of the instrument or person who pays the instrument is neither given notice nor otherwise affected by the restriction in the indorsement unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of fiduciary duty.

(e) The presence on an instrument of an indorsement to which this section applies does not prevent a purchaser of the instrument from becoming a holder in due course of the instrument unless the purchaser is a converter under subsection (c) of this section or has notice or knowledge of breach of fiduciary duty as stated in subsection (d) of this section.

(f) In an action to enforce the obligation of a party to pay the instrument, the obligor has a defense if payment would violate an indorsement to which this section applies and the payment is not permitted by this section.

Source: L. 94: Entire article R&RE, p. 852, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-205 and 4-3-206 as they existed prior to 1994.

ANNOTATION

I. General Consideration.

II. Negotiation not Prevented.

III. Intermediary or Payor Bank.

I. GENERAL CONSIDERATION.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Because of statute. Unrestricted indorsements cannot be varied either by parol evidence or evidence of custom in business for the reason that the statute definitely defines their meaning and controls their effect. Interstate Trust Co. v. United States Nat'l Bank, 67 Colo. 6, 185 P. 260 (1919).

An unrestricted indorsement cannot be varied or changed by parol evidence.

Shaw v. Brady, 80 Colo. 337, 251 P. 532 (1926).

Or evidence of custom. Interstate Trust Co. v. United States Nat'l Bank, 67 Colo. 6, 185 P. 260 (1919).

Latter special indorsement superseded restrictive indorsement. Where a depository bank specially indorsed a check to the plaintiff, who became a holder in his own right, payment by the maker to the plaintiff was not contrary to a restrictive indorsement "pay any bank", because the latter special indorsement superseded the restrictive indorsement and such action by the depository bank was the equivalent of a constructive cancellation. Thus, any satisfaction to the ensuing holder was not inconsistent with the terms of the previous restrictive indorsement. Lamson v. Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966 (1975).

Addition by holder of the words "deposit only" to indorser's blank indorsement neither changed blank indorsement into a special indorsement, nor altered the effect of the blank indorsement, but was in fact a restrictive indorsement by holder which imposed a duty on depository bank to honor holder's restrictive indorsement. La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

Indorsement directing payment "to any bank — previous indorsements guaranteed" considered not restrictive. Interstate Trust Co. v. United States Nat'l Bank, 67 Colo. 6, 185 P. 260 (1919).

Addition by holder of the words "deposit only" to indorser's blank indorsement neither changed blank indorsement into a special indorsement, nor altered the effect of the blank indorsement, but was in fact a restrictive indorsement by holder which imposed a duty on depository bank to honor holder's restrictive indorsement. La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

Indorsement "for deposit" was restrictive and imposed duty upon depository bank to not deposit funds in any account other than the indorser's account. Travis v. La Junta State Bank, 694 P.2d 350 (Colo. App. 1984).

This section defines a "trust" restrictive indorsement. Walter E. Heller & Co. v. Mesa Bldg. Prods. Co., 233 F. Supp. 434 (D. Colo. 1964).

II. NEGOTIATION NOT PREVENTED.

Under N.I.L. legal title vested with a restrictive indorsement. Walter E. Heller & Co. v. Mesa Bldg. Prods. Co., 233 F. Supp. 434 (D. Colo. 1964) (indorsee); Barnes v. Cherry Creek Nat'l Bank, 163 Colo. 414, 431 P.2d 471 (1967) (indorser).

But under UCC negotiability is not destroyed by mere addition of a restrictive indorsement. La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

Negotiability was destroyed. Barnes v. Cherry Creek Nat'l Bank, 163 Colo. 414, 431 P.2d 471 (1967).

With bank receiving such in deposit becoming an agent for collection. Barnes v. Cherry Creek Nat'l Bank, 163 Colo. 414, 431 P.2d 471 (1967).

Liable for paying impostor. Barnes v. Cherry Creek Nat'l Bank, 163 Colo. 414, 431 P.2d 471 (1967).

III. INTERMEDIARY OR PAYOR BANK.

Subsection (2) under former law not in conflict with requirements of § 4-4-205 (2) under former law. The clear import of both subsection (2) and § 4-4-205 (2) is that, while intermediary banks and nondepository payor banks may ignore all restrictive indorsements except those of the bank's immediate transferor, depository banks may not so ignore restrictive indorsements. La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

4-3-207. Reacquisition.

Reacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise. A former holder who reacquires the instrument may cancel indorsements made after the reacquirer first became a holder of the instrument. If the cancellation causes the instrument to be payable to the reacquirer or to bearer, the reacquirer may negotiate the instrument. An indorser whose indorsement is canceled is discharged, and the discharge is effective against any subsequent holder.

Source: L. 94: Entire article R&RE, p. 853, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-208 as it existed prior to 1994.

Cross references: For the effect of discharge against a holder in due course, see § 4-3-601; for payment or satisfaction, see § 4-3-602; for cancellation and renunciation, see § 4-3-604.

ANNOTATION

Holder of a note indorsed in blank may strike out all indorsements subsequent to that of the payee and hold directly from him. Marks v. Munson, 59 Colo. 440, 149 P. 440 (1915) (decided under repealed laws antecedent to CSA, C. 112, § 48, negotiable instruments law).

PART 3

ENFORCEMENT OF INSTRUMENTS

4-3-301. Person entitled to enforce instrument.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 4-3-309 or 4-3-418 (d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Source: L. 94: Entire article R&RE, p. 853, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-301 as it existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

A note drawn to alternative, not joint, payees can be discharged only by a holder of the instrument. Reese v. Lietzan, 160 Colo. 253, 419 P.2d 959 (1966).

A holder of a note may sue upon it even if held as collateral to another which is unpaid. Rogers v. First State Bank, 79 Colo. 84, 243 P. 637 (1926); Smith v. Weindrop, 833 P.2d 856 (Colo. App. 1992).

If holder does not have entire interest. A holder may bring suit on a promissory note even if he does not have the entire interest in it. Retallic v. Dickson, 75 Colo. 123, 224 P. 1054 (1924).

If holder paid nothing. The indorsee of a promissory note is entitled to an action thereon against the maker though he paid nothing for it as well as against a prior indorser. Sykes v. Kruse, 49 Colo. 560, 113 P. 1013 (1914).

Payee, not the owner, cannot by suit cut off defense which maker might have against real party in interest. Retallic v. Dickson, 75 Colo. 123, 224 P. 1054 (1924).

Bank not authorized to enforce note because authorized agent already accepted a payoff of the note. Payment to an authorized agent of the holder has the same legal effect as payment to the holder. Section contains no explicit requirement that payment must be made only to the holder of an instrument, and the common law of agency supplements the UCC. Citywide Banks v. Armijo, 313 P.3d 647 (Colo. App. 2011).

No judgment can be legally rendered against the makers of a promissory note in favor of the original payee who has parted with his title thereto before the bringing of the action where there is nothing to show there had been a redelivery to him before the beginning of the action or at the time of the trial. Shaw v. Brady, 80 Colo. 337, 251 P. 532 (1926).

Plaintiff's possession of a promissory note is prima facie evidence of ownership although indorsed by him as against a general objection that his complaint does not state any cause of action. Gumaer v. Jackson, 37 Colo. 39, 86 P. 885 (1906).

The holder of a promissory note may set off the amount thereof in an action by the maker against him, even though he purchased the note solely for the purpose of so applying it and regardless of the fact that he acquired the note at a great discount. Holick v. Stokes, 53 Colo. 385, 127 P. 143 (1912).

Applied in Commercial Credit Corp. v. Univ. Nat'l Bank, 590 F.2d 849 (10th Cir. 1979); La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

4-3-302. Holder in due course.

(a) Subject to subsection (c) of this section and section 4-3-106 (d) "holder in due course" means the holder of an instrument if:

(1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in section 4-3-306, and (vi) without notice that any party has a defense or claim in recoupment described in section 4-3-305 (a).

(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a) of this section, but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding,

(ii) by purchase as part of a bulk transaction not in ordinary course of business of the transferor, or (iii) as the successor in interest to an estate or other organization.

(d) If, under section 4-3-303 (a)(1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

(e) If (i) the person entitled to enforce an instrument has only a security interest in the instrument and (ii) the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.

(f) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

(g) This section is subject to any law limiting status as a holder in due course in particular classes of transactions.

Source: L. 94: Entire article R&RE, p. 853, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-302 as it existed prior to 1994.

Cross references: For the effect of the "Uniform Consumer Credit Code" on holder in due course, see § 5-3-303.

ANNOTATION

I. General Consideration.

III. Payee May Be H.D.C.

IV. When Not H.D.C.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Judicial Limitations on Holder in Due Course Claims", see 42 U. Colo. L. Rev. 439 (1971).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Applied in Hollemon v. Murray, 666 P.2d 1107 (Colo. App. 1982); La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

II. HOLDER IN DUE COURSE.

A. In General.

B. For Value.

C. In Good Faith.

D. Without Notice.

E. Facts Not Constituting Notice.

F. Recordation Not Notice.

G. Opportunity to Act.

A. In General.

It is axiomatic that in order for one to be a holder in due course he must first be a holder. Walter E. Heller & Co. v. Mesa Bldg. Prods. Co., 233 F. Supp. 434 (D. Colo. 1964).

All presumptions under this section are in favor of the holder of an instrument. Civic Fin. Co. v. Meintzer, 137 Colo. 572, 328 P.2d 379 (1958).

Person can qualify as holder in due course through constructive possession. Person was holder in due course of check deposited into its bank account by authorized agent of another person despite fact that agent wrote check for own benefit. Physical possession of check was not required. Georg v. Metro Fixtures Contractors, Inc., 178 P.3d 1209 (Colo. 2008).

A payee on an instrument who deals directly with the drawer or issuer is not typically entitled to assert the rights of a holder in due course. Flatiron Linen, Inc. v. First Amer. State Bank, 1 P.3d 244 (Colo. App. 1999), rev'd on other grounds, 23 P.3d 1209 (Colo. 2001).

Allegation that payee was "holder in due course" is not a mere conclusion of law insufficient to state a claim for relief. Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974).

Burden of proof is on holder where title is defective. When it is shown that the title of any individual who has negotiated a promissory note is defective, the burden is on the holder to prove that he acquired the title as a holder in due course. Delaney v. Brownwood, 73 Colo. 83, 213 P. 578 (1923).

Assignee of negotiable instrument suing thereon need not plead specific facts from which his assignor derives the status of a holder in due course. Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974).

When a directed verdict may be entered. Where there is not sufficient evidence before the jury to contradict plaintiff's testimony that he is a holder in due course, a directed verdict is right. Neal v. Wilson County Bank, 83 Colo. 118, 263 P. 18 (1927). See Miller v. Farmers' Bank & Trust Co., 82 Colo. 373, 260 P. 112 (1927).

Where bank acquired a single promissory note from a trust, transaction could not be considered a bulk purchase under subsection (3)(c) because the successor organization did not acquire a substantial part of the paper held by the predecessor organization; and since it was not a bulk transaction, the purchase did not preclude the bank from becoming a holder

in due course. First Nat. Bank v. Lohman, 827 P.2d 583 (Colo. App. 1992).

If the signers on a note are able to prove close connectedness between the original payee of the note and an assignee thereof, then such relationship effectively invalidates the assignee's claim to a holder in due course status and allows the defenses available against the payee also to be asserted against the assignee. Stotler v. Geibank Indus. Bank, 827 P.2d 608 (Colo. App. 1992).

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If the signers on a note are able to prove close connectedness between the original payee of the note and an assignee thereof, then such relationship effectively invalidates the assignee's claim to a holder in due course status and allows the defenses available against the payee also to be asserted against the assignee. Stotler v. Geibank Indus. Bank, 827 P.2d 608 (Colo. App. 1992).

The fact that an assignor and an assignee of a negotiable instrument are corporate siblings or have a corporate parent-subsidiary relationship is not enough to establish as a matter of law a close connection barring holder in due course status. There must be some other indicia that the related corporation knew or should have known that the instrument was infirm. Deutsche Bank Trust Co. Ams. v. Samora, 2013 COA 81, 321 P.3d 590.

Applied in Terrell v. Walter E. Heller & Co., 165 Colo. 463, 439 P.2d 989 (1968).

B. For Value.

A bank does not become a holder for value merely by giving credit. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960). See Delaney v. Brownwood, 73 Colo. 83, 213 P. 578 (1923).

Where a promissory note is given as collateral for a debt, the pledgee is a holder in due course for value, and he does not lose that character where the debt which is secured still exceeds the amount of the note although partly paid. Fredericksen v. City Nat'l Bank, 70 Colo. 553, 203 P. 659 (1922).

Negotiable instrument in form of a check shows prima facie consideration and therefore, payee's assignee, alleging in his suit on the check that payee was a holder in due course, is not required to allege facts which, if proven, would show that the maker was indebted to payee. Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974).

C. In Good Faith.

Proof of payment of full value by holder raises a presumption of good faith, which, if not overcome, entitles him to judgment. Delaney v. Brownwood, 73 Colo. 83, 213 P. 578 (1923).

The "good faith" standard is a subjective one. Under a subjective standard, an absence of knowledge is not equivalent to a lack of good faith. Money Mart Check Cashing Center, Inc. v. Epicycle Corp., 667 P.2d 1372 (Colo. 1983).

If a note is taken by indorsement under circumstances which impute knowledge of infirmities in it so that the taking of it amounts to bad faith, the transferee is not a holder in due course. McClellan v. Morris, 71 Colo. 304, 206 P. 575 (1922).

Suspicions and surmises cannot be made to take the place of evidence, and to defeat the note, there must be evidence of actual knowledge of such facts that the action of the indorsee in taking the note constituted bad faith. Hukill v. McGinnis, 70 Colo. 455, 202 P. 110 (1921); Neal v. Wilson County Bank, 83 Colo. 118, 263 P. 18 (1927).

Bad faith must be shown. An indorsee of a check is presumed to have received it in good faith, and it will not be invalidated in the hands of such indorsee by suspicious circumstances attending its indorsement unless the circumstances are sufficient to show that it was taken in bad faith. Wedge Mines Co. v. Denver Nat'l Bank, 19 Colo. App. 182, 73 P. 873 (1903).

Bad faith in fact, or mala fides, is the opposite of good faith and consists in guilty knowledge, or willful ignorance, showing a vicious or evil mind. Burnham Loan & Inv. Co. v. Sethman, 64 Colo. 189, 171 P. 884 (1918); Hendrickson v. Alpert, 159 Colo. 463, 412 P.2d 433 (1966).

Such as corporate president who indorses corporation check to himself. A president of a corporation who in such capacity indorses to himself a note payable to the corporation does not thereby become a holder in due course free from the defenses of the maker against the corporation. Denver Suburban Homes & Water Co. v. Fugate, 63 Colo. 423, 168 P. 33 (1917).

Knowledge of obtaining notes by false representations. Where a bank buys and discounts a note with knowledge that the indorser has obtained other similar notes by means of false representations, this constitutes evidence of bad faith so that the bank is not a holder in due course. Platte Valley State Bank v. Burge, 73 Colo. 296, 215 P. 149 (1923).

Knowledge of fraud. In an action to obtain the return of a promissory note obtained by fraud, where the person obtaining the note had knowledge of such facts, his action in taking the instrument amounted to bad faith, and therefore he is not a holder in due course. Myers v. Griffith, 108 Colo. 218, 115 P.2d 397 (1941).

In order to defeat a recovery on the ground of fraud in an action on a promissory note by one who acquired it for a consideration before maturity, the burden is on defendant to prove that at the time plaintiff acquired the note, he had actual knowledge of the fraud or knowledge of such facts that his action in taking the instrument amounted to bad faith. Abley v. Davies, 84 Colo. 398, 270 P. 880 (1928).

One who cashes a check without knowledge of adverse facts is a holder in

due course and entitled to recovery from the drawer. Levitt v. Kerrigan, 109 Colo. 129, 122 P.2d 246 (1942).

"Good faith" unaffected by payee's account level. In the case of a bank cashing a check, if the bank establishes that the check was taken without notice of dishonor or of any other defense, this is sufficient to establish "good faith". The issue of good faith, to establish that the bank is a holder in due course, is unaffected by the fact that the payee's account is low or overdrawn at the time the check is cashed. Vail Nat'l Bank v. J. Wheeler Constr. Corp., 669 P.2d 1038 (Colo. App. 1983).

D. Without Notice.

One who has knowledge of all the facts of a transaction is not a holder in due course free from the equities of the maker against the original payee, even though he holds the note for valid consideration as a subsequent indorsee. Reiter v. Pollard, 75 Colo. 203, 225 P. 222 (1924).

One offered negotiable paper fair upon its face, and not due, is under no duty to inquire of the maker as to its validity. Burnham Loan & Inv. v. Sethman, 64 Colo. 189, 171 P. 884 (1918).

If there is nothing on the face of a negotiable instrument, or in the written indorsement or assignment, to notify the assignee that the instrument was originally given upon an illegal consideration (gambling debts excepted) or obtained through fraud, the assignee who pays value therefor, and takes the same in good faith before maturity, may recover as against the maker. And this fact is true even though such assignee be in possession of facts or circumstances sufficient to arouse suspicion in the mind of a person of ordinary prudence and though he is guilty of negligence in not first following up such information for the purpose of discovering the fraud or illegality to which the suspicious circumstances may point. This rule is founded upon commercial necessity, for the untrammeled circulation of these instruments is a matter of supreme importance in the vast field of mercantile transactions; drafts, bills of exchange and other negotiable instruments take the place of money, and circulate almost as freely. Hence, to hold that each assignee must, before accepting them, inquire into each and every suspicious circumstance bearing upon the original execution, or pointing to possible defenses in a suit between the original parties, would produce serious inconveniences to the commercial world. Hukill v. McGinnis, 70 Colo. 455, 202 P. 110 (1921); Hendrickson v. Alpert, 159 Colo. 463, 412 P.2d 433 (1966).

Even though bearing no revenue stamps. A promissory note, otherwise in due form, is complete and regular upon its face although it bears no revenue stamps, since the absence of revenue stamps is no notice to an indorsee of a promissory note of any infirmity in the instrument or defect in the title of the person negotiating it, is not a suspicious circumstance, and is no evidence that the note was taken in bad faith. Metro. State Bank v. McNutt, 73 Colo. 291, 215 P. 151 (1923).

Whether an instrument is complete and regular on its face is questionable where an officer of a payee bank testifies that in 90

to 100 percent of similar cases where instruments are signed blank, they are filled in when delivered to the bank. Atkinson v. Englewood State Bank, 141 Colo. 436, 34 P.2d 702 (1960).

Tests other than "actual knowledge" may be used in resolving the issue of whether an endorsee of a promissory note is a holder in due course including whether the holder had in his possession facts from which he had reason to know of the defenses "at the time in question". The critical time for such notice is when the party comes into possession of the note as a holder. Salter v. Vanotti, 42 Colo. App. 448, 599 P.2d 962 (1979).

Duty to inquire as to possible defenses. Where an instrument is regular on its face there is no duty on the part of a check cashing service to inquire as to possible defenses, unless circumstances of which the holder has knowledge are of such a nature that the failure to inquire reveals a deliberate desire to evade knowledge because of a fear that investigation would disclose the existence of a defense. Money Mart Check Cashing Center, Inc. v. Epicycle Corp., 667 P.2d 1372 (Colo. 1983).

When inquiry required. If the purchaser has actual knowledge of facts which would apprise him of possible irregularities some inquiry is required by the notice provisions of the UCC. Salter v. Vanotti, 42 Colo. App. 448, 599 P.2d 962 (1979).

Refusal to investigate. The protection afforded a holder in due course cannot be used to shield one who simply refuses to investigate when the facts known to him suggest an irregularity concerning the commercial paper he purchases. Salter v. Vanotti, 42 Colo. App. 448, 599 P.2d 962 (1979).

Party held to have notice of defense sufficient to deny status as holder in due course. Ackmann v. Merchants Mtg. & Trust Corp., 659 P.2d 697 (Colo. App. 1982).

Party held to have notice of defense sufficient to deny status as holder in due course. See Ackmann v. Merchants Mtg. & Trust Corp., 659 P.2d 697 (Colo. App. 1982), rev'd on other grounds sub nom. Kopeikin v. Merchants Mortg. & Trust Corp., 679 P.2d 599 (Colo. 1984).

Instrument must be acquired before maturity. One of the essentials to constitute a holder in due course is that the instrument must have been acquired before maturity. First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914).

One who acquires a note after its maturity is not a holder in due course. See Vigil v. Pacheco, 95 Colo. 405, 36 P.2d 766 (1934).

Certified check not mature before presentment. A check certified to the payee by the bank on which it is drawn as accepted payable at the same bank does not mature until presented to such bank for payment, and a purchaser by indorsement before such presentment is a holder in due course, but not after maturity. Citizens' Nat'l Bank v. First Nat'l Bank, 66 Colo. 426, 182 P. 12 (1919).

Record supported the trial court's finding that the bank had no notice of any

offset against the promissory note where the note was current in its payments at the time of the transfer, the maker of the note made another payment thereon subsequent to the transfer to the bank, and the note itself did not specify any offset against it. First Nat. Bank v. Lohman, 827 P.2d 583 (Colo. App. 1992).

E. Facts Not Constituting Notice.

The fact that a promissory note is indorsed without recourse is not in itself sufficient to put a purchaser on inquiry. Omaha Steel Works v. Martin, 78 Colo. 560, 243 P. 619 (1926).

Knowledge that pledgor of note was treasurer of payee. Purchaser's knowledge, at the time of accepting a note, that the pledgor thereof was treasurer of the payee is not any evidence of bad faith on the part of the purchaser and insufficient to warrant any inference thereof where in pledging the note the pledgor exercised no function of treasurer. Burnham Loan & Inv. Co. v. Sethman, 64 Colo. 189, 171 P. 884 (1918).

Where director-purchaser relies on corporation's agents. The purchaser of a current note from an industrial corporation payee is not individually charged with knowledge of false representations made by agents of the corporation in procuring the note merely because he is a director in the corporation. Dodo v. Stocker, 74 Colo. 95, 219 P. 222 (1923).

F. Recordation Not Notice.

Constructive notice given by the recordation of instruments does not impute such knowledge as is contemplated by this section. Metro. State Bank v. McNutt, 73 Colo. 291, 215 P. 151 (1923).

G. Opportunity to Act.

An organization is charged with notice of infirmities relating to the procurement of a note when its principal officer obtains it, in which case, it is not entitled to protection as a holder in due course. Reserve Bldg. & Loan Ass'n v. Jamison, 108 Colo. 503, 119 P.2d 621 (1941).

When a company learns that its checks used in gambling by one of its employees have been paid by the bank, it cannot disaffirm and recover from the bank except by prompt action. Nat'l Surety Co. v. Stockyards Nat'l Bank, 84 Colo. 563, 272 P. 470 (1928).

III. PAYEE MAY BE H.D.C.

Title of payee of promissory note is defective when he negotiates it fraudulently or in breach of trust. Delaney v. Brownwood, 73 Colo. 83, 213 P. 578 (1923).

IV. WHEN NOT H.D.C.

A trustee in bankruptcy is not a bona fide purchaser for value but takes a note subject to all defenses the maker may have against the payee. Investors' Fin. Co. v. Bodnar, 87 Colo. 498, 289 P. 599 (1930).

4-3-303. Value and consideration.

(a) An instrument is issued or transferred for value if:

(1) The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;

(2) The transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;

(3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

(4) The instrument is issued or transferred in exchange for a negotiable instrument; or

(5) The instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

(b) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a) of this section, the instrument is also issued for consideration.

Source: L. 94: Entire article R&RE, p. 855, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-303 as it existed prior to 1994.

ANNOTATION

I. General Consideration.

II. Want of Consideration as a Defense.

III. Presumption of Consideration.

I. GENERAL CONSIDERATION.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

The giving of credit without more is not giving of value. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960) (decided under repealed § 95-1-52, C.R.S. 1963, negotiable instruments law).

II. WANT OF CONSIDERATION AS A DEFENSE.

One cannot recover amount of a draft given without consideration, there being

no question of the rights of an innocent holder. Moise Bros. Co. v. Jamison, 89 Colo. 278, 1 P.2d 925 (1931).

Partial failure of consideration is a defense pro tanto only to an action on a promissory note. Gillett v. Cheairs, 79 Colo. 20, 243 P. 1112 (1926).

Though vendor who is unable to convey title cannot recover on note given in part payment of the purchase price of the property, but having delivered possession, he is, in equity, entitled to protection. Gillett v. Cheairs, 79 Colo. 20, 243 P. 1112 (1926).

Where a guaranteed renewal note is given in payment of, or as security for an antecedent obligation to pay loan that maker obtained from bank, want of consideration is no defense to suit by bank against guarantors of note which is not paid by insolvent maker. State Bank v. Owens, 31 Colo. App. 351, 502 P.2d 965 (1972).

The validity of consideration created by antecedent debt is not affected by fact that the old note is not surrendered, provided there is no agreement to return the old note, which has not been transferred to one other than the payee of the new note. Wolf v. Larimer County Bank & Trust Co., 79 Colo. 376, 246 P. 285 (1926).

Nonperformance constitutes defense. Where the directors and stockholders of an insolvent state bank gave their individual notes to the bank which took over the assets on the promise of the latter to perform certain conditions, nonperformance of conditions constituted a defense to liability on the notes. Weicker v. Bromfield, 34 F.2d 377 (10th Cir. 1929).

Where the purpose is served. Where defendant executed notes in payment of his share of the expense of building a drain ditch the ditch being built and serving its purpose, he could not avoid payment of his notes because the ditch was not placed on a certain section line as provided in the agreement, under the contention that this constituted a failure of consideration. Fort v. Roberts, 82 Colo. 572, 261 P. 664 (1927).

III. PRESUMPTION OF CONSIDERATION.

Promissory note which shows on its face that it is given for value imports consideration. Neal v. Wilson County Bank, 83 Colo. 118, 263 P. 18 (1927).

Maker must overcome presumption of consideration. Since a note is prima facie presumed to be based on a valuable consideration and that one whose signature is placed thereon is presumed to have become a party for value, the maker, when sued by the payee, must overcome the presumption by showing, as an affirmative defense, that there was an absence or failure of consideration. Luby v. Jefferson County Bank, 28 Colo. App. 441, 476 P.2d 292 (1970).

Burden is on party pleading such. In an action on a promissory note, the burden of proving want or failure of consideration is on the party pleading it. James v. Ward, 80 Colo. 293, 250 P. 1097 (1926).

Absence of failure of consideration is an affirmative defense. Luby v. Jefferson County Bank, 28 Colo. App. 441, 476 P.2d 292 (1970).

Defense must be established by fair preponderance of evidence. Under this section a defendant who affirmatively pleads absence or failure of consideration has the burden of establishing his defense by a fair preponderance of the evidence, which burden remains with him throughout the trial. Hickman-Lunbeck Grocery Co. v. Hager, 75 Colo. 554, 227 P. 829 (1924).

Defense fails where no evidence. A duly executed promissory note imports consideration, and no evidence to the contrary being introduced, a defensive allegation of no consideration, fails. Viles v. Jackson, 105 Colo. 68, 94 P.2d 1085 (1939).

Failure of consideration for a promissory note may be shown by parol where the action is between the original parties to the note. Berta v. Rocchio, 149 Colo. 325, 369 P.2d 51 (1962).

Where agreement recites payment in full. Where notes are given in accordance with an agreement which recites they are payment in full for rights conveyed thereby, parol evidence cannot be introduced to prove there was to be additional consideration for the notes. Collins v. Shaffer, 66 Colo. 84, 179 P. 152 (1919).

Notwithstanding, presumption does not apply where fiduciary relationship. The general presumption of consideration of promissory notes is overcome by the specific presumption arising out of where there is a fiduciary relationship, in which case the claimant must overcome, by evidence, the presumption of undue influence with which the transaction is tainted because of the existence of the fiduciary relationship. Arnold v. Abernethy, 134 Colo. 573, 307 P.2d 1106 (1957).

IV. WHAT CONSTITUTES CONSIDERATION.

A. Adequate.

B. Inadequate.

A. Adequate.

A benefit to the promisor or a detriment to the promisee can constitute consideration, however slight. Luby v. Jefferson County Bank, 28 Colo. App. 441, 476 P.2d 292 (1970).

A promise for a promise is a valid consideration. Denver Indus. Corp. v. Kesselring, 90 Colo. 295, 8 P.2d 767 (1932).

A single consideration which moves to any one of two or more comakers of a note will be adequate or sufficient to support the undertaking of them all. Luby v. Jefferson County Bank, 28 Colo. App. 441, 476 P.2d 292 (1970).

The fact that the proceeds of the loan go to a comaker of the note or to his designee does not constitute a lack or failure of consideration. Luby v. Jefferson County Bank, 28 Colo. App. 441, 476 P.2d 292 (1970).

Extension of the time for the payment of a sum of money is a sufficient consideration for the execution of a promissory note. Wheelock v. Hondius, 74 Colo. 400, 222 P. 404 (1924).

Extension of the time for the payment of a sum of money does not promise to continue paying interest. An extension for

time of payment is not invalid for lack of consideration where such extension does not promise to continue to pay interest, for in such circumstances the promise to pay interest is implied. Adamson v. Bosick, 82 Colo. 309, 259 P. 513 (1927).

Where unpaid interest due after maturity is added to the past due principal and an extension of time is granted on the new amount, there is a valid consideration for the extension. Foote v. Larimer County Bank & Trust Co., 82 Colo. 323, 259 P. 1031 (1927).

Between the immediate parties, payment in advance of installment and interest payments on a promissory note are sufficient consideration for an extension agreement that future payments each year will be postponed until receipt of money from the annual sale of crops. Kuhlman v. McCormick, 116 Colo. 300, 180 P.2d 863 (1947).

For extension of time for payment of obligation constitutes consideration. State Bank v. Owens, 31 Colo. App. 351, 502 P.2d 965 (1972).

Including for attorney's fees. An extension of time for payment of an account is sufficient consideration for a provision for attorney's fees in notes taken. Taylor v. Continental Supply Co., 16 F.2d 578 (8th Cir. 1926).

Where a maker of a note makes a partial payment on it by a check of another which is dishonored and then subsequently makes another note for the amount of the check, the debt due the bank is sufficient consideration for the second note. Peterson v. First State Bank, 79 Colo. 494, 246 P. 784 (1926).

A preexisting debt is sufficient consideration for a promissory note. Beaman v. Stewart, 19 Colo. App. 226, 74 P. 344 (1903).

Preexisting debt sufficient consideration for check. Georg v. Metro Fixtures Contractors, Inc., 178 P.3d 1209 (Colo. 2008).

The debt of another. Where a promissory note of an individual is executed and received in satisfaction of the debt of another in whole, there is sufficient consideration for the new indebtedness. Lomax v. Colo. Nat'l Bank, 46 Colo. 229, 104 P. 85 (1909).

Settlement of a disputed claim is in itself sufficient consideration for the execution of a promissory note. Tisdel v. Central Sav. Bank & Trust Co., 90 Colo. 114, 6 P.2d 912 (1931). But see Moise Bros. Co. v. Jamison, 89 Colo. 278, 1 P.2d 925 (1931).

Even though the claim be of doubtful value. A note given in consideration of the settlement of a claim made in good faith, even though the claim be of doubtful value, is based on a valid consideration. Dixon v. Retallic, 80 Colo. 78, 249 P. 2 (1926). But see Moise Bros. Co. v. Jamison, 89 Colo. 278, 1 P.2d 925 (1931).

Forbearance in not suing on a promissory note is a valid consideration for the execution of a new note. James v. Ward, 80 Colo. 293, 250 P. 1097 (1926). But see

Moise Bros. Co. v. Jamison, 89 Colo. 278, 1 P.2d 925 (1931).

The relinquishment of a void homestead entry whereby the entrant surrenders the land, thereby saving the expense of a contest, is sufficient consideration to support a note given in payment for the relinquishment. Huff v. Geis, 71 Colo. 7, 203 P. 677 (1922).

An agreement to convey land is a sufficient consideration for a promissory note. Gillett v. Cheairs, 79 Colo. 20, 243 P. 1112 (1926).

A promissory note executed by a judgment debtor to his creditor is sufficient consideration for the release and satisfaction of the judgment. Blythe v. Cordingly, 20 Colo. App. 580, 80 P. 495 (1905).

Note signed by officer and stockholder to procure money for corporation is based on valid consideration. James v. Ward, 80 Colo. 293, 250 P. 1097 (1926). See Hunt v. Central Sav. Bank & Trust Co., 76 Colo. 480, 231 P. 60 (1925).

Note given to reduce excess loan to corporation. A promissory note given to a bank by an individual stockholder and officer of a corporation for the purpose of reducing the amount of an excess loan to his company, to which the state bank examiner had objected, is based upon a valid consideration. Rogers v. First State Bank, 79 Colo. 84, 243 P. 637 (1926). But see Cripple Creek State Bank v. Rollestone, 70 Colo. 434, 202 P. 115 (1921).

A stockholder who gives a note for money advanced by another to pay for a pro rata share of an anticipated assessment to restore impaired capital cannot allege lack of consideration for such note, as payment of the money discharged a liability as a stockholder. Campbell v. Hoch, 88 Colo. 303, 295 P. 798 (1931).

Where a party, after the discounting of a note, indorses it pursuant to a previous agreement, his act in signing relates back to the original contract and is supported by the same consideration. It is not necessary that he agreed to sign the note; rather, it is sufficient that the original maker promised to procure his signature and that he signed pursuant to such promise. Loveland v. Sigel-Campion Live Stock Co., 77 Colo. 22, 234 P. 168 (1925).

Where maker executes a note without consideration and the payee indorses it "without recourse", leaving such with the maker who credits payment thereon to reduce an amount equal to a loan from another to him by indorsing the note to this individual, the fact of no consideration as to the original transaction does not avail the maker as against this third party who took under an unqualified indorsement. Beach v. Bennett, 16 Colo. App. 459, 66 P. 567 (1901).

B. Inadequate.

A note given to a store for indebtedness is void for lack of consideration where the store does not credit the account for the amount of the note; since the indebtedness exists both prior and subsequent to the payment of the note there is no

consideration. Daniels & Fisher Co. v. Allen, 66 Colo. 83, 179 P. 152 (1919).

Where a sales agreement gives the seller an election to terminate the agreement in the event of default and retain the payments made by the buyer as liquidated damages, and the seller so elects, a note given subsequent thereto by the buyer for defaulted payments is without consideration. Saunders v. Akers, 128 Colo. 100, 260 P.2d 596 (1953).

Where the cashier of a bank guarantees by indorsement a note held by the bank to maintain its capital and satisfy a bank examiner, the bank cannot maintain an action against the cashier, there being no consideration for the guarantee. Cripple Creek State Bank v. Rollestone, 70 Colo. 434, 202 P. 115 (1921). But see Rogers v. First State Bank, 79 Colo. 84, 243 P. 637 (1926).

Where a note is given to a corporation for corporate stock which will entitle the owner to purchase merchandise at the company's store at a reduced price, the subsequent failure of the company to build such a store invalidates the note for lack of consideration. Investors Fin. Co. v. Bodnar, 87 Colo. 498, 289 P. 599 (1930).

One who is induced to purchase stock in a corporation then being organized by the representation that the corporation is to limit its operations to the shipment of fruit grown by its stockholders, and that only by uniting with it will he be able to secure its service in the shipment of his fruit, may defeat an action upon a promissory note given for the stock by proof that, in fact, the corporation engaged in a general commission business and has refused and confessed itself unable to ship his fruit. Divine v. Western Slope Fruit Growers' Ass'n, 27 Colo. App. 368, 149 P. 841 (1915).

A note given by the maker to assist the payee in a scheme of the latter to defraud a creditor is void and unenforceable as between the parties, there being no other consideration. Abernethy v. Wright, 27 Colo. App. 239, 148 P. 277 (1915).

Agreement is void between executor and legatees. Since an agreement between an executor of a will and certain of the legatees for payment of certain sums as compensation, expenses, and attorney's fees is void, a promissory note given to effectuate the same is without consideration. Currier v. Clark, 15 Colo. App. 6, 60 P. 958 (1900).

Debt founded upon gambling consideration. Even in the hands of bona fide purchasers, negotiable paper founded in whole or in part upon a gambling or gaming consideration is utterly void. Western Nat'l Bank v. State Bank, 18 Colo. App. 128, 70 P. 439 (1902).

If a draft is given one in settlement of a dispute, he cannot recover thereon where the disputed claim is wholly without foundation. Moise Bros. Co. v. Jamison, 89 Colo. 278, 1 P.2d 925 (1931). But see Dixon v. Retallic, 80 Colo. 78, 249 P. 2 (1926); Tisdel v. Central Sav. Bank & Trust Co., 90 Colo. 114, 6 P.2d 912 (1931).

No cause of action. If a draft is given for staying, discontinuing or dismissing litigation, one cannot recover thereon when

he knows he has no cause of action. Moise Bros. Co. v. Jamison, 89 Colo. 278, 1 P.2d 925 (1931). But see James v. Ward, 80 Colo. 293, 250 P. 1097 (1926).

In addition, indorsement of a note pursuant to an arrangement after it has been executed, delivered, and discounted is without consideration, and judgment against the indorser erroneous. Loveland v. Sigel-Campion Live Stock Co., 77 Colo. 22, 234 P. 168 (1925).

4-3-304. Overdue instrument.

(a) An instrument payable on demand becomes overdue at the earliest of the following times:

(1) On the day after the day demand for payment is duly made;

(2) If the instrument is a check, 90 days after its date; or

(3) If the instrument is not a check, when the instrument has been outstanding for a period of time after its date which is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and usage of the trade.

(b) With respect to an instrument payable at a definite time the following rules apply:

(1) If the principal is payable in installments and a due date has not been accelerated, the instrument becomes overdue upon default under the instrument for nonpayment of an installment, and the instrument remains overdue until the default is cured.

(2) If the principal is not payable in installments and the due date has not been accelerated, the instrument becomes overdue on the day after the due date.

(3) If a due date with respect to principal has been accelerated, the instrument becomes overdue on the day after the accelerated due date.

(c) Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal.

Source: L. 94: Entire article R&RE, p. 855, § 1, effective January 1, 1995.

ANNOTATION

The presumption that an indorsement of a promissory note is made before maturity is of little value where the indorsee took no action towards enforcing the note until more than 16 years after its maturity, as the claim was too stale to entitle him to invoke the presumption and this presumption is not intended to shield fraud

or gross wrong against innocent persons nor to forgive inexcusable or unexplained laches or neglect. Guthrie v. Gibson, 67 Colo. 94, 184 P. 989 (1919) (decided under repealed laws antecedent to CSA, C. 112, § 45, negotiable instruments law).

4-3-305. Defenses and claims in recoupment.

(a) Except as stated in subsection (b) of this section, the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this article or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1) of this section, but is not subject to defenses of the obligor stated in subsection (a)(2) of this section or claims in recoupment stated in subsection (a)(3) of this section against a person other than the holder.

(c) Except as stated in subsection (d) of this section, in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (section 4-3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

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

Source: L. 94: Entire article R&RE, p. 856, § 1, effective January 1, 1995.

ANNOTATION

I. General Consideration.

II. Free From All Claims.

IV. Conditions Precedent and Delivery.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Judicial Limitations on Holder in Due Course Claims", see 42 U. Colo. L. Rev. 439 (1971).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

A purchaser in good faith of a negotiable instrument before maturity and for value which is valid on its face may recover as against the maker. Civic Fin. Co. v. Meintzer, 137 Colo. 572, 328, P.2d 379 (1958).

Defendant has not established a defense as to the amount in dispute where the notes and foreclosure documents were properly admitted and were sufficient to establish the amount at issue. Smith v. Weindrop, 833 P.2d 856 (Colo. App. 1992).

Where the holder of a note acquires it after maturity, he holds it subject to every defense which the maker might have against a suit on it by the payee. First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914).

A setoff is properly allowed. First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914).

Defenses cannot destroy legal effect of note. A purchaser after maturity of a promissory note takes it subject to any defense the maker has against the payee, though such defenses may not destroy the legal effect of the note as such at the time it was made. Cooper v. German Nat'l Bank, 9 Colo. App. 169, 47 P. 1041 (1897).

Where fraud as a "real" defense is not available. Where fraud as a "real" defense (that is, fraud which is effective even as to a holder in due course) is not available, misrepresentations as to the character of the instrument signed is available only if the holder is not a holder in due course. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960).

Right to immediate possession. While a showing of fraud, misrepresentation, or mistake may constitute a defense to payment, it does not establish the right to immediate possession, a necessary prerequisite to establishing a claim for conversion. Commercial Credit Corp. v. Univ. Nat'l Bank, 590 F.2d 849 (10th Cir. 1979).

Fraudulent representations in obtaining signature on a note-contract held a sufficient defense as against a

holder not in due course. See Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960).

The defenses available in a contract action pursuant to this section are those defenses to the contract between the original payee and the co-makers and not those defenses grounded in contract solely between the co-makers. Armstrong v. Armstrong, 714 F. Supp. 451 (D. Colo. 1989).

Maker of check could not assert for itself as underlying obligor a third-party's defense of payoff, since "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". Lamson v. Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966 (1975).

Applied in Condado Aruba Caribbean Hotel, N.V. v. Tickel, 39 Colo. App. 51, 561 P.2d 23 (1977); Salter v. Vanotti, 42 Colo. App. 448, 599 P.2d 962 (1979); Ackmann v. Merchants Mtg. & Trust Corp., 645 P.2d 7 (Colo. 1982); Meyers v. B.J. Johanningmeier, 735 P.2d 206 (Colo. App. 1987); Cole v. Farner, 749 P.2d 970 (Colo. App. 1987).

II. FREE FROM ALL CLAIMS.

An agent for collection cannot bind a holder in due course as principal by any collateral agreement concerning the note, such as releasing a joint maker upon his partial payment of the principal. Torbit v. Heath, 11 Colo. App. 492, 53 P. 615 (1898).

Bank not precluded by stop payment order. Where a bank credits the amount of a check deposited with it to the payee's account and permits him to draw against it, but payment is stopped by the maker, the bank can recover from the maker any amounts paid thereon, it being an innocent owner holding for value and without any notice of any defect in the instrument. Bromfield v. Cochran, 86 Colo. 486, 283 P. 45 (1929).

III. DEFENSES AND EXCEPTIONS.

A. In General.

B. Duress.

C. Illegality.

D. Misrepresentation.

A. In General.

Lack of consideration not a defense. The maker of a promissory note may not defend in an action against him by a bona fide holder in due course on the ground that the assignment to the holder was without consideration. Asiatic Tunnel Co. v. Stephenson, 63 Colo. 301, 165 P. 773 (1917).

One cannot avoid liability on a note even if it be conceded that there was a breach of contract between him and the original holder of the notes where one proves that he is a holder in due course and acquired the notes for value long before maturity without knowledge of any infirmity in the notes until after he had acquired them. Neal v. Wilson County Bank, 83 Colo. 118, 263 P. 18 (1927).

When duty to inquire as to defenses exists. Where an instrument is regular on its face there is no duty on the part of a check cashing service to inquire as to possible defenses, unless circumstances of which the holder in due course has knowledge are of such a nature that the failure to inquire reveals a deliberate desire to evade knowledge because of a fear that investigation would disclose the existence of a defense. Money Mart Check Cashing Ctr., Inc. v. Epicycle Corp., 667 P.2d 1372 (Colo. 1983).

The defense of fraudulent inducement is unavailable against a holder in due course and summary judgment was properly entered for holder of note. Stotler v. Geibank Indus. Bank, 827 P.2d 608 (Colo. App. 1992).

Maker's claim in her affidavit that she was deceived as to the nature of the document when she signed it is akin to asserting a claim of fraud in the factum and is a real defense which, if proved, defeats the rights of holder to collect under the note. Stotler v. Geibank Indus. Bank, 827 P.2d 608 (Colo. App. 1992).

Purported maker may raise forgery as a defense to an obligation on an instrument held by a party claiming holder-in-due-course status. Liberty Mortg. Corp. v. Fiscus, 2016 CO 31, 379 P.3d 278.

Failure of a seller of land in a development to timely provide a HUD report to the buyer and the forgery of a buyer's signature can, in certain circumstances, provide a defense on a note against an assignee who might otherwise be a holder in due course. Stotler v. Geibank Indus. Bank, 827 P.2d 608 (Colo. App. 1992).

If the signers on a note are able to prove close connectedness between the original payee of the note and an assignee thereof, then such relationship effectively invalidates the assignee's claim to a holder in due course status and allows the defenses available against the payee also to be asserted against the assignee. Stotler v. Geibank Indus. Bank, 827 P.2d 608 (Colo. App. 1992).

B. Duress.

Threat of sending husband to penitentiary is duress. Where a wife, who is old and in poor health, executes a note under a threat to send her husband, who is even older than she, to the penitentiary, there is duress which voids the note; and such duress is a continuing one which is not waived by the execution of a renewal of such note. Union Nat'l Bank v. Wright, 79 Colo. 574, 247 P. 453 (1926).

Refusal to release deed of trust is not duress. The declaration of a creditor that he would not release a deed of trust on a debtor's property unless the debtor signed a promissory note does not constitute duress in law. Marquart v. Clark, 109 Colo. 62, 121 P.2d 885 (1942).

C. Illegality.

Defense based on gaming is good. No assignment of any negotiable paper where the whole or any part of the consideration thereof arises out of any gaming transaction offsets the statutory defense of the person

executing such, as it is absolutely null and void, even in the hands of an innocent purchaser for value. W. Nat'l Bank v. State Bank, 18 Colo. App. 128, 70 P. 439 (1902).

One indorsing and assigning a negotiable instrument in another state in payment of a gambling loss cannot defend an action on such as against an innocent purchaser for value before maturity notwithstanding the gaming statute where the law which prevails in the state where the assignment was made permits such to be good in the hands of an innocent purchaser, provided the law of the state concerned is not so shocking to the moral sense of the community so as to make an exception to the rule that in suits on contracts the "lex loci" controls. Sullivan v. German Nat'l Bank, 18 Colo. App. 99, 70 P. 162 (1902).

D. Misrepresentation.

Answer alleging fraud states a defense. In an action upon an accepted bill of exchange by an indorsee thereof, an answer setting forth fraud on the part of the drawer and payee and that the indorsee is not a holder in good faith but a mere agent of the drawer for collection states a defense. Johnson County Sav. Bank v. Gregg, 51 Colo. 358, 117 P. 1003 (1911).

Which is a jury question. The issue whether a note was induced by fraud is a question for the jury. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960).

In an action on a renewal note where the defense is fraudulent representations in procurement of the original note, the renewal note itself is evidence tending to show waiver of the fraud, but it still must be shown that the note was renewed with the intention of waiving the fraud. First Nat'l Bank v. Navins, 70 Colo. 491, 202 P. 702 (1921).

Fraud held not a defense as against holder in due course. See Metro. State Bank v. McNutt, 73 Colo. 291, 215 P. 151 (1923); Abley v. Davies, 84 Colo. 398, 270 P. 880 (1928).

IV. CONDITIONS PRECEDENT AND DELIVERY.

Law reviews. For note, "Conditional Delivery of Negotiable Instruments in Colorado", see 13 Rocky Mt. L. Rev. 248 (1941).

Ordinarily a promissory note is prima facie evidence of an obligation enforceable as to its legal import, but while in the hands of the payee, the way is always open to the maker to prove circumstances showing that it never was made or delivered with the intention that it should be binding at all events; and he may not be foreclosed from establishing, if he can, that in effect it was no contract at all. McCaffrey v. Mitchell, 98 Colo. 467, 56 P.2d 926, 57 P.2d 900 (1936).

This section permits the payor of a note to show that he delivered it conditionally or for a special purpose only, and not for the purpose of transferring the property in the instrument, where the note is in the hands of the original payee who brings suit on it. Divine v. W. Slope Fruit Growers' Ass'n, 27 Colo. App. 368, 149 P. 841 (1915).

As between the immediate parties to a promissory note, delivery may be shown to

be conditional or for a special purpose. Wheelock v. Hondius, 74 Colo. 400, 222 P. 404 (1924); Rock River Inv. Co. v. Mtn. Fin. Corp., 94 Colo. 539, 31 P.2d 914 (1934).

Delivery may be shown by oral testimony. Wheelock v. Hondius, 74 Colo. 400, 222 P. 404 (1924); Rock River Inv. Co. v. Mtn. Fin. Corp., 94 Colo. 539, 31 P.2d 914 (1934).

Since the parol evidence rule permits the reception of oral testimony of a contemporaneous oral agreement to show conditional delivery. Wheelock v. Hondius, 74 Colo. 400, 222 P. 404 (1924).

There is nothing in the negotiable instrument law, nor in the statute of frauds, that requires a contract of conditional delivery to be in writing; this fact being so, it of course may rest in parol. Norman v. McCarthy, 56 Colo. 290, 138 P. 28 (1914).

Parol evidence has not the effect to contradict or vary the terms of a writing, but merely shows the want of an element essential to its character as a contract — to wit, unconditional delivery. Norman v. McCarthy, 56 Colo. 290, 138 P. 28 (1914); Denison Clay Co. v. Pennock, 95 Colo. 20, 32 P.2d 189 (1934).

Parol evidence has not the effect to show that note is not to be paid at all. See Wheelock v. Hondius, 74 Colo. 400, 222 P. 404 (1924); Denver Indus. Corp. v. Kesselring, 90 Colo. 295, 8 P.2d 767 (1932).

The oral agreement constituting delivery must be contemporaneous with, and not prior to, the physical delivery of the instrument. Wheelock v. Hondius, 74 Colo. 400, 222 P. 404 (1924); Rock River Inv. Co. v. Mtn. Fin. Corp., 94 Colo. 539, 31 P.2d 914 (1934). See Hall v. Farmers' Bank, 74 Colo. 165, 220 P. 237 (1923).

One who executes a promissory note payable to a principal and delivers it to his agent cannot defend on the note as to a collateral agreement with the agent for conditional payment in the absence of showing authorization of the agent. McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393, 58 P. 358 (1899).

As burden of proof on asserting party. That the delivery of a promissory note was conditional must be established by the party who asserts it when pleaded. Hickman-Lunbeck Grocery Co. v. Hager, 75 Colo. 554, 227 P. 829 (1924).

Evidence of entire agreement is admissible. When a transaction involving the giving of a promissory note is questioned, evidence disclosing the entire agreement is always admissible. McCaffrey v. Mitchell, 98 Colo. 467, 56 P.2d 926, 57 P.2d 900 (1936).

Though defense of conditional delivery cannot be aided by allegations of want of consideration. Hickman-Lunbeck Grocery Co. v. Hager, 75 Colo. 554, 227 P. 829 (1924).

Where a defendant who assumed and agreed to pay the promissory note of another contends that the plaintiff is bound by a contemporaneous oral agreement as to the time and manner of payment so as to bring the case within an exception to the parol evidence rule, such a question of

conditional delivery of a written instrument is not within the meaning of this section which is quite different from the question of the assumption of the note, and hence the contention is to be rejected. Index Shale Oil Co. v. Wheeler, 81 Colo. 402, 255 P. 982 (1927).

Where a promissory note is delivered upon parol condition that it shall be without effect in certain event, and the event specified occurs, no action lies thereon by the payee against the maker. Sayre v. Leonard, 57 Colo. 116, 140 P. 196 (1914).

Temporary security for a loan. Where a promissory note is in the hands of the corporation payee, named therein, the maker may defeat an action thereon by showing under proper averment that he subscribed the paper solely to enable the corporation to pledge it temporarily with a bank as security for a loan, that the loan was in fact made, and the note afterwards restored to the corporation. Divine v. W. Slope Fruit Growers' Ass'n, 27 Colo. App. 368, 149 P. 841 (1915), modifying Cooper v. German Nat'l Bank, 9 Colo. App. 169, 47 P. 1041 (1897).

Where a condition has not been performed. In an action upon an instrument by payee against the drawer, the drawer may, under this section, show by parol that the instrument was delivered upon a condition which has not been performed and which has become impossible of performance. Norman v. McCarthy, 56 Colo. 290, 138 P. 28 (1914).

Being signed by another. Promissory notes signed and delivered under an express agreement and condition that they are not to become obligatory until signed by another person also are void at the option of the maker in the hands of the original payee, and a "quia timet" action will lie for delivery up and cancellation of the notes. Dygert v. Clem, 26 Colo. App. 286, 143 P. 823 (1914).

Where payment is to be paid from dividends. In an action by an assignee after maturity, upon a note where a corporation was the payee, a parol agreement made contemporaneous with the execution of the note to the effect that the note would be paid from the maker's share in the dividends of the corporation, and not otherwise, is a complete defense to the action. George v. Williams, 27 Colo. App. 400, 149 P. 837 (1915).

Where a bank check is given under condition that drawer "made collections to pay it", the condition not being fulfilled, judgment is properly given for defendant. Miller v. Maxwell, 82 Colo. 540, 261 P. 1116 (1927).

Condition of prescribed purchase for maker gives negotiation right. The delivery of a note which is conditioned on an agreement that the payee will use the proceeds thereof in making a prescribed purchase for the maker carries with it the right of negotiation without which it would be valueless. Greenless v. Chezik, 68 Colo. 521, 190 P. 667 (1920).

An indorsee for value can recover against the maker even though he had knowledge of the conditions of the delivery. Greenless v. Chezik, 68 Colo. 521, 190 P. 667 (1920).

Even a purchaser for value cannot take negotiable paper freed from conditions attached of which he knows. Weicker v. Bromfield, 34 F.2d 377 (10th Cir. 1929).

Latter special indorsement superseded restrictive indorsement. Where a depository bank specially indorsed a check to the plaintiff, who became a holder in his own right, payment by the maker to the plaintiff was not contrary to a restrictive indorsement "pay any bank", because the latter special indorsement superseded the restrictive indorsement and such action by the depository bank was the equivalent of a constructive cancellation. Thus, any satisfaction to the ensuing holder was not inconsistent with the terms of the previous restrictive indorsement. Lamson v. Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966 (1975).

4-3-306. Claims to an instrument.

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument.

Source: L. 94: Entire article R&RE, p. 857, § 1, effective January 1, 1995.

4-3-307. Notice of breach of fiduciary duty.

(a) In this section:

(1) "Fiduciary" means an agent, trustee, partner, corporate officer or director, or other representative owing a fiduciary duty with respect to an instrument.

(2) "Represented person" means the principal, beneficiary, partnership, corporation, or other person to whom the duty stated in paragraph (1) of this subsection (a) is owed.

(b) If (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:

(1) Notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person.

(2) In the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or

as security for a debt known by the taker to be the personal debt of the fiduciary or (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary.

(3) If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty.

(4) If an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

Source: L. 94: Entire article R&RE, p. 857, § 1, effective January 1, 1995. **L. 2000:** (b)(2) amended, p. 1173, § 3, effective May 26.

Cross references: For registration, see part 4 of this article.

4-3-308. Proof of signatures and status as holder in due course.

(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under section 4-3-402 (a).

(b) If the validity of signatures is admitted or proved and there is compliance with subsection (a) of this section, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under section 4-3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

Source: L. 94: Entire article R&RE, p. 858, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-307 as it existed prior to 1994.

ANNOTATION

I. General Consideration.

II. Presumption of Delivery.

I. GENERAL CONSIDERATION.

Law reviews. For note, "The Burden of Proof of a Holder in Due Course of a Defective Negotiable Instrument", see 4 Rocky Mt. L. Rev. 145 (1932). For article, "One Year Review of Contracts", see 36 Dicta 19 (1959).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Every holder of a negotiable instrument is deemed prima facie to be a holder in due course. Civic Fin. Co. v. Meintzer, 137 Colo. 572, 328 P.2d 379 (1958). See Myrick v. Garcia, 138 Colo. 298, 332 P.2d 900 (1958).

A holder is entitled to sue thereon. A holder of a promissory note is deemed prima facie to be a holder in due course and entitled to sue thereon. Waterman v. Sullivan, 156 Colo. 195, 397 P.2d 739 (1964).

A holder is entitled to recover. A plaintiff, being holder of a note in his possession, is entitled to have it admitted in evidence, establishing a prima facie right to recover thereon. Myrick v. Garcia, 138 Colo. 298, 332 P.2d 900 (1958).

Whether a promissory note is negotiable or not is immaterial, as the same result would obtain, a holder of an instrument being entitled to sue thereon as the prima facie owner. Myrick v. Garcia, 138 Colo. 298, 332 P.2d 900 (1958).

Assignee of negotiable instrument suing thereon need not plead specific facts from which his assignor derives the status of a holder in due course. Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974).

A holder is entitled to the presumption of due course holding until the maker succeeds in showing a defense. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960).

Where the answer of the maker denies that the holder is the owner of the note sued upon, such answer merely has the effect of putting this defense in issue, and thus the holder is not obliged to prove such ownership until maker's evidence challenges his prima facie title. Myrick v. Garcia, 138 Colo. 298, 332 P.2d 900 (1958), rev'g in part Marks v. Munson, 59 Colo. 440, 149 P. 440 (1915); Middlesex Safe Deposit & Trust Co. v. Jacobs, 87 Colo. 445, 290 P. 784 (1930).

The burden of establishing an affirmative defense against a holder in due course is on the maker. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960) (fraud).

The burden is on the holder. When it is shown that the title of any person who has negotiated a promissory note is defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. Delaney v. Brownwood, 73 Colo. 83, 213 P. 578 (1923). See McClellan v. Morris, 71 Colo. 304, 206 P. 575 (1922); Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954).

By a preponderance of the evidence. Where the maker proves at least a prima facie defense, the burden is on the holder to establish by a preponderance of the evidence that he is a holder in due course. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960).

That he is a bona fide holder. Where title is defective the burden of proof is upon the holder to show that he is a bona fide holder and that he took the paper before maturity, in good faith and for value. Johnson County Sav. Bank v. Gregg, 51 Colo. 358, 117 P. 1003 (1911).

Which may be sustained by proof of paying full value and good faith. Where the burden of showing due course is cast upon the holder, he sustains that burden by proof of payment of full value and by showing the full details of the transaction from which there can be no national inference of knowledge or bad faith on his part. Delaney v. Brownwood, 73 Colo. 83, 213 P. 578 (1923); Omaha Steel Works v. Martin, 78 Colo. 560, 243 P. 619 (1926).

Upon proof of full payment, a presumption of innocence prevails again as before the proof of defective title, subject, of course, to refutation by further evidence. This rule is reasonable, for who, with knowledge that a note was paid or invalid, would buy it at full price? Delaney v. Brownwood, 73 Colo. 83, 213 P. 578 (1923).

Evidence held to support finding that holder purchased note in due course. Stewart v. Pub. Indus. Bank, 85 Colo. 546, 277 P. 782 (1929).

Section determinative of sufficiency of allegations required to state claim. Although this statute on its face is concerned with evidentiary burdens of proof, it is also determinative of the sufficiency of allegations required to state a claim for relief in an action to recover on a negotiable instrument. Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974).

Subsection (2) sets forth the requirements of a prima facie case. Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974).

Parol evidence to show that a maker was only secondarily liable on a note is not a defense under subsection (2) and rejection of such evidence was not error. Metro Nat'l Bank v. Roe, 675 P.2d 331 (Colo. App. 1983).

Applied in First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

II. PRESUMPTION OF DELIVERY.

Under the N.I.L., as long as an instrument remained in the possession of a person whose signature appeared thereon, there was no presumption of delivery from that person. Norman v. McCarthy, 56 Colo. 290, 138 P. 28 (1914).

When the instrument was no longer in the possession of a party whose signature appeared thereon, a delivery from the persons whose signatures did appear thereon was presumed until the contrary appeared. Norman v. McCarthy, 56 Colo. 290, 138 P. 28 (1914). See Weaver v. First Nat'l Bank, 138 Colo. 83, 330 P.2d 142 (1958).

When the instrument was in the possession of a holder in due course, that presumption became conclusive. Norman v. McCarthy, 56 Colo. 290, 138 P. 28 (1914).

Where there was no evidence of the delivery, it was presumed that it was delivered to the named payee by the drawer. Weaver v. First Nat'l Bank, 138 Colo. 83, 330 P.2d 142 (1958).

Indorsement allegation implied delivery. In an action upon a negotiable promissory note by an indorsee, an allegation that the payee indorsed the note to the indorsee implied a delivery, and it was unnecessary to specifically allege a delivery. Louisville Coal Mining Co. v. Int'l Trust Co., 18 Colo. App. 345, 71 P. 898 (1903).

Presumption of delivery did not apply where fiduciary relationship. The general presumption of delivery was overcome by the specific presumption arising where there was a fiduciary relationship in which case the claimant had to overcome, by evidence, the presumption of undue influence with which the transaction was tainted because of the existence of the fiduciary relationship. Arnold v. Abernethy, 134 Colo. 573, 307 P.2d 1106 (1957).

4-3-309. Enforcement of lost, destroyed, or stolen instrument.

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, section 4-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that

might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

Source: L. 94: Entire article R&RE, p. 858, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-804 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974).

Applied in Hull v. Bowest Corp., 649 P.2d 334 (Colo. App. 1982), aff'd, 683 P.2d 1181 (Colo. 1984).

4-3-310. Effect of instrument on obligation for which taken.

(a) Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not affect any liability that the obligor may have as an indorser of the instrument.

(b) Unless otherwise agreed and except as provided in subsection (a) of this section, if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

(1) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

(3) Except as provided in paragraph (4) of this subsection (b), if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the

obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

(4) If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

(c) If an instrument other than one described in subsection (a) or (b) of this section is taken for an obligation, the effect is (i) that stated in subsection (a) of this section if the instrument is one on which a bank is liable as maker or acceptor, or (ii) that stated in subsection (b) of this section in any other case.

Source: L. 94: Entire article R&RE, p. 859, § 1, effective January 1, 1995.

ANNOTATION

Payment by cashier's check, certified funds, or certified check on debtor's account was "taken" for obligation under subsection (a) without regard to bank's internal administrative actions after receipt of payment. Fifth Third Bank v. Jones, 168 P.3d 1 (Colo. App. 2007).

Check was "taken" only while it was held without being cashed. When a homeowner tendered a check to a homeowners' association and the association subsequently returned the check to the homeowner, the check was "taken", and the homeowner's debt obligation to the association was suspended only while the association had possession of the check. Briargate at Seventeenth Ave. v. Nelson, 2021 COA 78M, 494 P.3d 1149.

Maker of check not exposed to double liability where he was required to pay the holder since, upon payment of the checks, its liability is completely discharged. Once the obligor is discharged on the instruments, he is also discharged on the underlying obligation. Lamson v. Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966 (1975).

Rule that negotiable instrument constitutes conditional payment is subject to condition "unless otherwise agreed" is applied in Berardini v. Hart, 682 P.2d 519 (Colo. App. 1984).

Applied in Mtn. Stone Co. v. H.W. Hammond Co., 39 Colo. App. 58, 564 P.2d 958 (1977).

4-3-311. Accord and satisfaction by use of instrument.

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d) of this section, a claim is not discharged under subsection (b) of this section if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within ninety days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph (2) does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i) of this subsection (c).

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Source: L. 94: Entire article R&RE, p. 859, § 1, effective January 1, 1995.

ANNOTATION

Law reviews. For article, "Full Satisfaction Checks Under UCC Revised Article III", see 24 Colo. Law. 771 (1995).

Inclusion of accord-and-satisfaction pre-printed language above the indorsement line on the back of a check appears to be health insurer's standard business practice, providing some evidence of a lack of good faith. Lupia v. Medicredit, Inc., 445 F. Supp. 3d 1271 (D. Colo. 2020).

Applied in Briargate at Seventeenth Ave. v. Nelson, 2021 COA 78M, 494 P.3d 1149.

4-3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check.

(a) In this section:

(1) "Check" means a cashier's check, teller's check, or certified check.

(2) "Claimant" means a person who claims the right to receive the amount of a cashier's check, teller's check, or certified check that was lost, destroyed, or stolen.

(3) "Declaration of loss" means a written statement, made under penalty of perjury, to the effect that (i) the declarer lost possession of a check, (ii) the declarer is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check, (iii) the loss of possession was not the result of a transfer by the declarer or a lawful seizure, and (iv) the declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(4) "Obligated bank" means the issuer of a cashier's check or teller's check or the acceptor of a certified check.

(b) A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if (i) the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check, (ii) the communication contains or is accompanied by a declaration of loss of the claimant with respect to the check, (iii) the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid, and (iv) the claimant provides reasonable identification if requested by the obligated bank. Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration. The warranty is made to the obligated bank and any person entitled to enforce the check. If a claim is asserted in compliance with this subsection (b), the following rules apply:

(1) The claim becomes enforceable at the later of (i) the time the claim is asserted, or (ii) the 90th day following the date of the check, in the case of a cashier's check or teller's check, or (iii) the 90th day following the date of the acceptance, in the case of a certified check.

(2) Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to person entitled to enforce the check discharges all liability of the obligated bank with respect to the check.

(3) If the claim becomes enforceable before the check is presented for payment, the obligated bank is not obliged to pay the check.

(4) When the claim becomes enforceable, the obligated bank becomes obliged to pay the amount of the check to the claimant if payment of the check has not been made to a person entitled to enforce the check. Subject to section 4-4-302 (a)(1), payment to the claimant discharges all liability of the obligated bank with respect to the check.

(c) If the obligated bank pays the amount of a check to a claimant under subsection (b)(4) of this section and, after the claim became enforceable, the check is presented for payment by a person having rights of a holder in due course, the claimant is obliged to (i) refund the payment to the obligated bank if the check is paid, or (ii) pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.

(d) If a claimant has the right to assert a claim under subsection (b) of this section and is also a person entitled to enforce a cashier's check, teller's check, or certified check which is lost, destroyed, or stolen, the claimant may assert rights with respect to the check either under this section or section 4-3-309.

Source: L. 94: Entire article R&RE, p. 860, § 1, effective January 1, 1995.

PART 4

LIABILITY OF PARTIES

4-3-401. Signature necessary for liability on instrument.

A person is not liable on an instrument unless (i) the person signed the instrument or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under section 4-3-402.

Source: L. 94: Entire article R&RE, p. 862, § 1, effective January 1, 1995. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 531, § 22, effective August 7.

Editor's note: This section is similar to former § 4-3-401 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "Civil Liability for Check Forgeries in Colorado", see 16 Colo. Law. 959 (1987).

No person is liable on an instrument unless his signature appears thereon. Jett v. Phillips & Associates, 439 F.2d 987 (10th Cir. 1971).

Even if a party does not sign an assumption agreement, the party may still be liable on the original obligation for which the instrument was given. Bigelow v. Nottingham, 833 P.2d 764 (Colo. App. 1991).

However, liability may arise apart from the instrument itself. A party who does not sign an assumption agreement may still be liable on the original obligation for which the instrument is given. Husband who executed promissory note and second deed of trust, but who consented by silence to subordination agreement that impaired his collateral, is still liable as a surety for the underlying obligation. Bigelow v. Nottingham, 833 P.2d 764 (Colo. App. 1992).

4-3-402. Signature by representative.

(a) If a person acting, or purporting to act, as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in the instrument.

(b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:

(1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.

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

(c) If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the

represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person.

Source: L. 94: Entire article R&RE, p. 862, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-103 as it existed prior to 1994.

Cross references: For unauthorized signatures, see § 4-3-403.

ANNOTATION

Law reviews. For article, "Augmenting the Anomalousness of the Anomalous Indorser", see 16 Dicta 254 (1939).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

The words "we promise to pay" on a note together with the signature of both a corporation and the corporation president do not impart personal liability to the corporate officer where it is clear that the signatures are intended to bind only the corporation. MacKay v. Lay, 28 Colo. App. 70, 470 P.2d 614 (1970). See New England Elec. Co. v. Shook, 27 Colo. App. 30, 145 P. 1002 (1915).

If an agent exceeds his authority, his principal may complain but a third person may not. MacKay v. Lay, 28 Colo. App. 70, 470 P.2d 614 (1970).

Indorsee may assume action of corporate officer is authorized. An indorsee before maturity and for value of a note subscribed with the name of a corporation by its principal officer who is without notice of any want of authority in such officer may assume that his action is authorized. Gold Glen Mines & Tunnel Co. v. Dennis, 21 Colo. App. 284, 121 P. 677 (1912).

If the agency of the party is made to appear, the principal will not be bound beyond the authority given. McClellan v. Morris, 71 Colo. 304, 206 P. 575 (1922).

Where corporate note is given for noncorporate debt. A promissory note of a corporation given under authority of the directors in acknowledgment of what is not a debt of the corporation and by which some of the directors become creditors of the corporation is invalid as to a payee with knowledge. Gold Glen Mining Co. v. Stimson, 44 Colo. 406, 98 P. 727 (1908).

Liability of party signing note as individual, without qualifying designation. Where parties sign a note as individuals, without any qualifying designations, they are individually liable as

makers, and not as accommodation parties. Rink-A-Dinks v. TNT Motorcycles, Inc., 655 P.2d 431 (Colo. App. 1982).

Parol evidence may be admitted as between the original parties to show that one signed a note in a representative capacity. Bieser v. Irwin, 101 Colo. 210, 72 P.2d 271 (1937).

An otherwise authorized signature on a negotiable instrument is not converted into an unauthorized forgery when an agent, authorized to sign the principal's name, abuses that authority by negotiating the instrument to a holder in due course for the agent's own personal benefit. Willey v. Mayer, 876 P.2d 1260 (Colo. 1994).

Applied in Abrams v. Colo. Seal and Stripe, Inc., 702 P.2d 765 (Colo. App. 1985); La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986); Kunz v. Cycles West, Inc., 969 P.2d 781 (Colo. App. 1998); Genesis Capital Ventures, LLC v. Restore with Apex, Inc., 282 F. Supp. 3d 1225 (D. Colo. 2017).

4-3-403. Unauthorized signature.

(a) Unless otherwise provided in this article or article 4 of this title, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of this article.

(b) If the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking.

(c) The civil or criminal liability of a person who makes an unauthorized signature is not affected by any provision of this article which makes the unauthorized signature effective for the purposes of this article.

Source: L. 94: Entire article R&RE, p. 863, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-404 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974). For article, "Commercial Law", which discusses a Tenth Circuit decision dealing with bank liability on forged commercial paper, see 62 Den. U. L. Rev. 84

(1985). For article, "Civil Liability for Check Forgeries in Colorado", see 16 Colo. Law. 959 (1987).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Where the officers of a corporation are given full power and authority to negotiate and execute loans for and on behalf of the corporation for its declared purpose and benefit and the corporation has benefited materially as a result of their activity, then under such circumstances, it would be wholly inequitable to permit it to be absolved of its just obligations. Sec. Sav. & Loan Ass'n v. Colo. Real Estate Dev., Inc., 163 Colo. 155, 429 P.2d 288 (1967).

Want of authority may not be asserted. A corporation may not give its officers "carte blanche" authority to borrow money for its authorized business purpose and then assert want of authority when the venture turns unprofitable; even if loans were not originally authorized, they are ratified by acceptance of the benefits. Sec. Sav. & Loan Ass'n v. Colo. Real Estate Dev., Inc., 163 Colo. 155, 429 P.2d 288 (1967).

It is error to require lender to show express authority. A court errs when it rules that the lender must show, through the corporation's articles, bylaws, or minutes, express authority for such loans from the corporation or its board, inasmuch as the application of the doctrine of estoppel has kept pace with the rapid development of corporate enterprise, so that, while ancient rules regarding limits upon powers of officers of corporations have not been abrogated, they are conclusively presumed to have been complied with or compliance to have been waived by the corporation where justice so requires. Sec. Sav. & Loan Ass'n v. Colo. Real Estate Dev., Inc., 163 Colo. 155, 429 P.2d 288 (1967).

A forged or unauthorized signature of one of two joint payees destroys the negotiability of a check, and the holder of the check acquires only as an assignee of a nonnegotiable chose in action the interest of the payee who did indorse, and, as such an assignee, his interest in the proceeds of the check is to be determined. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954); Skinner v. Mortgage Inv. Co., 165 Colo. 241, 438 P.2d 504 (1968).

A payee whose signature has been forged, or whose check has been cashed without indorsement, can treat the entire transaction as a nullity and may demand payment of the debt from the drawer of the check, his debtor. Since the check was never delivered to the payee and was not negotiated by him, it cannot be legally binding and thus the debt owed by the drawer to the payee continues outstanding. United States Portland Cement Co. v. United States Nat'l Bank, 61 Colo. 334, 157 P. 202 (1916); Denver Elec. & Neon Serv. Corp. v. Gerald H. Phipps, Inc., 143 Colo. 530, 354 P.2d 618 (1960).

A payee can sue the collecting bank directly, but the legal effect of his doing this constitutes adoption and ratification of the collection and payment of the check, notwithstanding that it was not indorsed, and the legal consequence of no indorsement is considered to be the same as a forgery for

such purpose. United States Portland Cement Co. v. United States Nat'l Bank, 61 Colo. 334, 157 P. 202 (1916); Denver Elec. & Neon Serv. Corp. v. Gerald H. Phipps, Inc., 143 Colo. 530, 354 P.2d 618 (1960).

Institution of an action for conversion against bank for wrongfully paying corporate funds into the personal account of the treasurer is not a ratification of the actions of the collecting bank, but rather an election not to sue the drawee bank. Cent. Inc. v. Cache Nat'l Bank, 748 P.2d 351 (Colo. App. 1987).

On theory that it collected and misappropriated check proceeds. The payee of a check whose indorsement had been forged by a fraudulent agent can ratify payment by the drawee bank and maintain an action against the collecting bank on the theory that it collected and misappropriated the proceeds of the check and is thereby accountable to the payee for the proceeds. United States Portland Cement Co. v. United States Nat'l Bank. 61 Colo.; Denver Elec. & Neon Serv. Corp. v. Gerald H. Phipps, Inc., 143 Colo. 530, 354 P.2d 618 (1960). 334, 157 P. 202 (1916).

By ratifying such payment the payee releases the drawer and drawee of the check. United States Portland Cement Co. v. United States Nat'l Bank, 61 Colo. 334, 157 P. 202 (1916); Denver Elec. & Neon Serv. Corp. v. Gerald H. Phipps, Inc., 143 Colo. 530, 354 P.2d 618 (1960).

Assignee need not sue maker. In an action against indorsers of a note where one of the makers' names has been forged, an assignee is not precluded by failing to sue the makers. Cannon v. Serrel, 15 Colo. App. 99, 61 P. 187 (1900).

4-3-404. Impostors; fictitious payees.

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

(b) If (i) a person whose intent determines to whom an instrument is payable (section 4-3-110 (a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

(1) Any person in possession of the instrument is its holder.

(2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(c) Under subsection (a) or (b) of this section, an indorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee or (ii) the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to that of the payee.

(d) With respect to an instrument to which subsection (a) or (b) of this section applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

Source: L. 94: Entire article R&RE, p. 863, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-405 as it existed prior to 1994.

ANNOTATION

Bank not bound to know fictitious character of payee. In an action by a depositor against a bank to recover money paid out on checks drawn by an authorized employee of the depositor, but made payable to fictitious payees and cashed by the employee, the bank is not liable to the depositor for paying such checks, inasmuch as it is not bound to know the fictitious character of a payee. Goodyear Tire & Rubber Co. v. First Nat'l Bank, 95 Colo. 34, 32 P.2d 268 (1934) (decided under repealed laws antecedent to CSA, C. 112, § 9 (3), negotiable instruments law).

4-3-405. Employer's responsibility for fraudulent indorsement by employee.

(a) In this section:

(1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

(2) "Fraudulent indorsement" means (i) in the case of an instrument payable to the employer, a forged indorsement purporting to be that of the employer, or (ii) in the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee.

(3) "Responsibility" with respect to instruments means authority (i) to sign or indorse instruments on behalf of the employer, (ii) to process instruments received by the employer for

bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity. "Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.

(b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(c) Under subsection (b) of this section, an indorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name substantially similar to the name of that person or (ii) the instrument, whether or not indorsed, is deposited in a depositary bank to an account in name substantially similar to the name of that person.

Source: L. 94: Entire article R&RE, p. 864, § 1, effective January 1, 1995.

4-3-406. Negligence contributing to forged signature or alteration of instrument.

(a) A person whose failure to exercise ordinary care contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) Under subsection (a) of this section, if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

(c) Under subsection (a) of this section, the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection (b) of this section, the burden of proving failure to exercise ordinary care is on the person precluded.

Source: L. 94: Entire article R&RE, p. 865, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-406 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974). For article, "Commercial Law", which discusses a Tenth Circuit decision dealing with bank liability on forged commercial paper, see 62 Den. U. L. Rev. 84 (1985). For article, "Civil Liability for Check Forgeries in Colorado", see 16 Colo. Law. 959 (1987).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

For discussion of the standard of a bank's liability for payments made on forged withdrawal slips, see Bill Manning, Inc. v. Denver West Bank and Trust, 697 P.2d 403 (Colo. App. 1984).

Where undisputed evidence established that collecting bank failed to make inquiries as to the authority of a corporate treasurer to deposit checks payable to corporation into the personal account of the treasurer, the court properly determined that the bank had not acted according to reasonable commercial standards. Central Inc. v. Cache Nat'l Bank, 748 P.2d 351 (Colo. App. 1987).

Where bank fails to establish that payment of an altered instrument was in good faith and in accordance with reasonable commercial standards, plaintiff's negligence is irrelevant. Central Inc. v. Cache Nat'l Bank, 748 P.2d 351 (Colo. App. 1987).

Effect of stop-payment order on postdated check. Although a stop-payment order on a postdated check forbids payment by the bank to the payee or endorser, the maker remains liable on the instrument. Esecson v. Bushnell, 663 P.2d 258 (Colo. App. 1983).

While a payor bank's issuance of a cashier's check based on a forged power of attorney may have been a lax and even negligent business practice, it did not induce the collecting bank to accept and pay on the fraudulently endorsed checks and, therefore, was not the proximate cause of the improper payment of the checks. Vectra Bank of Englewood v. Bank Western, 890 P.2d 259 (Colo. App. 1995).

4-3-407. Alteration.

(a) "Alteration" means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

(b) Except as provided in subsection (c) of this section, an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.

(c) A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (i) according to its original terms, or (ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

Source: L. 94: Entire article R&RE, p. 865, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-407 as it existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Alteration of a promissory note renders it invalid. Farmers State Bank v. Klein, 159 Colo. 165, 410 P.2d 632 (1966).

Where a promissory note, blank as to the rate of interest and the time from which interest is to be computed, is subscribed by the maker, as well as the sureties, and delivered by the maker to the payee, who, without authority of the sureties, fills the blanks and advances money thereon to the maker, the alteration is a material one, and, consequently, the instrument is thereby avoided. Ayres v. Walker, 54 Colo. 571, 131 P. 384 (1913).

Reason for rule. This is an old and wise provision of the law, and the reason for it is apparent when we consider the absoluteness of custody and control by the payee or holder and the utter helplessness to prevent an alteration in the case of the maker in that respect. And so the law has provided as a penalty, not only of criminal liability, but a forfeiture and cancellation of the obligation in its entirety. Ayres v. Walker, 54 Colo. 571, 131 P. 384 (1913).

One is estopped as against a H.D.C. One who signs a promissory note with blank spaces for interest which are subsequently

filled in by the payee and thereafter assigned to a holder in due course without knowledge thereof is estopped to defend on the ground of alteration. Statton v. Stone, 15 Colo. App. 237, 61 P. 481 (1900).

An alteration on the face of a note reducing the principal, but made honestly with the intention of making a proper credit, does not bar recovery on the note. Whitehead v. Emmerich, 38 Colo. 13, 87 P. 790 (1906).

The contention of claimant that the burden of explaining an alteration of the date of a note upon which his claim was based was not upon him since the defendant had not objected on that ground was overruled. Gavin v. Kniffen, 82 Colo. 448, 261 P. 6 (1927).

Defense of alteration must be based on preponderance of evidence. Where the defense of fraudulent alteration is interposed in an action on a promissory note, an instruction that the jury can find for the defendant only upon a clear satisfactory preponderance of the evidence is sufficient. Brunton v. Ditto, 51 Colo. 178, 117 P. 156 (1911).

4-3-408. Drawee not liable on unaccepted draft.

A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.

Source: L. 94: Entire article R&RE, p. 865, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-409 as it existed prior to 1994.

ANNOTATION

I. General Consideration.

II. Draft Not an Assignment.

III. Other Liability Not Affected.

I. GENERAL CONSIDERATION.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

II. DRAFT NOT AN ASSIGNMENT.

The giving of a check does not assign present funds on deposit and does not create drawee liability to the payee unless and until it is accepted by the drawee. Denver Elec. & Neon Serv. Corp. v. Gerald H. Phipps, Inc., 143 Colo. 530, 354 P.2d 618 (1960).

Bank may decline payment. Even where a signature to a check is correct, and all other required indicia appear thereon, still, the bank on which a check is drawn is not liable in action to the drawee thereof and in all legal grace may decline payment of the check. Henderson v. Greeley Nat'l Bank, 111 Colo. 365, 142 P.2d 480 (1943).

Even before the passage of the negotiable instrument law it was ruled that a right of action did not exist in favor of the holder of a check against the drawee bank where there has been no acceptance or promise to pay by the latter in Colo. Nat'l Bank v. Boettcher, (5 Colo. 185 (1879), aff'd, 15 Colo. 16, 24 P. 582 (1890)), and the statute has expressly enacted such. Van Buskirk v. State Bank, 35 Colo. 142, 83 P. 778 (1905).

III. OTHER LIABILITY NOT AFFECTED.

A promise to accept a bill or order made before the bill or order is drawn may be enforced against the party making the promise by one who purchases such bill or order relying upon the faith of the promise, and the drawee cannot avoid liability by proof of a contingent condition precedent where such orders were not drawn in excess of the amount of the promise. McPhee & McGinnity v. Fowler, 36 Colo. 202, 85 P. 421 (1906) (decided under repealed laws antecedent to CSA, C. 112, § 127, negotiable instruments law).

4-3-409. Acceptance of draft; certified check.

(a) "Acceptance" means the drawee's signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person.

(b) A draft may be accepted although it has not been signed by the drawer, is otherwise incomplete, is overdue, or has been dishonored.

(c) If a draft is payable at a fixed period after sight and the acceptor fails to date the acceptance, the holder may complete the acceptance by supplying a date in good faith.

(d) "Certified check" means a check accepted by the bank on which it is drawn. Acceptance may be made as stated in subsection (a) of this section or by a writing on the check which indicates that the check is certified. The drawee of a check has no obligation to certify the check, and refusal to certify is not dishonor of the check.

Source: L. 94: Entire article R&RE, p. 866, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-409, 4-3-410, and 4-3-411 as they existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Acceptance of a bill at common law and under this section is merely the signification by the drawee of his assent to the order of the drawer. The legal meaning of an acceptance is that the acceptor engages to pay the instrument according to the tenor of his acceptance; in other words, it is a promise to pay. Van Buskirk v. State Bank, 35 Colo. 142, 83 P. 778 (1905).

An agreement in writing to honor a draft is sufficient to create liability to a bank which in reliance thereon is the assignee for value of the draft. Posey v. Denver Nat'l Bank, 24 Colo. 199, 49 P. 282 (1897).

A drawer may recover of an acceptor upon a verbal acceptance, whether the drawer's funds are in the acceptor's hands upon acceptance or later. Durkee v. Conklin, 13 Colo. App. 313, 57 P. 486 (1899).

Such acceptance is outside the statute of frauds because it is only a promise to pay another's funds on his order. Durkee v. Conklin, 13 Colo. App. 313, 57 P. 486 (1899).

Drawee may be estopped by conduct to assert that acceptance was not in writing. Mumm v. Taylor, 121 Colo. 157, 213 P.2d 836 (1950).

Section applies to checks. Though a check need not be presented for acceptance in order to render the parties thereto liable, still the check itself does not operate as an assignment of any part of the fund to the credit of the drawer with the bank and the drawee bank is not liable to the holder, unless and until it accepts or certifies the check, and, except as otherwise provided all provisions applicable to a bill of exchange payable on demand apply to a check. Consequently, as no contrary provision for the acceptance of or promise to pay a check has been made, the provision applicable to a bill of exchange (i.e., draft) that acceptance or certification when made must be in writing applies also to a check. Van Buskirk v. State Bank, 35 Colo. 142, 83 P. 778 (1905).

Where upon inquiry by correspondent bank as agent of the drawer, the bank agrees to honor check, such assent constitutes an acceptance; and upon dishonor, drawer can maintain an action for breach of the agreement. Sigel-Campion Live Stock Co. v. Davis, 69 Colo. 511, 194 P. 468 (1921). See Gambrill v. Brown Hotel Co., 11 Colo. App. 529, 54 P. 1025 (1898).

Drawer discharged by acceptance. Where the payee of a bank check procures acceptance by the bank upon which it is drawn, upon which acceptance he obtains judgment against the latter, he cannot pursue a further remedy against the drawer of the

check in the same matter, there being as to such drawer a positive statutory discharge. Roberts v. Sch. Dist. No. 1, 99 Colo. 484, 63 P.2d 1232 (1936) (decided under repealed CSA, C. 112, § 188, negotiable instruments law).

4-3-410. Acceptance of varying draft.

(a) If the terms of a drawee's acceptance vary from the terms of the draft as presented, the holder may refuse the acceptance and treat the draft as dishonored. In that case, the drawee may cancel the acceptance.

(b) The terms of a draft are not varied by an acceptance to pay at a particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at that bank or place.

(c) If the holder assents to an acceptance varying the terms of a draft, the obligation of each drawer and indorser that does not expressly assent to the acceptance is discharged.

Source: L. 94: Entire article R&RE, p. 866, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-412 as it existed prior to 1994.

ANNOTATION

A conditional acceptance is as binding and effective as an absolute acceptance upon compliance with the conditions, but ineffective when the conditions have not been and probably never will be fulfilled. Barnsdall v. Waltemeyer, 142 F. 415 (8th Cir. 1905) (decided under repealed laws antecedent to CSA, C. 112, § 141, negotiable instruments law).

4-3-411. Refusal to pay cashier's checks, teller's checks, and certified checks.

(a) In this section, "obligated bank" means the acceptor of a certified check or the issuer of a cashier's check or teller's check bought from the issuer.

(b) If the obligated bank wrongfully (i) refuses to pay a cashier's check or certified check, (ii) stops payment on a teller's check, or (iii) refuses to pay a dishonored teller's check, the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages.

(c) Expenses or consequential damages under subsection (b) are not recoverable if the refusal of the obligated bank pay occurs because (i) the bank suspends payments, (ii) the obligated bank asserts a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument, (iii) the obligated bank has a reasonable doubt whether the person demanding payment is the person entitled to enforce the instrument, or (iv) payment is prohibited by law.

Source: L. 94: Entire article R&RE, p. 867, § 1, effective January 1, 1995. **L. 2005:** (b) amended, p. 760, § 9, effective June 1.

4-3-412. Obligation of issuer of note or cashier's check.

The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in sections 4-3-115 and 4-3-407. The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under section 4-3-415.

Source: L. 94: Entire article R&RE, p. 867, § 1, effective January 1, 1995.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Makers engage under this section to pay a note according to its tenor upon its falling due. Reese v. Lietzan, 160 Colo. 253, 419 P.2d 959 (1966).

The burden of avoidance is on maker. Where the maker makes no claim of mistake in the making of his written promise and the note on its face bears a consideration, the burden of avoidance of payment rests solely upon the maker. McCaffrey v. Mitchell, 98 Colo. 467, 56 P.2d 926, 57 P.2d 900 (1936).

Presumption does not apply where fiduciary relationship. The general presumption of liability of maker of promissory notes is over come by the specific presumption arising out of where there is a fiduciary relationship, in which case the claimant must overcome, by evidence, the presumption of undue influence with which the transaction is tainted because of the existence of the fiduciary relationship. Arnold v. Abernethy, 134 Colo. 573, 307 P.2d 1106 (1957).

The thoughts and purposes of the maker, not disclosed at the execution of the contract, may not be given to the jury in an attempt to show that the instrument means something other than what is shown on its face. McCaffrey v. Mitchell, 98 Colo. 467, 56 P.2d 926, 57 P.2d 900 (1936).

Maker cannot be heard to say that payee committed an illegal act in taking instrument, or had no authority to dispose of it, in the usual course of business, because, by its execution and delivery, he is precluded from raising any of these questions as against purchasers who obtained it for value before maturity without notice of the facts upon which he relies to defeat it. McMann v. Walker, 31 Colo. 261, 72 P. 1055 (1903).

Such as note given to foreign corporation which fails to comply with statutory prerequisites for doing business. See McMann v. Walker, 31 Colo. 261, 72 P. 1055 (1903).

The equities that may exist between payees governing the division of funds paid pursuant to a commercial promissory note are none of the makers' concern, as they must simply pay the note according to its tenor to the holder at maturity. Reese v. Lietzan, 160 Colo. 253, 419 P.2d 959 (1966).

Who is deemed the prima facie owner. Where an action is brought on a promissory note payable to the maker and indorsed in blank by him with a guarantee of payment, one having possession of the note is prima facie owner thereof and can recover against the maker as such. Byers v. Bellan-Price Co., 10 Colo. App. 74, 50 P. 368 (1897).

The maker of a promissory note may plead that another is the real owner thereof, that the action is prosecuted for his benefit, and set upon an indebtedness due and owing by such party in interest to him. Bank of Bromfield v. McKinlay, 53 Colo. 279, 125 P. 493 (1912).

Demand is not a condition precedent to an action on a note against the maker. Erdman v. Hardesty, 14 Colo. App. 395, 60 P. 360 (1900).

Including of bank holding municipal bonds. Where a municipality issues bonds, payable at the option of the holder at a bank, the failure of a holder to present the bonds for payment at such bank does not relieve the municipality as maker, although the bonds and payment fund have been forwarded to the bank by the municipality. Employers Mut. Ins. Co. v. Bd. of County Comm'rs, 102 Colo. 177, 78 P.2d 380 (1938).

Where money has been diverted from fund, bondholders may sue on the bonds as for a money demand and not be relegated to a mandamus action. Employers Mut. Ins. Co. v. Bd. of County Comm'rs, 102 Colo. 177, 78 P.2d 380 (1938).

Where a promissory note is executed and unconditionally delivered to a real estate agency as payee as part of a purchase price agreement, the payee may maintain an action upon the note without regard to any interest therein of the owner of the properly sold. Hubby v. Willis Agency, Inc., 131 Colo. 565, 283 P.2d 1080 (1955). See

Retallic v. Dixon, 75 Colo. 123, 224 P. 1054 (1924).

Rule prior to N.I.L. made surety a joint maker. Edmonston v. Ascough, 43 Colo. 55, 95 P. 313 (1908).

4-3-413. Obligation of acceptor.

(a) The acceptor of a draft is obliged to pay the draft (i) according to its terms at the time it was accepted, even though the acceptance states that the draft is payable "as originally drawn" or equivalent terms, (ii) if the acceptance varies the terms of the draft, according to the terms of the draft as varied, or (iii) if the acceptance is of a draft that is an incomplete instrument, according to its terms when completed, to the extent stated in sections 4-3-115 and 4-3-407. The obligation is owed to a person entitled to enforce the draft or to the drawer or an indorser who paid the draft under section 4-3-414 or 4-3-415.

(b) If the certification of a check or other acceptance of a draft states the amount certified or accepted, the obligation of the acceptor is that amount. If (i) the certification or acceptance does not state an amount, (ii) the amount of the instrument is subsequently raised, and (iii) the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course.

Source: L. 94: Entire article R&RE, p. 867, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-413 as it existed prior to 1994.

4-3-414. Obligation of drawer.

(a) This section does not apply to cashier's checks or other drafts drawn on the drawer.

(b) If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in sections 4-3-115 and 4-3-407. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under section 4-3-415.

(c) If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained.

(d) If a draft is accepted and the acceptor is not a bank, the obligation of the drawer to pay the draft if the draft is dishonored by the acceptor is the same as the obligation of an indorser under section 4-3-415 (a) and (c).

(e) If a draft states that it is drawn "without recourse" or otherwise disclaims liability of the drawer to pay the draft, the drawer is not liable under subsection (b) of this section to pay the draft if the draft is not a check. A disclaimer of the liability stated in subsection (b) of this section is not effective if the draft is a check.

(f) If (i) a check is not presented for payment or given to a depositary bank for collection within thirty days after its date, (ii) the drawee suspends payments after expiration of the thirty-day period without paying the check, and (iii) because of the suspension of payments, the drawer is deprived of funds maintained with the drawee to cover payment of the check, the drawer to the extent deprived of funds may discharge its obligation to pay the check by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds.

Source: L. 94: Entire article R&RE, p. 867, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-413 as it existed prior to 1994.

ANNOTATION

The drawer of a check is not presumed to know the signature of the payee. Goodyear Tire & Rubber Co. v. First Nat'l Bank, 95 Colo. 34, 32 P.2d 268 (1934) (decided under repealed laws antecedent to CSA, C. 112 § 61, negotiable instruments law).

4-3-415. Obligation of indorser.

(a) Subject to subsections (b), (c), (d) and (e) of this section and to section 4-3-419 (d), if an instrument is dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the terms of the instrument at the time it was indorsed, or (ii) if the indorser indorsed an incomplete instrument, according to its terms when completed, to the extent stated in sections 4-3-115 and 4-3-407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this section.

(b) If an indorsement states that it is made "without recourse" or otherwise disclaims liability of the indorser, the indorser is not liable under subsection (a) of this section to pay the instrument.

(c) If notice of dishonor of an instrument is required by section 4-3-503 and notice of dishonor complying with that section is not given to an indorser, the liability of the indorser under subsection (a) of this section is discharged.

(d) If a draft is accepted by a bank after an indorsement is made, the liability of the indorser under subsection (a) of this section is discharged.

(e) If an indorser of a check is liable under subsection (a) of this section and the check is not presented for payment, or given to a depositary bank for collection, within thirty days after the day the indorsement was made, the liability of the indorser under subsection (a) of this section is discharged.

Source: L. 94: Entire article R&RE, p. 868, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-414 as it existed prior to 1994.

ANNOTATION

I. General Consideration.

III. Order of Liability.

IV. Delay in Presentment or Notice.

V. Delay in Protest.

I. GENERAL CONSIDERATION.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Parol evidence is admissible to determine if reformation of instrument is appropriate where misrepresentations of legal effect of contract by assignee's attorney was alleged. Boyles Bros. Drilling v. Orion Indus., Ltd., 761 P.2d 278 (Colo. App. 1988).

II. CONTRACT OF INDORSER.

A. "Without Recourse".

B. Liability.

A. "Without Recourse".

Annotator's note. Since § 4-3-114 is similar to repealed laws antecedent to CSA, C. 112, § 38 (negotiable instruments law), relevant cases construing those provisions have been included in the annotations to this section.

One who by false representations as to the solvency of the maker of a promissory note induces another to accept it under an indorsement "without recourse" is liable to an action of deceit and the injured party is not concluded by the character of the indorsement. Pallister v. Camenisch, 21 Colo. App. 79, 121 P. 958 (1912).

Where a bank indorses a note over to its president for collection, but he later indorses it back to the bank without recourse, and the bank delivers the note without further indorsement to a third party for a valuable consideration, the bank is liable as an indorser without further

indorsement. Moore v. First Nat'l Bank, 38 Colo. 336, 88 P. 385 (1907).

Where a mortgage assigns "with the notes therein described without recourse", though the notes have been indorsed prior to the assignment, then the indorsement and assignment are considered as parts of one transaction, though of different dates, and are therefore construed together. Gillett v. Flora, 68 Colo. 218, 187 P. 527 (1920).

B. Liability.

Each indorser entitled to notice of dishonor. Where a complaint against numerous individuals alleges their liability as "indorsers", each of them is entitled to notice of dishonor precedent to any liability. Bieser v. Irwin, 101 Colo. 210, 72 P.2d 271 (1937).

Where there is a waiver of protest. By placing one's signature upon a note before delivery he becomes an indorser, and if the note contains a waiver of protest, he is not entitled to demand and notice, with his ability, therefore, being governed by this section where he is to pay the holder if the maker does not. Sproul v. Monteith, 66 Colo. 541, 185 P. 270 (1919).

The indorser of a promissory note is not a party to a warrant to confess judgment. Sproul v. Monteith, 66 Colo. 541, 185 P. 270 (1919).

Consequently, a judgment against him without service of process is void. Sproul v. Monteith, 66 Colo. 541, 185 P. 270 (1919).

Liability where estoppel created. While the principle that an indorser is liable on his warranty is correctly stated, the rule has no application when an estoppel has been created which would preclude plaintiff from obtaining a refund of the amount paid to defendant. First Nat'l Bank v. Ulibarri, 38 Colo. App. 428, 557 P.2d 1221 (1976).

Applied in Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954).

III. ORDER OF LIABILITY.

Where one, subsequent to discounting of notes to a bank, indorses his name thereon after that of the payee, this, prima facie makes him liable as an indorser after the latter, but such presumption can be overcome by proof. Loveland v. Sigel-Campion Live Stock Co., 77 Colo. 22, 234 P. 168 (1925) (decided under repealed laws antecedent to CSA, C. 112, § 64, negotiable instruments law).

Applied in Faden v. Midcap's Estate, 112 Colo. 573, 152 P.2d 682 (1944) (decided under repealed CSA, C. 112, § 68, negotiable instruments law).

IV. DELAY IN PRESENTMENT OR NOTICE.

Where presentment is not made on one of the makers primarily liable on the note, recovery cannot be had against the indorser. Prior v. Simonson, 62 Colo. 116, 160 P. 1035 (1916).

In case of a note secured by a chattel mortgage, the mortgagee, to preserve his lien against a third party, must make demand for payment of the mortgage debt within a reasonable time after maturity or take

possession of the mortgaged property, which must be within a reasonable time; and on his failure thus to act, his lien will be postponed to that of a subsequent bona fide incumbrancer who levies upon it before the mortgagee takes possession. Metro. State Bank v. Wright, 72 Colo. 106, 209 P. 804 (1922).

Similarly, a check must be presented within a reasonable time, depending upon the circumstances. Babcock v. City of Rocky Ford, 25 Colo. App. 312, 137 P. 899 (1914).

One must make presentment on day received when he has knowledge of bank's failing circumstances. See Babcock v. City of Rocky Ford, 25 Colo. App. 312, 137 P. 899 (1914).

The failure of a subcontractor to present a check for payment within a reasonable time after issue does not discharge the liability of the prime contractor. Hoeppner Constr. Co. v. United States ex rel. Trautman & Shreve, Inc., 273 F.2d 835 (10th Cir. 1960).

V. DELAY IN PROTEST.

A bank's failure to make a formal protest is immaterial where one's liability is based not on his indorsement of a check, but on his status as depositor and withdrawer of the funds. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

4-3-416. Transfer warranties.

(a) A person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that:

(1) The warrantor is a person entitled to enforce the instrument;

(2) All signatures on the instrument are authentic and authorized;

(3) The instrument has not been altered;

(4) The instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor;

(5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; and

(6) If the instrument is a demand draft, creation of the instrument according to the terms on its face was authorized by the person identified as drawer. Nothing in this section shall be construed to impair the rights of the drawer against the drawee.

(b) A person to whom the warranties under subsection (a) of this section are made and who took the instrument in good faith may recover from the warrantor as damages for breach of

warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.

(c) The warranties stated in subsection (a) of this section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) of this section is discharged to the extent of any loss caused by the delay in giving notice of the claim.

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

(e) If the warranty in paragraph (6) of subsection (a) of this section is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee.

Source: L. 94: Entire article R&RE, p. 869, § 1, effective January 1, 1995. **L. 2001:** (a) amended and (e) added, p. 867, § 4, effective August 8.

Editor's note: This section is similar to former § 4-3-417 as it existed prior to 1994.

Cross references: For the legislative declaration contained in the 2001 act amending subsection (a) and enacting subsection (e), see section 1 of chapter 244, Session Laws of Colorado 2001.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

One negotiating an instrument warrants its genuineness, his good title, that all prior parties had capacity to contract, and he has no knowledge of any fact impairing its validity or rendering it valueless. Am. Nat'l Bank v. First Nat'l Bank, 130 Colo. 557, 277 P.2d 951 (1954) (decided under repealed CSA, C. 112, § 65, negotiable instruments law).

Payee may not maintain action against depositary bank. Nat'l Sur. Corp. v. Citizens State Bank, 41 Colo. App. 580, 593

P.2d 362 (1978), aff'd, 199 Colo. 497, 612 P.2d 70 (1980).

4-3-417. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered;

(3) The warrantor has no knowledge that the signature of the drawer of the draft is unauthorized; and

(4) If the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as drawer. Nothing in this section shall be construed to impair the rights of the drawer against the drawee.

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

(c) If a drawee asserts a claim for breach of warranty under subsection (a) of this section based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under section 4-3-404 or 4-3-405 or the drawer is precluded under section 4-3-406 or 4-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other instrument is presented for payment to a party obliged to pay the instrument, and (iii) payment is received, the following rules apply:

(1) The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor

transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument.

(2) The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) of this section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) or (d) of this section is discharged to the extent of any loss caused by the delay in giving notice of the claim.

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

(g) A demand draft is a check, as provided in section 4-3-104 (f).

(h) If the warranty in paragraph (4) of subsection (a) of this section is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee.

Source: L. 94: Entire article R&RE, p. 869, § 1, effective January 1, 1995. **L. 2001:** (a) amended and (g) and (h) added, p. 867, § 5, effective August 8.

Editor's note: This section is similar to former § 4-3-417 as it existed prior to 1994.

Cross references: For the legislative declaration contained in the 2001 act amending subsection (a) and enacting subsections (g) and (h), see section 1 of chapter 244, Session Laws of Colorado 2001.

4-3-418. Payment or acceptance by mistake.

(a) Except as provided in subsection (c) of this section, if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that (i) payment of the draft had not been stopped pursuant to section 4-4-403 or (ii) the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. Rights of the drawee under this subsection are not affected by failure of the drawee to exercise ordinary care in paying or accepting the draft.

(b) Except as provided in subsection (c) of this section, if an instrument has been paid or accepted by mistake and the case is not covered by subsection (a) of this section, the person paying or accepting may, to the extent permitted by the law governing mistake and restitution, (i) recover the payment from the person to whom or for whose benefit payment was made or (ii) in the case of acceptance, may revoke the acceptance.

(c) The remedies provided by subsection (a) or (b) of this section may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This subsection does not limit remedies provided by section 4-3-417 or 4-4-407.

(d) Notwithstanding section 4-4-215, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under subsection (a) or (b) of this section, the instrument is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument.

Source: L. 94: Entire article R&RE, p. 871, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-418 as it existed prior to 1994.

ANNOTATION

Section and comments, when read together with § 4-4-215 and comments, treat a cashier's check as the equivalent of cash and preclude issuing banks from dishonoring them at any time. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

Cashier's checks represent the unconditional obligation of the issuing bank to pay, and therefore, banks may not dishonor their cashier's checks once issued. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

Where payee took check as a refund for a loan commission and without knowledge of a stop payment order on the check, payee took the check for value and in good faith, and the drawee bank has no remedies against the payee for its mistaken payment of the check. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

4-3-419. Instruments signed for accommodation.

(a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."

(b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsection (d) of this section, is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.

(c) A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in section 4-3-605, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the instrument for accommodation.

(d) If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if (i) execution of judgment against the other party has been returned unsatisfied, (ii) the other party is insolvent or in an insolvency proceeding, (iii) the other party cannot be served with process, or (iv) it is otherwise apparent that payment cannot be obtained from the other party.

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

Source: L. 94: Entire article R&RE, p. 871, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-415 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "Augmenting the Anomalousness of the Anomalous Indorser", see 16 Dicta 254 (1939).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Under the N.I.L. an accommodation party was one who signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person; such person was liable on the instrument to a holder for value, though the holder, at the time of taking the instrument, knew him to be only an accommodation party. Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg. Co., 155 Colo. 232, 393 P.2d 749 (1964).

One who signs a promissory note as surety is primarily liable on the instrument. Hall v. Farmers' Bank, 74 Colo. 165, 220 P. 237 (1923).

As distinguished from secondary liability. So far as concerns the holder of a note, the liability of a surety is a primary, as distinguished from a secondary, liability. Hall v. Farmers' Bank, 74 Colo. 165, 220 P. 237 (1923) (decided under repealed laws antecedent to CSA, C. 112, § 192, negotiable instruments law).

If one is an accommodation party lending his name, he is primarily liable to the holder, though he is merely a surety. Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg. Co., 155 Colo. 232, 393 P.2d 749 (1964).

Where loan would not have been made save for third person's indorsement. Where a third person writes his name on the back of a note before delivery to the payee, and without such indorsement the loan evidenced by the note would not have been made, such third person is an original promisor with a primary obligation in an action by the payee. Court Valhalla No. 16 Foresters of Am. v. Olson, 14 Colo. App. 243, 59 P. 883 (1900).

Where maker of note obtains extension of obligation to repay a bank as result of an accommodation party's indorsement of a renewal note, the mere fact that accommodation indorsement is made at request of bank does not alter maker's position as beneficiary of the accommodation indorsement and as the party accommodated in transaction; and the accommodation party is liable as an accommodation indorser to a holder of the renewal note. State Bank v. Owens, 31 Colo. App. 351, 502 P.2d 965 (1972).

Liability of party signing note as individual, without qualifying designation. Where parties sign a note as individuals, without any qualifying designations, they are individually liable as makers, and not as accommodation parties. Rink-A-Dinks v. TNT Motorcycles, Inc., 655 P.2d 431 (Colo. App. 1982).

One who executes a note for the purpose of obtaining money for another and who receives no part of the fund for his personal use, the entire amount going to the accommodated party, is an accommodation party. McGhee Inv. Co. v. Kirsher, 71 Colo. 137, 204 P. 891 (1922). See Fleming v. Gamble, 37 F.2d 72 (10th Cir. 1929).

The term "value" as used in this section relates to value for the negotiable instrument and not to the loan of the name by way of accommodation. McGhee Inv. Co. v. Kirsher, 71 Colo. 137, 204 P. 891 (1922).

Moreover, comaker's answer that he received nothing of value for signing is no defense. In an action against several makers of a promissory note, the answer of one of them that he received nothing of value for signing it does not constitute a defense, because the consideration may have been received by his comakers. Bloom v. State Bank, 75 Colo. 28, 223 P. 750 (1924).

One who indorses a note prior to delivery: "Demand notice and protest waived. Payment guaranteed" is a surety or accommodation indorser within the meaning of this section. Winton v. Sullivan, 104 Colo. 450, 91 P.2d 996 (1939) (decided also under repealed CSA, C. 112, § 192, negotiable instruments law).

Even if it is conceded that a party is an accommodation maker, that fact does not do away with his responsibility for payment as fixed by this section. Civic Fin. Co. v. Meintzer, 137 Colo. 572, 328 P.2d 379 (1958).

Such an accommodation maker is liable as a maker upon the payee's suit. Torbit v. Heath, 11 Colo. App. 492, 53 P. 615 (1898).

Also, upon notes which one signs individually as an accommodation maker at the lender's request in order to obtain loans for a corporation of which he is an officer and principal stockholder, he is liable jointly and severally with the corporation for all amounts due upon the notes. Sec. Sav. & Loan Ass'n v. Colo. Real Estate Dev., Inc., 163 Colo. 155, 429 P.2d 288 (1967).

Stockholders who execute a promissory note to raise corporate funds cannot claim to be accommodation makers; rather, they are principal makers upon a sufficient consideration. Reed v. First Nat'l Bank, 23 Colo. 380, 48 P. 507 (1897).

An accommodation maker may proceed against principal maker. An accommodation maker or surety on a promissory note against whom a judgment has been rendered may, without making payment himself, proceed in equity against the principal makers, or their estate, for payment of the note so as to exonerate the surety. Woodward v. Hollis, 93 Colo. 17, 22 P.2d 862 (1933); Nat'l City Bank of Denver v. Sather, 677 P.2d 432 (Colo. App. 1983).

Where one of several accommodation indorsers pays the note indorsed, he is entitled to contribution. Owens v. Greenlee, 68 Colo. 114, 188 P. 721 (1920).

Though neither the law merchant nor the negotiable instruments act attempted to prescribe the rights of joint makers as between themselves; rather, these rights were left to be settled according to the principles of the common law and the equities between the parties. Owens v. Greenlee, 68 Colo. 114, 188 P. 721 (1920).

A guaranty is to be reasonably interpreted according to the intention of the parties as disclosed by facts and circumstances surrounding its execution. Valley Nat'l Bank v. Foreign Car Rental, Inc., 404 P.2d 272 (1965); First Interstate

Bank v. Colcott Partners, 833 P.2d 876 (Colo. App. 1992).

Guaranty agreements must be strictly construed in favor of the guarantor. Walter E. Heller & Co. v. Wilkerson, 627 P.2d 773 (Colo. App. 1980); First Interstate Bank v. Colcott Partners, 833 P.2d 876 (Colo. App. 1992).

Guarantor's liability is separate and independent of and not affected by validity of stipulated settlement agreement. Defendants' claim that the settlement agreement was based upon a mistake of fact and should be set aside had no bearing on the validity of the unconditional guaranty. First Interstate Bank v. Colcott Partners, 833 P.2d 876 (Colo. App. 1992).

Guarantor's liability is the same as that of principal debtor where there is no language to the contrary in the guaranty. First Interstate Bank v. Colcott Partners, 833 P.2d 876 (Colo. App. 1992).

Where a contract of guaranty provides that notice of default of the principal debtor must be given to the guarantor, such notice must be given for the guarantor to be liable. W. States Leasing Co. v. Adturn, Inc., 31 Colo. App. 256, 500 P.2d 1190 (1972).

However, where an unambiguous absolute guaranty is silent as to notice and the maximum amount guaranteed is determinable at the time the guarantee is entered into, there is no basis to imply a requirement of notice. W. States Leasing Co. v. Adturn, Inc., 31 Colo. App. 256, 500 P.2d 1190 (1972).

It is error to resort to another instrument for any limiting conditions. Where separate instrument guarantying lease payment is unambiguous, it is error to resort to the language of the lease to construe the guaranty as to any limiting conditions. W. States Leasing Co. v. Adturn, Inc., 31 Colo. App. 256, 500 P.2d 1190 (1972).

Same person may be both guarantor and indorser. Winton v. Sullivan, 104 Colo. 450, 91 P.2d 996 (1939).

A guarantor of a note is not an indorser within the meaning of that term as used in a warrant of attorney in such note; hence, a judgment rendered upon confession thereunder is void for lack of jurisdiction of the person. Sidwell v. First Nat'l Bank, 76 Colo. 547, 233 P. 153 (1925) (decided under repealed laws antecedent to CSA, C. 112, § 29, negotiable instruments law).

Guarantor is secondarily liable. For the one who after the execution and delivery of a promissory note signs it as guarantor to satisfy a subsequent purchaser, his liability thereon is secondary and not primary. Cobbey v. Peterson, 89 Colo. 350, 3 P.2d 298 (1931) (decided under repealed laws antecedent to CSA, C. 112, § 192, negotiable instruments law).

Liability of a guarantor of negotiable paper was not fixed by the N.I.L. Winton v. Sullivan, 104 Colo. 450, 91 P.2d 996 (1939).

Under subsection (c), the lack of qualifying words on promissory note cannot defeat accommodation party status. Accordingly, because no such qualifiers are present, court looks for

evidence showing that individual defendants received a direct benefit from the value given for promissory note. Bd. of Cty. Comm'rs v. Sportsmen's Ranch, 271 P.3d 562 (Colo. App. 2011).

Because evidence does not show that individual defendants received a direct benefit from either original loan or subsequent promissory note, court of appeals must overturn jury's finding that defendants did not sign as accommodation parties. Here, individual defendants were accommodation parties. As accommodation parties, individual defendants were entitled to enforce note and their acquisition of the note did not extinguish underlying deed of trust. Bd. of Cty. Comm'rs v. Sportsmen's Ranch, 271 P.3d 562 (Colo. App. 2011).

4-3-420. Conversion of instrument.

(a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

(b) In an action under subsection (a) of this section, the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.

(c) A representative, other than a depositary bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

Source: L. 94: Entire article R&RE, p. 872, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-419 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the

Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Elements of conversion. There is a conversion of a negotiable instrument when any person unlawfully takes, detains, or refuses to surrender a negotiable instrument belonging to another person. Commercial Credit Corp. v. Univ. Nat'l Bank, 590 F.2d 849 (10th Cir. 1979).

While a showing of fraud, misrepresentation, or mistake may constitute a defense to payment, it does not establish the right to immediate possession, a necessary prerequisite to establishing a claim for conversion. Commercial Credit Corp. v. Univ. Nat'l Bank, 590 F.2d 849 (10th Cir. 1979).

Bank's wrongful deposit of corporate checks into treasurer's personal account, absent commercially reasonable inquiries as to the authority of the treasurer to deposit such checks, constitutes conversion. Central Inc. v. Cache Nat'l Bank, 748 P.2d 351 (Colo. App. 1987).

If payment by a collecting or depository bank occurs on a check with no indorsement or with a missing endorsement, it is the legal equivalent of payment on a forged indorsement, which constitutes conversion. Central Inc. v. Cache Nat'l Bank, 748 P.2d 351 (Colo. App. 1987).

Common-law recognized right of payee to maintain action for conversion against bank under circumstances where the bank wrongfully paid out moneys based upon a forged endorsement. Citizens State Bank v. Nat'l Sur. Corp., 199 Colo. 497, 612 P.2d 70 (1980).

Adoption of this section has not altered the law in Colorado by abolishing the common-law payee's conversion action against a depositary bank that has cashed a check upon a forged endorsement. Nat'l Sur. Corp. v. Citizens State Bank, 41 Colo. App. 580, 593 P.2d 362 (1978), aff'd, 199 Colo. 497, 612 P.2d 70 (1980).

Former version of subsection (1) not all inclusive. The three listed situations in subsection (1) of this section are not meant to be exclusive examples of actionable conversion. Commercial Credit Corp. v. Univ. Nat'l Bank, 590 F.2d 849 (10th Cir. 1979).

Purpose of former version of subsection (3) was to create an affirmative defense which a defendant-bank may assert. Citizens State Bank v. Nat'l Sur. Corp., 199 Colo. 497, 612 P.2d 70 (1980).

Where undisputed evidence established that collecting bank failed to make inquiries as to the authority of a corporate treasurer to deposit checks payable to corporation into the personal account of the treasurer, the court properly determined that the bank had not acted according to reasonable commercial standards and was not entitled to take advantage of the statutory defenses. Central Inc. v. Cache Nat'l Bank, 748 P.2d 351 (Colo. App. 1987).

The affirmative defense was not available to bank which paid checks without any indorsement. The bank as a matter of law

did not act in accordance with reasonable commercial standards in handling the checks without the payee's signature. Kelly v. Central Bank and Trust Co., 794 P.2d 1037 (Colo. App. 1989).

Phrase "or otherwise" in former version of subsection (3) only has meaning if the drafters anticipated a cause of action other than conversion, e.g., an action for moneys had and received. Citizens State Bank v. Nat'l Sur. Corp., 199 Colo. 497, 612 P.2d 70 (1980).

Applied in Nat'l Sur. Corp. v. Citizens State Bank, 651 P.2d 460 (Colo. App. 1982).

PART 5

DISHONOR

4-3-501. Presentment.

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

(b) The following rules are subject to article 4 of this title, agreement of the parties, and clearing-house rules and the like:

(1) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to any one of two or more makers, acceptors, drawees, or other payors.

(2) Upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has

established a cut-off hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cut-off hour.

Source: L. 94: Entire article R&RE, p. 873, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-501, 4-3-503, and 4-3-504 as they existed prior to 1994.

ANNOTATION

Law reviews. For comment on Colorado Nat'l Bank v. David appearing below, see 4 Rocky Mt. L. Rev. 289 (1932).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Under this section a check need not be presented for acceptance unless it contains an express stipulation to that effect. Van Buskirk v. State Bank, 35 Colo. 142, 83 P. 778 (1905).

Likewise, a bondholder is not required to present a bond or interest coupons for payment at maturity in order to fix the absolute liability of the maker, and this fact is true even though such is made payable at a particular bank where the maker has deposited funds to meet the obligations and the bank fails subsequent to the maturity of the bonds. Employers Mut. Ins. Co. v. Bd. of County Comm'rs, 102 Colo. 177, 78 P.2d 380 (1938).

To charge an indorser, presentment for payment and notice to him of the dishonor must be alleged and shown. Sykes v. Kruse, 49 Colo. 560, 113 P. 1013 (1911).

Which can be urged on appeal. Substantial defects may be urged on appeal though not presented in the court below, e.g., failure, as against the indorser of negotiable paper to allege presentment for payment and notice of dishonor. Sykes v. Kruse, 49 Colo. 560, 113 P. 1013 (1911).

Such does not apply to suits between accommodation indorsers. In a suit in equity by one of several accommodation indorsers against the others for contribution, the defendants will not be heard to contend that they were entitled to notice of the dishonor and protest of the bill, as the provisions of this section have no application in such case. Owens v. Greenlee, 68 Colo. 114, 188 P. 721 (1920).

In an action on a note payable at a specified place, a demand need not be averred or proved; and, if the maker was ready and offered at the time and place to pay it, this is a matter of defense to be pleaded and proved by him. Florence Oil & Ref. Co. v. First Nat'l Bank, 38 Colo. 119, 88 P. 182 (1906).

Notice to one does not constitute notice to all. In an action on a promissory note, notice of nonpayment to one defendant does not constitute notice to the others, and the contention that he is the general agent of his codefendants for the purpose of receiving notice is without merit. Bieser v. Irwin, 101 Colo. 210, 72 P.2d 271 (1937).

Where stolen check bore a 1971 date and was not cashed until 1973, when the time for presentment had long since passed, the lack of timely presentment would not have destroyed its negotiability as the negotiability of an instrument is not affected by the fact that it is undated, antedated, or postdated. Thus, the stolen check indorsed by accused falls squarely within the terms of the forgery statute under which he was convicted. People v. Palmer, 189 Colo. 358, 540 P.2d 341 (1975).

Unless negotiable paper is sent by the holder for collection from the maker to the very bank designated as the place of payment, such bank is the agent of the maker and not of the holder in relation to any deposit by the maker when there is no evidence of an express authority. Employers Mut. Ins. Co. v. Bd. of County Comm'rs, 102 Colo. 177, 78 P.2d 380 (1938).

Where a promissory note payable at a certain bank is there presented on the day of its maturity, but payment is refused, and the holder then presents it at the maker's place of business, but payment is likewise refused, his leaving such at the bank immediately thereafter is a good presentment. Archuleta v. Johnston, 53 Colo. 393, 127 P. 134 (1912).

A bondholder is not required to present a bond or interest coupons for payment at maturity in order to fix the absolute liability of the maker, and this is true even though the paper is made payable at a particular bank where the maker has deposited sufficient funds to meet his obligation and the bank has failed subsequent to the maturity of the paper. Employers Mut. Ins. Co. v. Bd. of County Comm'rs, 102 Colo. 177, 78 P.2d 380 (1938).

To charge the indorser of a promissory note, executed by two or more persons not partners, no place of payment being specified, presentment for payment must be made to each of the makers. Prior v. Simonson, 62 Colo. 116, 160 P. 1035 (1916).

Where payee pledges a note without the maker's knowledge, and the individual who assumes the note pays all interest to the payee with the pledgee's acquiescence, the payment of the principal to the payee is a defense against the pledgee. Colo. Nat'l Bank v. David, 89 Colo. 238, 1 P.2d 578 (1931).

A note drawn to alternative, not joint, payees can be discharged only by a holder of the instrument. Reese v. Lietzan, 160 Colo. 253, 419 P.2d 959 (1966).

Applied in Genua v. Kilmer, 37 Colo. App. 365, 546 P.2d 1279 (1976).

4-3-502. Dishonor.

(a) Dishonor of a note is governed by the following rules:

(1) If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.

(2) If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later.

(3) If the note is not payable on demand and paragraph (2) of this subsection (a) does not apply, the note is dishonored if it is not paid on the day it becomes payable.

(b) Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

(1) If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under section 4-4-301 or 4-4-302, or becomes accountable for the amount of the check under section 4-4-302.

(2) If a draft is payable on demand and paragraph (1) of this subsection (b) does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.

(3) If a draft is payable on a date stated in the draft, the draft is dishonored if (i) presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later, or (ii) presentment for acceptance is duly made before the day the draft becomes payable and the draft is not accepted on the day of presentment.

(4) If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment.

(c) Dishonor of an unaccepted documentary draft occurs according to the rules stated in subsection (b)(2), (3), and (4) of this section, except that payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by those paragraphs.

(d) Dishonor of an accepted draft is governed by the following rules:

(1) If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment.

(2) If the draft is not payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and payment is not made on the day it becomes payable or the day of presentment, whichever is later.

(e) In any case in which presentment is otherwise required for dishonor under this section and presentment is excused under section 4-3-504, dishonor occurs without presentment if the instrument is not duly accepted or paid.

(f) If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance the draft is treated as never having been dishonored.

Source: L. 94: Entire article R&RE, p. 873, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-501 and 4-3-507 as they existed prior to 1994.

4-3-503. Notice of dishonor.

(a) The obligation of an indorser stated in section 4-3-415 (a) and the obligation of a drawer stated in section 4-3-414 (d) may not be enforced unless (i) the indorser or drawer is given notice of dishonor of the instrument complying with this section or (ii) notice of dishonor is excused under section 4-3-504 (b).

(b) Notice of dishonor may be given by any person; may be given by any commercially reasonable means, including an oral, written, or electronic communication; and is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted. Return of an instrument given to a bank for collection is sufficient notice of dishonor.

(c) Subject to section 4-3-504 (c), with respect to an instrument taken for collection by a collecting bank, notice of dishonor must be given (i) by the bank before midnight of the next banking day following the banking day on which the bank receives notice of dishonor of the instrument, or (ii) by any other person within thirty days following the day on which the person receives notice of dishonor. With respect to any other instrument, notice of dishonor must be given within thirty days following the day on which dishonor occurs.

Source: L. 94: Entire article R&RE, p. 875, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-501, 4-3-508, and 4-3-510 as they existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Oral notice is sufficient. De La Vergne v. Globe Printing Co., 27 Colo. App. 308, 148 P. 923 (1915).

Such notice within two days held in due time where parties resided in different places. De La Vergne v. Globe Printing Co., 27 Colo. App. 308, 148 P. 923 (1915).

Notice of dishonor made on the day of dishonor and addressed to the indorser at a place which the indorser named as his residence at the time of the execution of the note is sufficient, since the payee is entitled to rely on such statement. Archuleta v. Johnston, 53 Colo. 393, 127 P. 134 (1912).

Delay in giving notice of dishonor to an antecedent party while investigating an apparent erasure of the party's name on the paper is not excused. Emerson & Buckingham Bank & Trust Co. v. German-American Trust Co., 65 Colo. 398, 176 P. 472 (1918).

4-3-504. Excused presentment and notice of dishonor.

(a) Presentment for payment or acceptance of an instrument is excused if (i) the person entitled to present the instrument cannot with reasonable diligence make presentment, (ii) the maker or acceptor has obligation to pay the instrument or is dead or in insolvency proceedings, (iii) by the terms of the instrument presentment is not necessary to enforce the obligation of indorsers or the drawer, (iv) the drawer or indorser whose obligation is being enforced has waived presentment or otherwise has no reason to expect or right to require that the instrument be paid or accepted, or (v) the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft.

(b) Notice of dishonor is excused if (i) by the terms of the instrument notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument, or (ii) the party whose obligation is being enforced waived notice of dishonor. A waiver of presentment is also a waiver of notice of dishonor.

(c) Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving the notice and the person giving the notice exercised reasonable diligence after the cause of the delay ceased to operate.

Source: L. 94: Entire article R&RE, p. 875, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-511 as it existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Presentment for payment and waiver of dishonor may be expressly or impliedly waived in accordance with this section. Torbert v. Montague, 38 Colo. 325, 87 P. 1145 (1906).

Such waiver may consist of acts and declarations of the indorser calculated to mislead the holder, put him off his guard, or induce him to forbear taking the necessary steps to charge such indorser. Torbert v. Montague, 38 Colo. 325, 87 P. 1145 (1906).

An indorser of a promissory note waives notice of dishonor under this section by repeated assurances before and after maturity that he would see that the note was paid. James v. Ward, 80 Colo. 293, 250 P. 1097 (1926).

Notice of dishonor need not be alleged in an action against the indorser where it is alleged that payment was demanded of him. De La Vergne v. Globe Printing Co., 27 Colo. App. 308, 148 P. 923 (1915).

4-3-505. Evidence of dishonor.

(a) The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor stated:

(1) A document regular in form as provided in subsection (b) of this section which purports to be a protest;

(2) A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor;

(3) A book or record of the drawee, payor bank, or collecting bank, kept in the usual course of business which shows dishonor, even if there is no evidence of who made the entry.

(b) A protest is a certificate of dishonor made by a United States consul or vice consul, or a notary public or other person authorized to administer oaths by the law of the place where dishonor occurs. It may be made upon information satisfactory to that person. The protest must

identify the instrument and certify either that presentment has been made or, if not made, the reason why it was not made, and that the instrument has been dishonored by nonacceptance or nonpayment. The protest may also certify that notice of dishonor has been given to some or all parties.

Source: L. 94: Entire article R&RE, p. 876, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-510 as it existed prior to 1994.

4-3-506. Recording credit card or social security numbers prohibited.

(a) When payment is made by check or other negotiable instrument, a person shall not record or require the maker of the check to record a credit card or social security number given as identification or proof of creditworthiness.

(b) Subsection (a) of this section shall not prohibit:

(1) The recording of a credit card number when a check or other negotiable instrument is issued to pay the credit card designated by the credit card number.

(2) (i) The recording of a person's social security number on a check or other negotiable instrument issued to pay a student loan.

(ii) For the purposes of this paragraph (2), "student loan" means a loan to finance higher education opportunities that is made, originated, disbursed, guaranteed, or serviced by the department of higher education, collegeinvest, an agency of another state, the federal government, or an institution of higher education, including, but not limited to, a loan that is secured pursuant to part 2 of article 3.1 of title 23, C.R.S., and a loan authorized by title IV, part B of the federal "Higher Education Act of 1965", as amended.

(3) The recording of a person's social security number on a bonafide loan application.

(c) Subsection (a) of this section shall not prohibit a person from requesting a purchaser of goods or services to display a credit card as indication of creditworthiness or identification if the only information about the credit card that is recorded is the type of credit card and the issuer of the credit card.

Source: L. 2003: Entire section added, p. 1337, § 1, effective August 6. **L. 2004:** (b)(2)(ii) amended, p. 574, § 29, effective July 1.

PART 6

DISCHARGE AND PAYMENT

4-3-601. Discharge and effect of discharge.

(a) The obligation of a party to pay the instrument is discharged as stated in this article or by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.

(b) Discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument without notice of the discharge.

Source: L. 94: Entire article R&RE, p. 876, § 1, effective January 1, 1995.

Editor's note: This section is similar to former §§ 4-3-601 and 4-3-602 as they existed prior to 1994.

ANNOTATION

Applied in Farner v. Cole, 778 P.2d 688 (Colo. 1989).

4-3-602. Payment.

(a) Subject to subsection (b) of this section, an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under section 4-3-306 by another person.

(b) The obligation of a party to pay the instrument is not discharged under subsection (a) of this section if:

(1) A claim to the instrument under section 4-3-306 is enforceable against the party receiving payment and (i) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case of an instrument other than a cashier's check, teller's check, or certified check, the party making

payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

(2) The person making payment knows that the instrument is a stolen instrument and pays a person it knows is in wrongful possession of the instrument.

Source: L. 94: Entire article R&RE, p. 876, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-603 as it existed prior to 1994.

ANNOTATION

I. General Consideration.

II. Payment or Satisfaction.

III. By Party Secondarily Liable.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

II. PAYMENT OR SATISFACTION.

A negotiable instrument may be discharged by any act which will discharge a simple contract for the payment of money. Adams v. White, 173 Colo. 51, 476 P.2d 36 (1970).

Accord and satisfaction is a proper defense that can be asserted. Adams v. White, 173 Colo. 51, 476 P.2d 36 (1970).

Payment is an affirmative defense and must be specially pleaded. Florence Oil & Ref. Co. v. First Nat'l Bank, 38 Colo. 119, 88 P. 182 (1906).

Where payments are made to a payee of a note as agent for the noteholder, then, if the latter acquiesces in such a method of payment, he is thereby bound and has no recourse against the maker if he fails to receive payments as made. Burck v. Hubbard, 104 Colo. 83, 88 P.2d 955 (1939).

A bank holding a note as collateral security, but without knowledge of the maker, which permits the pledgor to represent himself as the ostensible owner and to make collections thereon, makes such pledgor its agent for collection, and payment to him operates as a bar to an action by the bank. Colo. Nat'l Bank v. Rebbein, 88 Colo. 547, 298 P. 952 (1931); Gioso v. DiBell, 88 Colo. 287, 295 P. 919 (1931); Stockyards Nat'l Bank v. Neugebauer, 97 Colo. 246, 48 P.2d 813 (1935).

Maker of check not exposed to double liability where he was required to pay the

holder since, upon payment of the checks, its liability is completely discharged. Once the obligor is discharged on the instruments, he is also discharged on the underlying obligation. Lamson v. Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966 (1975).

However, payment by a borrower to a loan company of his note, which has been transferred with possession by the company before maturity, is not a payment of the note, unless an actual agency for collection on the part of the company is proven, or facts are shown which would estop the holder of the note from denying such agency. John Stuart & Co. v. Asher, 15 Colo. App. 403, 62 P. 1051 (1900).

Where notes are payable at a place and to a person specifically designated, then, if payment is made to the designated party who does not have possession of the notes, any conclusion that such party is the agent of the maker may be overcome by parol evidence showing that he is, in fact, an agent for indorsee and holder of the note to receive payment. Stark v. Stevens, 76 Colo. 550, 233 P. 619 (1925).

Although partial payment to agent bounds holder. Where a note which is payable in five years provides for an option in the maker to pay after three years and an agent is authorized to collect the note, partial payment to the agent after three, but before five years, bounds the holder. Frost v. Fisher, 13 Colo. App. 322, 58 P. 872 (1899).

III. BY PARTY SECONDARILY LIABLE.

When the guarantor of a promissory note discharges his secondary liability he is entitled to the note under the doctrine of subrogation; the essence of the doctrine of subrogation is the right of him who has paid to be put in place of one who has received payment while the primary obligation still exists. Cobbey v. Peterson, 89 Colo. 350, 3 P.2d 298 (1931).

The guarantor may sue maker. The discharge of the contract of guaranty by the guarantor does not extinguish or satisfy the obligation to which the contract of guaranty relates; consequently, it is universally held that upon payment of a note by a guarantor, when only secondarily liable, he becomes entitled to the possession of such note and may maintain an action upon it against the maker. Cone v. Eldridge, 51 Colo. 564, 119 P. 616 (1911).

Where the guarantor of a note pays the indebtedness to the holder who has transferred the paper to a third party, thus putting it out of his power to surrender the evidence of indebtedness to the guarantor, equity will afford appropriate relief to the latter even if by so doing it awards relief ordinarily cognizable only in courts of law. Cobbey v. Peterson, 89 Colo. 350, 3 P.2d 298 (1931).

Where several guarantors of promissory notes, of which a testator and another are the makers, have become assignees of, they are entitled to maintain a joint action thereon against the administrator; and what proportion they had contributed to the payment or purchase of the notes is of no concern to the administrator. Cone v. Eldridge, 51 Colo. 564, 119 P. 616 (1911).

4-3-603. Tender of payment.

(a) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.

(b) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates.

(c) If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument.

Source: L. 94: Entire article R&RE, p. 877, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-604 as it existed prior to 1994.

4-3-604. Discharge by cancellation or renunciation.

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed record. The obligation of a party to pay a check is not discharged solely by destruction of the check in connection with a process in which information is extracted from the check and an image of the check is made and, subsequently, the information and image are transmitted for payment.

(b) Cancellation or striking out of an indorsement pursuant to subsection (a) of this section does not affect the status and rights of a party derived from the indorsement.

Source: L. 94: Entire article R&RE, p. 877, § 1, effective January 1, 1995. **L. 2023:** (a) amended, (SB 23-090), ch. 136, p. 531, § 23, effective August 7.

Editor's note: This section is similar to former § 4-3-605 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "One Year Review of Contracts", see 39 Dicta 161 (1962).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Section does not apply where note is delivered. This section, providing that the release of a promissory note must be in writing, has no application to a case where the note is delivered to the maker by an authorized agent of the holder. Kitts v. Hill, 89 Colo. 186, 300 P. 610 (1931).

This section only applies if the defense of renunciation is asserted, and does not apply when an assertion is made that a party has waived its right to receive interest under the terms of a promissory note. Ebrahimi v. E.F. Hutton & Co., Inc., 794 P.2d 1015 (Colo. App. 1989).

This section provides that the renunciation of rights in a negotiable instrument must be in writing or the instrument itself must be delivered up to the person liable thereon. Coughlin v. Truitt, 149 Colo. 26, 367 P.2d 350 (1961); Berta v. Rocchio, 149 Colo. 325, 369 P.2d 51 (1962).

So oral evidence is inadmissible to establish a renunciation or release. Tisdel v. Central Sav. Bank & Trust Co., 90 Colo. 114, 6 P.2d 912 (1931); Coughlin v. Truitt, 149 Colo. 26, 367 P.2d 350 (1961); Berta v. Rocchio, 149 Colo. 325, 369 P.2d 51 (1962). But see Edmonston v. Ascough, 43 Colo. 55, 95 P. 313 (1908).

"Renunciation" is the unilateral act of the holder usually without consideration, whereby he expresses the intention of abandoning his rights on the instrument or against one or more parties thereto. Berta v. Rocchio, 149 Colo. 325, 369 P.2d 51 (1962).

Despite the language of this section, an intent to discharge a party is required, and consideration of evidence of intent of the parties is proper in determining the issue of discharge. Columbia Sav. and Loan Ass'n v. Zelinger, 794 P.2d 231 (Colo. 1990).

Where the affirmative defense of renunciation is asserted, the burden is upon those asserting the defense to produce a written renunciation or to prove that the note has been delivered up to them. Adams v. White, 173 Colo. 51, 476 P.2d 36 (1970).

Without delivery of a note to the maker, the writing of the word "paid" across the face of the note by payee and the signing of his name thereto does not operate to discharge the liability of the maker. Wittman v. Pickens, 33 Colo. 484, 81 P. 299 (1905).

Liability is discharged by cancellation and return. The liability of the payee of a promissory note who indorses when transferring it to another is discharged by the acts of the indorsee in cancelling and returning it to the maker and accepting in lieu thereof other evidences of indebtedness. Tomkins v. Tomkins, 78 Colo. 574, 243 P. 632 (1926).

Moreover, a note drawn to alternative, not joint, payees can be discharged only by a holder of the instrument. Reese v. Lietzan, 160 Colo. 253, 419 P.2d 959 (1966).

A cancellation induced through fraud does not act to discharge the parties to a note. Ohio Casualty Ins. Co. v. Yaklich, 768 P.2d 1274 (Colo. App. 1989).

Applied in Metro Nat'l Bank v. Roe, 675 P.2d 331 (Colo. App. 1983); Wynn v. Adams County Bank, 761 P.2d 234 (Colo. App. 1988).

4-3-605. Discharge of indorsers and accommodation parties.

(a) In this section, the term "indorser" includes a drawer having the obligation described in section 4-3-414 (d).

(b) Discharge, under section 4-3-604, of the obligation of a party to pay an instrument does not discharge the obligation of an indorser or accommodation party having a right of recourse against the discharged party.

(c) If a person entitled to enforce an instrument agrees, with or without consideration, to an extension of the due date of the obligation of a party to pay the instrument, the extension discharges an indorser or accommodation party having a right of recourse against the party whose obligation is extended to the extent the indorser or accommodation party proves that the extension caused loss to the indorser or accommodation party with respect to the right of recourse.

(d) If a person entitled to enforce an instrument agrees, with or without consideration, to a material modification of the obligation of a party other than an extension of the due date, the modification discharges the obligation of an indorser or accommodation party having a right of recourse against the person whose obligation is modified to the extent the modification causes loss to the indorser or accommodation party with respect to the right of recourse. The loss suffered by the indorser or accommodation party as a result of the modification is equal to the amount of the right of recourse unless the person enforcing the instrument proves that no loss was caused by the modification or that the loss caused by the modification was an amount less than the amount of the right of recourse.

(e) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an indorser or accommodation party having a right of recourse against the obligor

is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent (i) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (ii) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest. The burden of proving impairment is on the party asserting discharge.

(f) If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. If the party asserting discharge is an accommodation party not entitled to discharge under subsection (e) of this section, the party is deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment is on the party asserting discharge.

(g) Under subsection (e) or (f) of this section, impairing value of an interest in collateral includes (i) failure to obtain or maintain perfection or recordation of the interest in collateral, (ii) release of collateral without substitution of collateral of equal value, (iii) failure to perform a duty to preserve the value of collateral owed, under article 9 or other law, to a debtor or surety or other person secondarily liable, or (iv) failure to comply with applicable law in disposing of collateral.

(h) An accommodation party is not discharged under subsection (c), (d), or (e) of this section unless the person entitled to enforce the instrument knows of the accommodation or has notice under section 4-3-419 (c) that the instrument was signed for accommodation.

(i) A party is not discharged under this section if (i) the party asserting discharge consents to the event or conduct that is the basis of the discharge, or (ii) the instrument or a separate agreement of the party provides for waiver of discharge under this section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral.

Source: L. 94: Entire article R&RE, p. 878, § 1, effective January 1, 1995.

Editor's note: This section is similar to former § 4-3-606 as it existed prior to 1994.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

A verbal promise, without consideration, to release a joint maker and look to the principal maker alone does not release him from liability. Edmonston v. Ascough, 43 Colo. 55, 95 P. 313 (1908).

Nor does a request by such an accommodation maker that the holder of the note sue the principal maker discharge him from liability where the holder refuses and the principal maker becomes insolvent. Edmonston v. Ascough, 43 Colo. 55, 95 P. 313 (1908).

Also, an extension of time of payment of a promissory note must be by agreement of the parties and based upon a valid consideration. Am. Medical & Dental Ass'n v. Grant, 87 Colo. 183, 285 P. 1099 (1930).

A holder cannot arbitrarily extend time for payment. Stipulation in a promissory note that makers and indorsers agree to any extension of time of payment before, at, or after maturity does not mean that the holder can arbitrarily extend the time of payment. Am. Medical & Dental Ass'n v. Grant, 87 Colo. 183, 285 P. 1099 (1930).

As between the maker and payee of a note, an agreement to extend the time of payment until a copy of patent to land can be obtained is not invalid as an indefinite extension. Drake v. Pueblo Nat'l Bank, 44 Colo. 49, 96 P. 999 (1908).

Though such does not apply to a surety. A surety is primarily liable, and one primarily liable thereunder is not released from liability by an extension of the time of payment to the principal maker without the surety's consent. Only the person who can be released by a binding agreement extending time is one "secondarily" liable and as a surety is not "secondarily", but "primarily", liable, he is not released by such extension. Hall v. Farmers' Bank, 74 Colo. 165, 220 P. 237 (1923).

Where the holder of a note obtains control of property which a surety on the note is entitled to have applied to the payment of the note, thereby preventing the surety from being subrogated to the holder's rights in such property, the surety is released from liability. Crosby v. Woodbury, 37 Colo. 1, 89 P. 34 (1906).

Instructions merely stating section must include interpretation. Where instruction on impairment of recourse or of collateral is correct statement of law relative to defendant's defense, it is error not to include interpretation of this highly technical statute in instructions to aid jury in applying statute to facts of case. Pueblo Bank & Trust Co. v. McMartin, 31 Colo. App. 546, 506 P.2d 759 (1972).

Subsection (2) (under former law) does not require notification and consent as a prerequisite to an express reservation of rights. Although plaintiff discharged defendants in assumption agreement, it expressly reserved its rights against them. Therefore the defendants remained liable on their obligation to plaintiff. Matthews v. Saleen, 812 P.2d 1186 (Colo. App. 1991).

Failure to object to an increase in risk, the terms of which were never explained, cannot be deemed a consent to impairment of collateral. Haberl v. Bigelow, 855 P.2d 1368 (Colo. 1993).

Under former § 4-3-606, a prior, express consent provision in an instrument waives either a surety or a co-maker's right to claim a discharge of obligations based upon later modifications to the obligation. Crown Life Ins. Co. v. Haag Ltd. P'ship, 929 P.2d 42 (Colo. App. 1996).

Applied in Moss v. McDonald, 772 P.2d 626 (Colo. App. 1988); Resolution Trust Corp. v. Teem P'ship, 835 F. Supp. 563 (D. Colo. 1993).

ARTICLE 4

Bank Deposits and Collections

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PART 1

GENERAL PROVISIONS AND DEFINITIONS

4-4-101. Short title.

This article may be cited as the "Uniform Commercial Code - Bank Deposits and Collections".

Source: L. 94: Entire article amended with relocations, p. 879, § 2, effective January 1, 1995.

ANNOTATION

Law reviews. For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965). For article, "Article 4 — Bank Deposits and Collections", see 38 U. Colo. L. Rev. 65 (1965).

For cases construing provisions prior to U.C.C. concerning bank collections, see Peterson v. First State Bank, 79 Colo. 494, 246 P. 784 (1926); McAloon v. Ericson, 84 Colo. 467, 271 P. 192 (1928); McFerson v. Western Colo. Power Co., 102 Colo. 261, 78 P.2d 625 (1938); Walter E. Heller & Co. v. Mesa Bldg. Prods. Co., 233 F. Supp. 434 (D. Colo. 1964); Barnes v. Cherry Creek Nat'l Bank, 163 Colo. 414, 431 P.2d 471 (1967) (decided under repealed § 14-8-1 et seq., C.R.S. 1963, § 14-8-1 et seq., CRS 53, CSA C. 18, §§ 46 through 62, and laws antecedent to CSA, C. 18, §§ 46 through 62).

4-4-102. Applicability.

(a) To the extent that items within this article are also within articles 3 and 8 of this title, they are subject to those articles. If there is conflict, this article governs said article 3, but article 8 governs this article.

(b) 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.

Source: L. 94: Entire article amended with relocations, p. 879, § 2, effective January 1, 1995.

4-4-103. Variation by agreement - measure of damages - action constituting ordinary care.

(a) The effect of the provisions of this article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

(b) Federal reserve regulations and operating circulars, clearing-house rules, and the like have the effect of agreements under subsection (a) of this section, whether or not specifically assented to by all parties interested in items handled.

(c) Action or nonaction approved by this article or pursuant to federal reserve regulations or operating circulars is the exercise of ordinary care and, in the absence of special instructions, action or nonaction consistent with clearing-house rules and the like or with a general banking usage not disapproved by this article, is prima facie the exercise of ordinary care.

(d) The specification or approval of certain procedures by this article is not disapproval of other procedures that may be reasonable under the circumstances.

(e) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there is also bad faith it includes any other damages the party suffered as a proximate consequence.

Source: L. 94: Entire article amended with relocations, p. 880, § 2, effective January 1, 1995.

ANNOTATION

Breach of duties of "good faith" and "ordinary care". In transferring checks to a third party, a bank breaches its duty of "good faith" only if it deals dishonestly in transferring checks, and breaches its duty of "ordinary care" only if a reasonable holder in the bank's position, in the exercise of ordinary care, would not have transferred the checks. Commercial Credit Corp. v. Univ. Nat'l Bank, 590 F.2d 849 (10th Cir. 1979).

Customer's failure to prove loss. A partnership that could not meet its burden of proving that a bank's improper payment of drafts drawn on the partnership's account caused the partnership to suffer a loss could not have its account recredited for the amount of the draft payments. Isaac v. Am. Heritage Bank & Trust Co., 675 P.2d 742 (Colo. 1984).

Bad faith. Bad faith means actions in knowing or reckless disregard of customer's contractual rights and negligence alone does not constitute bad faith. Peregrine Homes v. Jefferson Bank & Trust, 713 P.2d 1342 (Colo. App. 1985).

Applied in Wheat State Serv. Corp. v. Colfax Nat'l Bank, 44 Colo. App. 376, 618 P.2d 696 (1980); Am. Heritage Bank & Trust Co. v. Isaac, 636 P.2d 1296 (Colo. App. 1981).

4-4-104. Definitions and index of definitions.

(a) In this article, unless the context otherwise requires:

(1) "Account" means any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit;

(2) "Afternoon" means the period of a day between noon and midnight;

(3) "Banking day" means the part of a day, excluding Saturday, Sunday, and holidays, on which a bank is open to the public for carrying on substantially all of its banking functions;

(4) "Clearing-house" means an association of banks or other payors regularly clearing items;

(5) "Customer" means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank;

(6) "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (section 4-8-102) or instruction for uncertificated securities (section 4-8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft;

(7) "Draft" means a draft as defined in section 4-3-104 or an item, other than an instrument, that is an order;

(8) "Drawee" means a person ordered in a draft to make payment;

(9) "Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by article 4.5 of this title or a credit or debit card slip;

(10) "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;

(11) "Settle" means to pay in cash, by clearing-house settlement, in a charge or credit, or by remittance, or otherwise as agreed. A settlement may be either provisional or final;

(12) "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.

(b) Other definitions applying to this article and the sections in which they appear are:

"Agreement for electronic presentment"	Section 4-4-110
"Bank"	Section 4-4-105
"Collecting bank"	Section 4-4-105
"Depositary bank"	Section 4-4-105
"Intermediary bank"	Section 4-4-105
"Payor bank"	Section 4-4-105
"Presenting bank"	Section 4-4-105
"Presentment notice"	Section 4-4-110

(c) "Control" as provided in section 4-7-106 and the following definitions in other articles of this title apply to this article:

"Acceptance"	Section 4-3-409
"Alteration"	Section 4-3-407
"Cashier's check"	Section 4-3-104
"Certificate of deposit"	Section 4-3-104
"Certified check"	Section 4-3-409

"Check"	Section 4-3-104
"Good faith"	Section 4-3-103
"Holder in due course"	Section 4-3-302
"Instrument"	Section 4-3-104
"Notice of dishonor"	Section 4-3-503
"Order"	Section 4-3-103
"Ordinary care"	Section 4-3-103
"Person entitled to enforce"	Section 4-3-301
"Presentment"	Section 4-3-501
"Promise"	Section 4-3-103
"Prove"	Section 4-3-103
"Teller's check"	Section 4-3-104
"Unauthorized signature"	Section 4-3-403

(d) In addition, article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article.

Source: L. 94: Entire article amended with relocations, p. 880, § 2, effective January 1, 1995. **L. 96:** (a)(6) amended, p. 234, § 6, effective July 1. **L. 2006:** (c) amended, p. 496, § 26, effective September 1. **L. 2007:** (c) amended, p. 375, § 28, effective August 3.

Editor's note - Colorado legislative change. In subsection (a)(3), Colorado added the words "excluding Saturday, Sunday, and holidays".

Cross references: For the conduct of banking business on Saturday, see § 11-105-103; for legal holidays, see § 24-11-101.

ANNOTATION

Law reviews. For article, "Commercial Law", which discusses Tenth Circuit

decisions dealing with questions of definition and interpretation, see 63 Den. U.L. Rev. 225 (1986).

4-4-105. "Bank" - "depositary bank" - "intermediary bank" - "collecting bank" - "payor bank" - "presenting bank".

In this article:

(1) "Bank" means a person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company.

(2) "Depositary bank" means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter;

(3) "Payor bank" means a bank that is the drawee of a draft;

(4) "Intermediary bank" means a bank to which an item is transferred in course of collection except the depositary or payor bank;

(5) "Collecting bank" means a bank handling an item for collection except the payor bank;

(6) "Presenting bank" means a bank presenting an item except a payor bank.

Source: L. 94: Entire article amended with relocations, p. 883, § 2, effective January 1, 1995.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974). For article, "Let the Payor Beware: Dishonoring Documentary Drafts", see 20 Colo. Law. 2263 (1991).

Language of an instrument determines whether a bank is a "collecting bank" or a "payor bank". Accordingly where the language of a sight draft designated a bank as a "collecting bank", its liability for mishandling of the draft was limited to the face value of the draft under § 4-4-103. Shelby Res., LLC v. Wells Fargo Bank, 160 P.3d 387 (Colo. App. 2007).

4-4-106. Payable through or payable at bank - collecting bank.

(a) If an item states that it is "payable through" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(b) If an item states that it is "payable at" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(c) If a draft names a nonbank drawee and it is unclear whether a bank named in the draft is a co-drawee or a collecting bank, the bank is a collecting bank.

Source: L. 94: Entire article amended with relocations, p. 883, § 2, effective January 1, 1995.

4-4-107. Separate office of bank.

A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders must be given under this article and under article 3 of this title.

Source: L. 94: Entire article amended with relocations, p. 884, § 2, effective January 1, 1995.

Editor's note - Colorado legislative change: (1) This section is similar to former § 4-4-106 as it existed prior to 1994, and the former § 4-4-107 was relocated to § 4-4-108.

(2) After the first word "bank", Colorado did not adopt the following: "maintaining its own deposit ledgers".

4-4-108. Time of receipt of items.

(a) 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 2 p.m. or later as a cutoff hour for the handling of money and items and the making of entries on its books.

(b) An item or deposit of money received on any day after a cutoff hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.

Source: L. 94: Entire article amended with relocations, p. 884, § 2, effective January 1, 1995.

Editor's note: This section is similar to former § 4-4-107 as it existed prior to 1994, and the former § 4-4-108 was relocated to § 4-4-109.

4-4-109. Delays.

(a) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment of a specific item drawn on a payor other than a bank, and with or without the approval of any person involved, may waive, modify, or extend time limits imposed or permitted by this title for a period not exceeding two additional banking days without discharge of drawers or indorsers or liability to its transferor or a prior party.

(b) Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this title or by instructions is excused if (i) the delay is caused by interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank, and (ii) the bank exercises such diligence as the circumstances require.

Source: L. 94: Entire article amended with relocations, p. 884, § 2, effective January 1, 1995.

Editor's note: This section is similar to former § 4-4-108 as it existed prior to 1994, and the former § 4-4-109 was relocated to § 4-4-110.

4-4-110. Electronic presentment.

(a) "Agreement for electronic presentment" means an agreement, clearing-house rule, or federal reserve regulation or operating circular, providing that presentment of an item may be made by transmission of an image of an item or information describing the item ("presentment notice") rather than delivery of the item itself. The agreement may provide for procedures governing retention, presentment, payment, dishonor, and other matters concerning items subject to the agreement.

(b) Presentment of an item pursuant to an agreement for presentment is made when the presentment notice is received.

(c) If presentment is made by presentment notice, a reference to "item" or "check" in this article means the presentment notice unless the context otherwise indicates.

Source: L. 94: Entire article amended with relocations, p. 884, § 2, effective January 1, 1995.

Editor's note: This section is similar to former § 4-4-109 as it existed prior to 1994.

4-4-111. Statute of limitations.

An action to enforce an obligation, duty, or right arising under this article must be commenced within three years after the cause of action accrues.

Source: L. 94: Entire article amended with relocations, p. 885, § 2, effective January 1, 1995.

PART 2

COLLECTION OF ITEMS - DEPOSITARY AND COLLECTING BANKS

4-4-201. Status of collecting banks as agent and provisional status of credits - applicability of article - item indorsed "pay any bank".

(a) Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of 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 rights of recoupment or setoff. If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of this article apply even though action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(b) 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 until the item has been:

(1) Returned to the customer initiating collection; or

(2) Specially indorsed by a bank to a person who is not a bank.

Source: L. 94: Entire article amended with relocations, p. 885, § 2, effective January 1, 1995.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974). For article, "Commercial Law", which discusses Tenth Circuit decisions dealing with questions of definition and interpretation, see 63 Den. U.L. Rev. 225 (1986).

When risk of loss remains on depositor. Where one indorses a check payable to him and deposits it in a bank, the bank credits the money to the account, and the depositor withdraws the full amount, but subsequently the foreign payor bank refuses to honor the check, the depositor is still the owner of the check, the bank is the agent for collection, and the credit given for the deposit is only provisional; therefore, the risk of loss on the check remains on the depositor. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

4-4-202. Responsibility for collection or return - when action timely.

(a) A collecting bank must exercise ordinary care in:

(1) Presenting an item or sending it for presentment;

(2) Sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted, as the case may be;

(3) Settling for an item when the bank receives final settlement; and

(4) Notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(b) A collecting bank exercises ordinary care under subsection (a) of this section by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time may constitute the exercise of ordinary care, but the bank has the burden of establishing timeliness.

(c) Subject to subsection (a)(1) of this section, 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 the possession of others or in transit.

Source: L. 94: Entire article amended with relocations, p. 886, § 2, effective January 1, 1995.

ANNOTATION

This section displaces common law negligence claims applicable to bank deposits and collections because it requires a failure to exercise ordinary care and causation almost, if not totally, identical to that which a common law negligence claim would require. Shelby Res., LLC v. Wells Fargo Bank, 160 P.3d 387 (Colo. App. 2007).

4-4-203. Effect of instructions.

Subject to article 3 of this title concerning conversion of instruments (section 4-3-420) and restrictive indorsements (section 4-3-206), only a collecting bank's transferor can give instructions that affect the bank or constitute notice to it, and a collecting bank is not liable to prior parties for any action taken pursuant to the instructions or in accordance with any agreement with its transferor.

Source: L. 94: Entire article amended with relocations, p. 886, § 2, effective January 1, 1995.

4-4-204. Methods of sending and presenting - sending directly to payor bank.

(a) A collecting bank shall send items by a reasonably prompt method, taking into consideration relevant instructions, the nature of the item, the number of those items on hand, the cost of collection involved, and the method generally used by it or others to present those items.

(b) A collecting bank may send:

(1) An item directly to the payor bank;

(2) An item to a nonbank payor if authorized by its transferor; and

(3) An item other than documentary drafts to a nonbank payor, if authorized by federal reserve regulation or operating circular, clearing-house rule, or the like.

(c) Presentment may be made by a presenting bank at a place where the payor bank or other payor has requested that presentment be made.

Source: L. 94: Entire article amended with relocations, p. 886, § 2, effective January 1, 1995.

4-4-205. Depositary bank holder of unindorsed item.

If a customer delivers an item to a depositary bank for collection:

(1) The depositary bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer indorses the item, and, if the bank satisfies the other requirements of section 4-3-302, it is a holder in due course; and

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

Source: L. 94: Entire article amended with relocations, p. 887, § 2, effective January 1, 1995.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Liability of indorser where estoppel created. While the principle that an indorser is liable on his warranty is correctly stated, the rule has no application when an estoppel has been created which would preclude plaintiff from obtaining a refund of the amount paid to defendant. First Nat'l Bank v. Ulibarri, 38 Colo. App. 428, 557 P.2d 1221 (1976).

Subsection (1) under former law held inapplicable where the depository bank did not in fact place a statement on the item to be collected, which statement would have been effective as its customer's indorsement. La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

It was impossible for bank to provide indorsement on check because payee was not the bank's customer. The indorsement by the bank was unauthorized as a matter of law. Kelly v. Central Bank and Trust Co., 794 P.2d 1037 (Colo. App. 1989).

Subsection (1) under former law does not permit depository bank to evade duties imposed by § 4-3-206(3) under former law. Subsection (1) does not permit a depository bank to evade its duty to act consistently with restrictive endorsements as provided by § 4-3-206 (3). La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

The duty to examine a restrictive indorsement and follow its directions may require a bank to refuse to deposit an item in a particular account if such conduct would be inconsistent with the restrictive

indorsement, or to investigate rather than accept an item as a matter of course. La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

Subsection (2) under former law not in conflict with requirements of § 4-3-206 (2) under former law. The clear import of both subsection (2) and § 4-3-206 (2) is that while intermediary banks and nondepository payor banks may ignore all restrictive indorsements except those of the bank's immediate transferor, depository banks may not so ignore restrictive indorsements. La Junta State Bank v. Travis, 727 P.2d 48 (Colo. 1986).

4-4-206. Transfer between banks.

Any agreed method that identifies the transferor bank is sufficient for the item's further transfer to another bank.

Source: L. 94: Entire article amended with relocations, p. 887, § 2, effective January 1, 1995.

4-4-207. Transfer warranties.

(a) A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:

(1) The warrantor is a person entitled to enforce the item;

(2) All signatures on the item are authentic and authorized;

(3) The item has not been altered;

(4) The item is not subject to a defense or claim in recoupment (section 4-3-305 (a)) of any party that can be asserted against the warrantor;

(5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; and

(6) If the item is a demand draft, creation of the item according to the terms on its face was authorized by the person identified as drawer. Nothing in this section shall be construed to impair the rights of the drawer against the drawee.

(b) If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item (i) according to the terms of the item at the time it was transferred, or (ii) if the transfer was of an incomplete item, according to its terms when completed as stated in sections 4-3-115 and 4-3-407. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that

takes the item in good faith. A transferor cannot disclaim its obligation under this subsection (b) by an indorsement stating that it is made "without recourse" or otherwise disclaiming liability.

(c) A person to whom the warranties under subsection (a) of this section are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(d) The warranties stated in subsection (a) of this section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

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

(f) If the warranty in paragraph (6) of subsection (a) of this section is not given by a transferor or collecting bank under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee, nor to any prior collecting bank of that transferee.

Source: L. 94: Entire article amended with relocations, p. 887, § 2, effective January 1, 1995. **L. 2001:** (a) amended and (f) added, p. 868, § 6, effective August 8.

Cross references: For the legislative declaration contained in the 2001 act amending subsection (a) and enacting subsection (f), see section 1 of chapter 244, Session Laws of Colorado 2001.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Liability of indorser where estoppel created. While the principle that an indorser is liable on his warranty is correctly stated, the rule has no application when an estoppel has been created which would preclude plaintiff from obtaining a refund of the amount paid to defendant. First Nat'l Bank v. Ulibarri, 38 Colo. App. 428, 557 P.2d 1221 (1976).

Payee may not maintain action against depositary bank on the basis of either this section under former law or § 4-3-417 under former law. Nat'l Sur. Corp. v. Citizens State Bank, 41 Colo. App. 580, 593 P.2d 362 (1978), aff'd, 199 Colo. 497, 612 P.2d 70 (1980).

A bank that accepts and pays a check with an unauthorized or forged endorsement warrants to subsequent transferees the validity of that endorsement and may be held liable on that warranty. The warranty's purpose is to place on a bank taking an instrument from a person making an unauthorized endorsement the responsibility of collecting from that person. The warranty exists even if a cashier's check is involved. Vectra Bank of Englewood v. Bank Western, 890 P.2d 259 (Colo. App. 1995) (decided under former law).

However, a transfer warranty as to the genuineness of the drawer's signature does not apply for the benefit of the drawee bank. Decibel Credit Union v. Pueblo Bank & Trust Co., 996 P.2d 784 (Colo. App. 2000).

Attorney fees are not "damages" and, therefore, are not within the contemplation of subsection (3) under former law. Vectra Bank of Englewood v. Bank Western, 890 P.2d 259 (Colo. App. 1995) (decided under former law).

4-4-208. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered;

(3) The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized; and

(4) If the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as drawer. Nothing in this section shall be construed to impair the rights of the drawer against the drawee.

(b) A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee

to recover damages under this subsection (b) is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft (i) breach of warranty is a defense to the obligation of the acceptor, and (ii) if the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated in this subsection (b).

(c) If a drawee asserts a claim for breach of warranty under subsection (a) of this section based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by reproving that the indorsement is effective under section 4-3-404 or 4-3-405 or the drawer is precluded under section 4-3-406 or 4-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other item is presented for payment to a party obliged to pay the item, and the item is paid, the person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item, a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (b) of this section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

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

(g) A demand draft is a check, as provided in section 4-3-104 (f).

(h) If the warranty in paragraph (4) of subsection (a) of this section is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee.

Source: L. 94: Entire article amended with relocations, p. 889, § 2, effective January 1, 1995. **L. 2001:** (a) amended and (g) and (h) added, p. 869, § 7, effective August 8.

Cross references: For the legislative declaration contained in the 2001 act amending subsection (a) and enacting subsections (g) and (h), see section 1 of chapter 244, Session Laws of Colorado 2001.

ANNOTATION

Warranty under (a)(1) of this section is only a warranty that there are no unauthorized or missing endorsements on the check, not that the drawer's signature is genuine. Where there was also no alteration to the checks and no claim that the presenting bank had actual knowledge of the forged drawer's signatures, the presenting bank did not extend any presentment warranty to the drawee bank by returning the checks through the federal reserve system. Decibel Credit Union v. Pueblo Bank & Trust Co., 996 P.2d 784 (Colo. App. 2000).

4-4-209. Encoding and retention warranties.

(a) A person who encodes information on or with respect to an item after issue warrants to any subsequent collecting bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depositary bank encodes, that bank also makes the warranty.

(b) A person who undertakes to retain an item pursuant to an agreement for electronic presentment warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply with the agreement. If a customer of a depositary bank undertakes to retain an item, that bank also makes this warranty.

(c) A person to whom warranties are made under this section and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus expenses and loss of interest incurred as a result of the breach.

Source: L. 94: Entire article amended with relocations, p. 891, § 2, effective January 1, 1995.

4-4-210. Security interest of collecting bank in items, accompanying documents, and proceeds.

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or

(3) If it makes an advance on or against the item.

(b) If credit 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.

(c) 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. So long as the bank does not receive final settlement for the item or give up possession of the item or possession or control of the accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to article 9 of this title, but:

(1) No security agreement is necessary to make the security interest enforceable (section 4-9-203 (b)(3)(A));

(2) No filing is required to perfect the security interest; and

(3) The security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

Source: L. 94: Entire article amended with relocations, p. 891, § 2, effective January 1, 1995. **L. 2001:** (c)(1) amended, p. 1441, § 27, effective July 1. **L. 2006:** IP(c) amended, p. 497, § 27, effective September 1.

Editor's note: This section is similar to former § 4-4-208 as it existed prior to 1994, and the former § 4-4-210 was relocated to § 4-4-212.

4-4-211. When bank gives value for purposes of holder in due course.

For purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item, if the bank otherwise complies with the requirements of section 4-3-302 on what constitutes a holder in due course.

Source: L. 94: Entire article amended with relocations, p. 892, § 2, effective January 1, 1995.

Editor's note: This section is similar to former § 4-4-209 as it existed prior to 1994, and the former § 4-4-211 was relocated to § 4-4-213.

4-4-212. Presentment by notice of item not payable by, through, or at a bank - liability of drawer or indorser.

(a) 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 4-3-501 by the close of the bank's next banking day after it knows of the requirement.

(b) If presentment is made by notice and payment, acceptance, or request for compliance with a requirement under section 4-3-501 is not received by the close of business on the day after maturity or, in the case of demand items, by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any drawer or indorser by sending it notice of the facts.

Source: L. 94: Entire article amended with relocations, p. 892, § 2, effective January 1, 1995.

Editor's note: This section is similar to former § 4-4-210 as it existed prior to 1994, and the former § 4-4-212 was relocated to § 4-4-214.

4-4-213. Medium and time of settlement by bank.

(a) With respect to settlement by a bank, the medium and time of settlement may be prescribed by federal reserve regulations or circulars, clearing-house rules, and the like, or agreement. In the absence of such prescription:

(1) The medium of settlement is cash or credit to an account in a federal reserve bank of or specified by the person to receive settlement; and

(2) The time of settlement is:

(i) With respect to tender of settlement by cash, a cashier's check, or teller's check, when the cash or check is sent or delivered;

(ii) With respect to tender of settlement by credit in an account in a federal reserve bank, when the credit is made;

(iii) With respect to tender of settlement by a credit or debit to an account in a bank, when the credit or debit is made or, in the case of tender of settlement by authority to charge an account, when the authority is sent or delivered; or

(iv) With respect to tender of settlement by a funds transfer, when payment is made pursuant to section 4-4.5-406 (a) to the person receiving settlement.

(b) If the tender of settlement is not by a medium authorized by subsection (a) of this section or the time of settlement is not fixed by subsection (a) of this section, no settlement occurs until the tender of settlement is accepted by the person receiving settlement.

(c) If settlement for an item is made by cashier's check or teller's check and the person receiving settlement, before its midnight deadline:

(1) Presents or forwards the check for collection, settlement is final when the check is finally paid; or

(2) Fails to present or forward the check for collection, settlement is final at the midnight deadline of the person receiving settlement.

(d) If settlement for an item is made by giving authority to charge the account of the bank giving settlement in the bank receiving settlement, settlement is final when the charge is made by the bank receiving settlement if there are funds available in the account for the amount of the item.

Source: L. 94: Entire article amended with relocations, p. 892, § 2, effective January 1, 1995.

Editor's note: This section is similar to former § 4-4-211 as it existed prior to 1994, and the former § 4-4-213 was relocated to § 4-4-215.

4-4-214. Right of charge-back or refund - liability of collecting bank - return of item.

(a) If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive 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 item, if, by its midnight deadline or within a longer reasonable time after it learns the facts, it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final.

(b) A collecting bank returns an item when it is sent or delivered to the bank's customer or transferor or pursuant to its instructions.

(c) A depositary bank that 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 4-4-301).

(d) The right to charge back is not affected by:

(1) Previous use of a credit given for the item; or

(2) Failure by any bank to exercise ordinary care with respect to the item, but a bank so failing remains liable.

(e) A failure to charge back or claim refund does not affect other rights of the bank against the customer or any other party.

(f) If credit is given in dollars as the equivalent of the value of an item payable in a foreign money, the dollar amount of any charge-back or refund must be calculated on the basis of the bank-offered spot rate for the foreign money prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.

Source: L. 94: Entire article amended with relocations, p. 894, § 2, effective January 1, 1995.

Editor's note: This section is similar to former § 4-4-212 as it existed prior to 1994, and the former § 4-4-214 was relocated to § 4-4-216.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Liability of indorser where estoppel created. While the principle that an indorser is liable on his warranty is correctly stated, the rule has no application when an estoppel

has been created which would preclude plaintiff from obtaining a refund of the amount paid to defendant. First Nat'l Bank v. Ulibarri, 38 Colo. App. 428, 557 P.2d 1221 (1976).

Where payor bank retains a demand item beyond its midnight deadline without settling it, nothing occurs to cause the provisional settlement between depositor and depositary bank to become final, and the depositary bank still has a right of refund from the depositor. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

When a depositary bank has made a provisional settlement for an item for its depositor but fails to receive final settlement from the payor bank, the depositary bank may revoke the provisional settlement and obtain a refund from the depositor. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

The bank's failure to make a formal protest is immaterial where one's liability is based not on his indorsement of a check, but on his status as depositor and withdrawer of funds. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

4-4-215. Final payment of item by payor bank - when provisional debits and credits become final - when certain credits become available for withdrawal.

(a) An item is finally paid by a payor bank when the bank has first done any of the following:

(1) Paid the item in cash;

(2) Settled for the item without having a right to revoke the settlement under statute, clearing-house rule, or agreement; or

(3) Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing-house rule, or agreement.

(b) If provisional settlement for an item does not become final, the item is not finally paid.

(c) If provisional settlement for an item between the presenting and payor banks is made through a clearing house 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.

(d) If a collecting bank receives a settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

(e) Subject to (i) applicable law stating a time for availability of funds and (ii) any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in a customer's account becomes available for withdrawal as of right:

(1) If the bank has received a provisional settlement for the item, when the settlement becomes final and the bank has had a reasonable time to receive return of the item and the item has not been received within that time;

(2) If the bank is both the depositary bank and the payor bank, and the item is finally paid, at the opening of the bank's second banking day following receipt of the item.

(f) Subject to any applicable law stating a time for availability of funds and any right of a bank to apply a deposit to an obligation of the depositor, a deposit of money becomes available for withdrawal as of right at the opening of the bank's next banking day after receipt of the deposit.

Source: L. 94: Entire article amended with relocations, p. 895, § 2, effective January 1, 1995.

Editor's note: This section is similar to former § 4-4-213 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974). For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2107 (1988).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

The rule that a payor bank is "accountable" for an item does not mean that there has been a final settlement which would preclude a depositary bank from charging the amount of the item back to its depositor, for this section sets forth the circumstances under which a provisional settlement becomes final, and there is no provision that mere accountability of a payor bank for a check is a final settlement unless the check is actually paid by the payor bank. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

Hence, where payor bank retains a demand item beyond its midnight deadline without settling it, nothing occurs to cause the provisional settlement between depositor and depositary bank to become final, and the depositary bank still has a right of refund from the depositor. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

Final settlement of a demand item occurs when an item is deemed "finally paid" as a result of payor's bank failure to revoke a provisional settlement before the midnight deadline. Kimberly A. Allen Trust v. FirstBank of Lakewood, 989 P.2d 203 (Colo. App. 1999) (disagreeing with Mercantile Bank & Trust Co. v. Hunter cited above).

Section and comments, when read together with § 4-3-418 and comments, treat a cashier's check as the equivalent of cash and preclude issuing banks from dishonoring them at any time. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

Cashier's checks represent the unconditional obligation of the issuing bank to pay, and therefore, banks may not dishonor their cashier's checks once issued. Flatiron Linen, Inc. v. First Amer. State Bank, 23 P.3d 1209 (Colo. 2001).

4-4-216. Insolvency and preference.

(a) If an item is in or comes into the possession of a payor or collecting bank that suspends payment and the item has not been finally paid, the item must be returned by the receiver, trustee, or agent in charge of the closed bank to the presenting bank or the closed bank's customer.

(b) 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.

(c) 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's becoming final if the finality occurs automatically upon the lapse of certain time or the happening of certain events.

(d) If a collecting bank receives from subsequent parties settlement for an item, which settlement is or becomes final and the bank suspends payments without making a settlement for the item with its customer which settlement is or becomes final, the owner of the item has a preferred claim against the collecting bank.

Source: L. 94: Entire article amended with relocations, p. 896, § 2, effective January 1, 1995.

Editor's note: This section is similar to former § 4-4-214 as it existed prior to 1994.

ANNOTATION

Law reviews. For article, "Commercial Law", which discusses Tenth Circuit decisions dealing with questions of commercial law, see 63 Den. U.L. Rev. 225 (1986).

PART 3

COLLECTION OF ITEMS - PAYOR BANKS

4-4-301. Deferred posting - recovery of payment by return of items - time of dishonor - return of items by payor bank.

(a) If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke the settlement and recover the settlement if, before it has made final payment and before its midnight deadline, it:

(1) Returns the item; or

(2) Sends written notice of dishonor or nonpayment if the item is unavailable for return.

(b) If a demand item is received by a payor bank for credit on its books, it may return the item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in subsection (a) of this section.

(c) Unless previous notice of dishonor has been sent, an item is dishonored at the time when for the purposes of dishonor it is returned or notice sent in accordance with this section.

(d) An item is returned:

(1) As to an item presented through a clearing house, when it is delivered to the presenting or last collecting bank or to the clearing house or is sent or delivered in accordance with clearing-house rules; or

(2) In all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to instructions.

Source: L. 94: Entire article amended with relocations, p. 897, § 2, effective January 1, 1995.

4-4-302. Payor bank's responsibility for late return of item.

(a) If an item is presented to and received by a payor bank, the bank is accountable for the amount of:

(1) A demand item, other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(2) 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.

(b) The liability of a payor bank to pay an item pursuant to subsection (a) of this section is subject to defenses based on breach of a presentment warranty (section 4-4-208) or proof that the person seeking enforcement of the liability presented or transferred the item for the purpose of defrauding the payor bank.

Source: L. 94: Entire article amended with relocations, p. 897, § 2, effective January 1, 1995.

ANNOTATION

Where payor bank retains a demand item beyond its midnight deadline without settling it, nothing occurs to cause the provisional settlement between depositor and depositary bank to become final, and the depositary bank still has a right of refund from the depositor. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

Strict compliance with the midnight deadline requirement is mandatory even though bank could have properly refused to pay the debits presented against an account because of account's bankruptcy. Am. Nat. Bank & Trust v. Cent. Bank, 132 B.R. 171 (Bankr. D. Colo. 1991).

4-4-303. When items subject to notice, stop-payment order, legal process, or setoff - order in which items may be charged or certified.

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

(1) The bank accepts or certifies the item;

(2) The bank pays the item in cash;

(3) The bank settles for the item without having a right to revoke the settlement under statute, clearing-house rule, or agreement;

(4) The bank becomes accountable for the amount of the item under section 4-4-302 dealing with the payor bank's responsibility for late return of items; or

(5) With respect to checks, a cutoff hour no earlier than one hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check.

(b) Subject to subsection (a) of this section, items may be accepted, paid, certified, or charged to the indicated account of its customer in any order.

Source: L. 94: Entire article amended with relocations, p. 898, § 2, effective January 1, 1995.

ANNOTATION

Law reviews. For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2108 (1988).

Because bank's right to setoff against taxpayer's account was not exercised in a timely and certain manner, the unexercised setoff does not have priority over federal administrative levy. U.S. v. Central Bank of Denver, 843 F.2d 1300 (10th Cir. 1988).

PART 4

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER

4-4-401. When bank may charge customer's account.

(a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

(b) A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.

(c) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable

certainty. The notice is effective for the period stated in section 4-4-403 (b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank reasonable opportunity to act on it before the bank takes any action with respect to the check described in section 4-4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under section 4-4-402.

(d) A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:

(1) The original terms of the altered item; or

(2) The terms of the completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

Source: L. 94: Entire article amended with relocations, p. 899, § 2, effective January 1, 1995.

ANNOTATION

Law reviews. For article, "Payee v. Depository Bank: What is the UCC Defense to Handling Checks Bearing Forged Indorsements?", see 45 U. Colo. L. Rev. 281 (1974). For article, "Civil Liability for Check Forgeries in Colorado", see 16 Colo. Law. 959 (1987).

Customer's failure to prove loss. A partnership that could not meet its burden of proving that a bank's improper payment of drafts drawn on the partnership's account caused the partnership to suffer a loss could not have its account recredited for the amount of the draft payments. Isaac v. Am. Heritage Bank & Trust Co., 675 P.2d 742 (Colo. 1984).

Liability of maker on instrument. Although a stop-payment order on a postdated check forbids payment by the bank to the payee or endorser, the maker remains liable on the instrument. Esecson v. Bushnell, 663 P.2d 258 (Colo. App. 1983).

4-4-402. Bank's liability to customer for wrongful dishonor - time of determining insufficiency of account.

(a) Except as otherwise provided in this article, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft.

(b) A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for

an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

(c) A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available funds is wrongful.

Source: L. 94: Entire article amended with relocations, p. 899, § 2, effective January 1, 1995.

ANNOTATION

Law reviews. For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2108 (1988).

4-4-403. Customer's right to stop payment - burden of proof of loss.

(a) A customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in section 4-4-303. If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account.

(b) A stop-payment order is effective for six months, but it lapses after fourteen calendar days if the original order was oral and was not confirmed in writing within that period. A stop-payment order may be renewed for additional six-month periods by a writing given to the bank within a period during which the stop-payment order is effective.

(c) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close an account is on the customer. The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items under section 4-4-402.

Source: L. 94: Entire article amended with relocations, p. 900, § 2, effective January 1, 1995.

4-4-404. 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.

Source: L. 94: Entire article amended with relocations, p. 900, § 2, effective January 1, 1995.

4-4-405. Death or incompetence of customer.

(a) A payor or collecting bank's authority to accept, pay, or collect an item or to account for proceeds of its collection, if otherwise effective, is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes the authority to accept, pay, collect, or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(b) Even with knowledge, a bank may for ten days after the date of death pay or certify checks drawn on or before that date unless ordered to stop payment by a person claiming an interest in the account.

Source: L. 94: Entire article amended with relocations, p. 900, § 2, effective January 1, 1995. **L. 2004:** (a) amended, p. 400, § 1, effective July 1.

4-4-406. Customer's duty to discover and report unauthorized signature or alteration.

(a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment. If the bank does not return the items, it shall provide in the statement of account the telephone number that the customer may call to request an item or a legible copy thereof pursuant to subsection (b) of this section.

(b) If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of seven years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item. A bank shall provide, upon request and without charge to the customer, at least two items or a legible copy thereof with respect to each statement of account sent to the customer.

(c) If a bank sends or makes available a statement of account or items pursuant to subsection (a) of this section, the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

(d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c) of this section, the customer is precluded from asserting against the bank:

(1) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and

(2) The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding thirty days, in which to examine the item or statement of account and notify the bank.

(e) If subsection (d) of this section applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that failure contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) of this section and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) of this section does not apply.

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (subsection (a) of this section) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection (f), the payor bank may not recover for breach of warranty under section 4-4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

Source: L. 94: Entire article amended with relocations, p. 901, § 2, effective January 1, 1995.

ANNOTATION

Law reviews. For article, "Civil Liability for Check Forgeries in Colorado", see 16 Colo. Law. 959 (1987).

Bank's lack of ordinary care estops defense of contributory negligence. Where a bank did not exercise ordinary care in approving drafts drawn on a partnership's account, the bank is estopped from asserting that one of the partners was contributorily negligent in allowing it to pay the drafts on the other partner's signature. Am. Heritage Bank & Trust Co. v. Isaac, 636 P.2d 1296 (Colo. App. 1981).

4-4-407. Payor bank's right to subrogation on improper payment.

If a payor bank has paid an item over the order of the drawer or maker to stop payment, or after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank is subrogated to the rights:

(1) Of any holder in due course on the item against the drawer or maker;

(2) 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

(3) 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.

Source: L. 94: Entire article amended with relocations, p. 903, § 2, effective January 1, 1995.

PART 5

COLLECTION OF DOCUMENTARY DRAFTS

4-4-501. Handling of documentary drafts - duty to send for presentment and to notify customer of dishonor.

A bank that takes a documentary draft for collection shall 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, shall seasonably notify its customer of the fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

Source: L. 94: Entire article amended with relocations, p. 903, § 2, effective January 1, 1995.

4-4-502. Presentment of "on arrival" drafts.

If a draft or the relevant instructions require presentment "on arrival", "when goods arrive", or the like, the collecting bank need not present until in its judgment a reasonable time for arrival of the goods has expired. Refusal to pay or accept because the goods have not arrived is not dishonor; the bank must notify its transferor of the refusal but need not present the draft again until it is instructed to do so or learns of the arrival of the goods.

Source: L. 94: Entire article amended with relocations, p. 903, § 2, effective January 1, 1995.

4-4-503. Responsibility of presenting bank for documents and goods - report of reason for dishonor - referee in case of need.

Unless otherwise instructed and except as provided in article 5 of this title, a bank presenting a documentary draft:

(1) 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

(2) Upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or if the presenting bank does not choose to utilize the referee's services, it must use diligence and good faith to ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor, and must request instructions.

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

Source: L. 94: Entire article amended with relocations, p. 903, § 2, effective January 1, 1995.

4-4-504. Privilege of presenting bank to deal with goods - security interest for expenses.

(a) A presenting bank that, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

(b) For its reasonable expenses incurred by action under subsection (a) of this section, 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.

Source: L. 94: Entire article amended with relocations, p. 904, § 2, effective January 1, 1995.

ARTICLE 4.5

Funds Transfers

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PART 1

SUBJECT MATTER AND DEFINITIONS

4-4.5-101. Short title.

This article may be cited as "Uniform Commercial Code -- Funds Transfers".

Source: L. 90: Entire article added, p. 342, § 1, effective January 1, 1991.

4-4.5-102. Subject matter.

Except as otherwise provided in section 4-4.5-108, this article applies to funds transfers defined in section 4-4.5-104.

Source: L. 90: Entire article added, p. 342, § 1, effective January 1, 1991.

4-4.5-103. Payment order - definitions.

(a) In this article 4.5:

(1) "Payment order" means an instruction of a sender to a receiving bank, transmitted orally or in a record, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:

(i) The instruction does not state a condition to payment to the beneficiary other than time of payment,

(ii) The receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(iii) The instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.

(2) "Beneficiary" means the person to be paid by the beneficiary's bank.

(3) "Beneficiary's bank" means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(4) "Receiving bank" means the bank to which the sender's instruction is addressed.

(5) "Sender" means the person giving the instruction to the receiving bank.

(b) If an instruction complying with subsection (a)(1) of this section is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

(c) A payment order is issued when it is sent to the receiving bank.

Source: L. 90: Entire article added, p. 342, § 1, effective January 1, 1991. **L. 2023:** IP(a) and IP(a)(1) amended, (SB 23-090), ch. 136, p. 531, § 24, effective August 7.

4-4.5-104. Funds transfer - definitions.

In this article:

(a) "Funds transfer" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.

(b) "Intermediary bank" means a receiving bank other than the originator's bank or the beneficiary's bank.

(c) "Originator" means the sender of the first payment order in a funds transfer.

(d) "Originator's bank" means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

Source: L. 90: Entire article added, p. 343, § 1, effective January 1, 1991.

4-4.5-105. Other definitions.

(a) In this article:

(1) "Authorized account" means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.

(2) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this article.

(3) "Customer" means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.

(4) "Funds-transfer business day" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(5) "Funds-transfer system" means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

(6) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(7) "Prove" with respect to a fact means to meet the burden of establishing the fact (section 4-1-201 (b)(8)).

(b) Other definitions applying to this article and the sections in which they appear are:

"Acceptance".	Section 4-4.5-209
"Beneficiary".	Section 4-4.5-103
"Beneficiary's bank".	Section 4-4.5-103
"Executed".	Section 4-4.5-301
"Execution date".	Section 4-4.5-301
"Funds transfer".	Section 4-4.5-104
"Funds-transfer system rule".	Section 4-4.5-501
"Intermediary bank".	Section 4-4.5-104
"Originator".	Section 4-4.5-104
"Originator's bank".	Section 4-4.5-104
"Payment by beneficiary's bank to beneficiary".	Section 4-4.5-405
"Payment by originator to beneficiary".	Section 4-4.5-406
"Payment by sender to receiving bank".	Section 4-4.5-403
"Payment date".	Section 4-4.5-401

"Payment order".	Section 4-4.5-103
"Receiving bank".	Section 4-4.5-103
"Security procedure".	Section 4-4.5-201
"Sender".	Section 4-4.5-103

(c) The following definitions in article 4 of this title apply to this article:

"Clearing house".	Section 4-4-104
"Item".	Section 4-4-104
"Suspends payments".	Section 4-4-104

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

Source: L. 90: Entire article added, p. 343, § 1, effective January 1, 1991. **L. 2006:** (a)(7) amended, p. 497, § 28, effective September 1. **L. 2013:** (a)(2) amended, (SB 13-154), ch. 282, p. 1468, § 18, effective July 1.

4-4.5-106. Time payment order is received.

(a) The time of receipt of a payment order or communication canceling or amending a payment order is determined by the rules applicable to receipt of a notice stated in section 4-1-202. A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications canceling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cut-off time may apply to senders generally or different cut-off times may apply to different senders or categories of payment orders. If a payment order or communication canceling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cut-off time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.

(b) If this article refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this article.

Source: L. 90: Entire article added, p. 344, § 1, effective January 1, 1991. **L. 2006:** (a) amended, p. 497, § 29, effective September 1.

4-4.5-107. Federal reserve regulations and operating circulars.

Regulations of the board of governors of the federal reserve system and operating circulars of the federal reserve banks supersede any inconsistent provision of this article to the extent of the inconsistency.

Source: L. 90: Entire article added, p. 345, § 1, effective January 1, 1991.

4-4.5-108. Relationship to federal "Electronic Fund Transfer Act of 1978".

(1) Except as provided in subsection (2) of this section, this article does not apply to a funds transfer any part of which is governed by the "Electronic Fund Transfer Act of 1978", Title XX, Pub.L. 95-630, 92 Stat. 3728, 15 U.S.C. sec. 1693 et seq., as amended from time to time.

(2) This article applies to a funds transfer that is a remittance transfer as defined in the federal "Electronic Fund Transfer Act of 1978", 15 U.S.C. sec. 1693o-1, as amended from time to time, unless the remittance transfer is an electronic fund transfer as defined in the federal "Electronic Fund Transfer Act of 1978", 15 U.S.C. sec. 1693a, as amended from time to time.

(3) In a funds transfer to which this article applies, in the event of an inconsistency between an applicable provision of this article and an applicable provision of the federal "Electronic Fund Transfer Act of 1978", the provision of the federal "Electronic Fund Transfer Act of 1978" governs to the extent of the inconsistency.

Source: L. 90: Entire article added, p. 345, § 1, effective January 1, 1991. **L. 2013:** Entire section amended, (HB 13-1157), ch. 99, p. 316, § 1, effective April 4.

PART 2

ISSUE AND ACCEPTANCE OF PAYMENT ORDER

4-4.5-201. Security procedure.

"Security procedure" means a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending

or canceling a payment order is that of the customer or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may impose an obligation on the receiving bank or the customer and may require the use of algorithms or other codes, identifying words, numbers, symbols, sounds, biometrics, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer or requiring a payment order to be sent from a known email address, IP address, or telephone number is not by itself a security procedure.

Source: L. 90: Entire article added, p. 345, § 1, effective January 1, 1991. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 532, § 25, effective August 7.

4-4.5-202. Authorized and verified payment orders.

(a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the bank's obligations under the security procedure and any agreement or instruction of the customer, evidenced by a record, restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates an agreement with the customer, evidenced by a record, or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank; the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank; alternative security procedures offered to the customer; and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer and (ii) the customer expressly agreed in a record to be bound by any payment order, whether or not authorized, issued in its name and

accepted by the bank in compliance with the bank's obligations under the security procedure chosen by the customer.

(d) The term "sender" in this article includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection (a) of this section, or it is effective as the order of the customer under subsection (b) of this section.

(e) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this section and in section 4-4.5-203 (a)(1), rights and obligations arising under this section or section 4-4.5-203 may not be varied by agreement.

Source: L. 90: Entire article added, p. 345, § 1, effective January 1, 1991. **L. 2023:** (b) and (c) amended, (SB 23-090), ch. 136, p. 532, § 26, effective August 7.

4-4.5-203. Unenforceability of certain verified payment orders.

(a) If an accepted payment order is not, under section 4-4.5-202 (a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to section 4-4.5-202 (b), the following rules apply:

(1) By express agreement evidenced by a record, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person (i) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (ii) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

Source: L. 90: Entire article added, p. 346, § 1, effective January 1, 1991. **L. 2023:** (a)(1) amended, (SB 23-090), ch. 136, p. 533, § 27, effective August 7.

4-4.5-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.

(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under section 4-4.5-202, or (ii) not enforceable, in whole or in part, against the customer under section 4-4.5-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding ninety days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under subsection (a) of this section may be fixed by agreement as stated in section 4-1-205, but the obligation of a receiving bank to refund payment as stated in subsection (a) of this section may not otherwise be varied by agreement.

Source: L. 90: Entire article added, p. 346, § 1, effective January 1, 1991. **L. 2006:** (b) amended, p. 497, § 30, effective September 1.

4-4.5-205. Erroneous payment orders.

(a) If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order (i) erroneously instructed payment to a beneficiary not intended by the sender, (ii) erroneously instructed payment in an amount greater than the amount intended by the sender, or (iii) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

(1) If the sender proves that the sender or a person acting on behalf of the sender pursuant to section 4-4.5-206 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in paragraphs (2) and (3) of this subsection (a).

(2) If the funds transfer is completed on the basis of an erroneous payment order described in clause (i) or (iii) of subsection (a) of this section, the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(3) If the funds transfer is completed on the basis of a payment order described in clause (ii) of subsection (a) of this section, the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution.

(b) If (i) the sender of an erroneous payment order described in subsection (a) of this section is not obliged to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding ninety days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

(c) This section applies to amendments to payment orders to the same extent it applies to payment orders.

Source: L. 90: Entire article added, p. 347, § 1, effective January 1, 1991.

4-4.5-206. Transmission of payment order through funds-transfer or other communication system.

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

(b) This section applies to cancellations and amendments of payment orders to the same extent it applies to payment orders.

Source: L. 90: Entire article added, p. 348, § 1, effective January 1, 1991.

4-4.5-207. Misdescription of beneficiary.

(a) Subject to subsection (b) of this section, if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:

(1) Except as otherwise provided in subsection (c) of this section, if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in subsection (b) of this section is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1) of this section, the following rules apply:

(1) If the originator is a bank, the originator is obliged to pay its order.

(2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a record stating the information to which the notice relates.

(d) In a case governed by subsection (b)(1) of this section, if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in subsection (c) of this section, the originator has the right to recover.

(2) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

Source: L. 90: Entire article added, p. 348, § 1, effective January 1, 1991. **L. 2023:** (c)(2) amended, (SB 23-090), ch. 136, p. 533, § 28, effective August 7.

4-4.5-208. Misdescription of intermediary bank or beneficiary's bank.

(a) This subsection (a) applies to a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number.

(1) The receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank and need not determine whether the number identifies a bank.

(2) The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(b) This subsection (b) applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify different persons.

(1) If the sender is a bank, the receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank if the receiving bank, when it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(2) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by subsection (b)(1) of this section, as though the sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a record stating the information to which the notice relates.

(3) Regardless of whether the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different

persons. The receiving bank need not determine whether the name and number refer to the same person.

(4) If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in section 4-4.5-302 (a)(1).

Source: L. 90: Entire article added, p. 349, § 1, effective January 1, 1991. **L. 2023:** (b)(2) amended, (SB 23-090), ch. 136, p. 533, § 29, effective August 7.

4-4.5-209. Acceptance of payment order.

(a) Subject to subsection (d) of this section, a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.

(b) Subject to subsections (c) and (d) of this section, a beneficiary's bank accepts a payment order at the earliest of the following times:

(1) When the bank (i) pays the beneficiary as stated in section 4-4.5-405(a) or 4-4.5-405(b), or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order;

(2) When the bank receives payment of the entire amount of the sender's order pursuant to section 4-4.5-403(a)(1) or 4-4.5-403(a)(2); or

(3) The opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within (i) one hour after that time, or (ii) one hour after the opening of the next business day of the sender following the payment date if that time is later. If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly.

(c) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under subsection (b)(2) or (b)(3) of this section if the

beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.

(d) A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently canceled pursuant to section 4-4.5-211(b), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.

Source: L. 90: Entire article added, p. 350, § 1, effective January 1, 1991.

4-4.5-210. Rejection of payment order.

(a) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally or in a record. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, (i) any means complying with the agreement is reasonable and (ii) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(b) This subsection (b) applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order. If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled pursuant to section 4-4.5-211 (d) or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

(c) If a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time the bank suspends payments.

(d) Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order.

Source: L. 90: Entire article added, p. 351, § 1, effective January 1, 1991. **L. 2023:** (a) amended, (SB 23-090), ch. 136, p. 533, § 30, effective August 7.

4-4.5-211. Cancellation and amendment of payment order.

(a) A communication of the sender of a payment order canceling or amending the order may be transmitted to the receiving bank orally or in a record. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.

(b) Subject to subsection (a) of this section, a communication by the sender canceling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

(c) After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.

(1) With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.

(2) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(d) An unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order.

(e) A canceled payment order cannot be accepted. If an accepted payment order is canceled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issue of a new payment order in the amended form at the same time.

(f) Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

(g) A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.

(h) A funds-transfer system rule is not effective to the extent it conflicts with subsection (c)(2) of this section.

Source: L. 90: Entire article added, p. 351, § 1, effective January 1, 1991. **L. 2023:** (a) amended, (SB 23-090), ch. 136, p. 534, § 31, effective August 7.

4-4.5-212. Liability and duty of receiving bank regarding unaccepted payment order.

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this article, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this article or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in section 4-4.5-209, and liability is limited to that provided in this article. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this article or by express agreement.

Source: L. 90: Entire article added, p. 352, § 1, effective January 1, 1991.

PART 3

EXECUTION OF SENDER'S PAYMENT ORDER BY RECEIVING BANK

4-4.5-301. Execution and execution date.

(a) A payment order is "executed" by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary's bank can be accepted but cannot be executed.

(b) "Execution date" of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender's order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date.

Source: L. 90: Entire article added, p. 353, § 1, effective January 1, 1991.

4-4.5-302. Obligations of receiving bank in execution of payment order.

(a) Except as provided in subsections (b) through (d) of this section, if the receiving bank accepts a payment order pursuant to section 4-4.5-209 (a), the bank has the following obligations in executing the order:

(1) The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning (i) any intermediary bank or funds-transfer system to be used in carrying out the funds transfer, or (ii) the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.

(2) If the sender's instruction states that the funds transfer is to be carried out telephonically or by wire transfer or otherwise indicates that the funds transfer is to be carried out by the most expeditious means, the receiving bank is obliged to transmit its payment order by the most expeditious available means, and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible.

(b) Unless otherwise instructed, a receiving bank executing a payment order may (i) use any funds-transfer system if use of that system is reasonable in the circumstances, and (ii) issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank. A receiving bank is not required to follow an instruction of the sender designating a funds-transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer.

(c) Unless subsection (a)(2) of this section applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first class mail or by any means reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated.

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

Source: L. 90: Entire article added, p. 353, § 1, effective January 1, 1991.

4-4.5-303. Erroneous execution of payment order.

(a) A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or (ii) issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order under section 4-4.5-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

(b) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under section 4-4.5-402(c) if (i) that subsection is otherwise satisfied and (ii) the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted

only to the extent of the amount of the erroneous order. This subsection (b) does not apply if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.

(c) If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed and all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received to the extent allowed by the law governing mistake and restitution.

Source: L. 90: Entire article added, p. 354, § 1, effective January 1, 1991.

4-4.5-304. Duty of sender to report erroneously executed payment order.

If the sender of a payment order that is erroneously executed as stated in section 4-4.5-303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding ninety days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under section 4-4.5-402(d) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.

Source: L. 90: Entire article added, p. 355, § 1, effective January 1, 1991.

4-4.5-305. Liability for late or improper execution or failure to execute payment order.

(a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of section 4-4.5-302 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in subsection (c), of this section, additional damages are not recoverable.

(b) If execution of a payment order by a receiving bank in breach of section 4-4.5-302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank designated by the originator, or (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by subsection (a) of this section, resulting from the improper execution. Except as provided in subsection (c) of this section, additional damages are not recoverable.

(c) In addition to the amounts payable under subsections (a) and (b) of this section, damages, including consequential damages, are recoverable to the extent provided in an express agreement of the receiving bank, evidenced by a record.

(d) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, evidenced by a record, but are not otherwise recoverable.

(e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a) or (b) of this section is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection (d) of this section and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection (d) of this section is made and refused before an action is brought on the claim.

(f) Except as stated in this section, the liability of a receiving bank under subsections (a) and (b) of this section may not be varied by agreement.

Source: L. 90: Entire article added, p. 355, § 1, effective January 1, 1991. **L. 2023:** (c) and (d) amended, (SB 23-090), ch. 136, p. 534, § 32, effective August 7.

PART 4

PAYMENT

4-4.5-401. Payment date.

"Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank.

Source: L. 90: Entire article added, p. 356, § 1, effective January 1, 1991.

4-4.5-402. Obligation of sender to pay receiving bank.

(a) This section is subject to sections 4-4.5-205 and 4-4.5-207.

(b) With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.

(c) This subsection (c) is subject to subsection (e) of this section and to section 4-4.5-303. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order.

(d) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in sections 4-4.5-204 and 4-4.5-304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as stated in subsection (c) of this section and an intermediary bank is obliged to refund payment as stated in subsection (d) of this section but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in section 4-4.5-302(a)(1), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in subsection (d) of this section.

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) of this section or to receive refund under subsection (d) of this section may not be varied by agreement.

Source: L. 90: Entire article added, p. 356, § 1, effective January 1, 1991.

4-4.5-403. Payment by sender to receiving bank.

(a) Payment of the sender's obligation under section 4-4.5-402 to pay the receiving bank occurs as follows:

(1) If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a federal reserve bank or through a funds-transfer system.

(2) If the sender is a bank and the sender (i) credited an account of the receiving bank with the sender, or (ii) caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.

(3) If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.

(b) If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection (b) has been exercised.

(c) If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under section 4-4.5-402 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other.

(d) In a case not covered by subsection (a) of this section, the time when payment of the sender's obligation under section 4-4.5-402(b) or 4-4.5-402(c) occurs is governed by applicable principles of law that determine when an obligation is satisfied.

Source: L. 90: Entire article added, p. 356, § 1, effective January 1, 1991.

4-4.5-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.

(a) Subject to sections 4-4.5-211 (e), 4-4.5-405 (d), and 4-4.5-405 (e), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

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

(c) The right of a beneficiary to receive payment and damages as stated in subsection (a) of this section may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as stated in subsection (b) of this section may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer.

Source: L. 90: Entire article added, p. 357, § 1, effective January 1, 1991.

4-4.5-405. Payment by beneficiary's bank to beneficiary.

(a) If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under section 4-4.5-404(a) occurs when and to the extent (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(b) If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under section 4-4.5-404(a) occurs is governed by principles of law that determine when an obligation is satisfied.

(c) Except as stated in subsections (d) and (e) of this section, if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.

(d) A funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if (i) the rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated, (ii) the beneficiary, the beneficiary's bank and the originator's bank agreed to be bound by the rule, and (iii) the beneficiary's bank did not receive payment of the payment order that it accepted. If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under section 4-4.5-406.

(e) This subsection (e) applies to a funds transfer that includes a payment order transmitted over a funds-transfer system that (i) nets obligations multilaterally among participants, and (ii) has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one or more participants that do not meet their settlement obligations. If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement pursuant to its rules with respect to any payment order in the funds transfer, (i) the acceptance by the beneficiary's bank is nullified and no person has any right or obligation based on the acceptance, (ii) the beneficiary's bank is entitled to recover payment from the beneficiary, (iii) no payment by the originator to the beneficiary occurs under section 4-4.5-406, and (iv) subject to section 4-4.5-402(e), each sender in the funds transfer is excused from its obligation to pay its payment order under section 4-4.5-402(c) because the funds transfer has not been completed.

Source: L. 90: Entire article added, p. 358, § 1, effective January 1, 1991.

4-4.5-406. Payment by originator to beneficiary; discharge of underlying obligation.

(a) Subject to sections 4-4.5-211(e), 4-4.5-405(d), and 4-4.5-405(e), the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for

the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.

(b) If payment under subsection (a) of this section is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless (i) the payment under subsection (a) of this section was made by a means prohibited by the contract of the beneficiary with respect to the obligation, (ii) the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment, (iii) funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary, and (iv) the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract. If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under section 4-4.5-404 (a).

(c) For the purpose of determining whether discharge of an obligation occurs under subsection (b) of this section, if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

(d) Rights of the originator or of the beneficiary of a funds transfer under this section may be varied only by agreement of the originator and the beneficiary.

Source: L. 90: Entire article added, p. 359, § 1, effective January 1, 1991.

PART 5

MISCELLANEOUS PROVISIONS

4-4.5-501. Variation by agreement and effect of funds-transfer system rule.

(a) Except as otherwise provided in this article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.

(b) "Funds-transfer system rule" means a rule of an association of banks (i) governing transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a federal reserve bank,

acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this article, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this article and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in sections 4-4.5-404(c), 4-4.5-405(d), and 4-4.5-507(c).

Source: L. 90: Entire article added, p. 360, § 1, effective January 1, 1991.

4-4.5-502. Creditor process served on receiving bank; setoff by beneficiary's bank.

(a) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(b) This subsection (b) applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(1) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(2) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(3) If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.

(d) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by

that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

Source: L. 90: Entire article added, p. 360, § 1, effective January 1, 1991.

4-4.5-503. Injunction or restraining order with respect to funds transfer.

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

Source: L. 90: Entire article added, p. 361, § 1, effective January 1, 1991.

4-4.5-504. Order in which items and payment orders may be charged to account; order of withdrawals from account.

(a) If a receiving bank has received more than one payment order of the sender or one or more payment orders and other items that are payable from the sender's account, the bank may charge the sender's account with respect to the various orders and items in any sequence.

(b) In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied.

Source: L. 90: Entire article added, p. 361, § 1, effective January 1, 1991.

4-4.5-505. Preclusions of objection to debit of customer's account.

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the

customer's objection to the payment within one year after the notification was received by the customer.

Source: L. 90: Entire article added, p. 361, § 1, effective January 1, 1991.

4-4.5-506. Rate of interest.

(a) If, under this article, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined (i) by agreement of the sender and receiving bank, or (ii) by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system.

(b) If the amount of interest is not determined by an agreement or rule as stated in subsection (a) of this section, the amount is calculated by multiplying the applicable federal funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable federal funds rate is the average of the federal funds rates published by the federal reserve bank of New York for each of the days for which interest is payable divided by three hundred sixty. The federal funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank.

Source: L. 90: Entire article added, p. 361, § 1, effective January 1, 1991.

4-4.5-507. Choice of law.

(a) The following rules apply unless the affected parties otherwise agree or subsection (c) of this section applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.

(b) If the parties described in each paragraph of subsection (a) of this section have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(c) A funds-transfer system rule may select the law of a particular jurisdiction to govern (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system, or (ii) the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (ii) is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this subsection (c) may govern, whether or not that law bears a reasonable relation to the matter in issue.

(d) In the event of inconsistency between an agreement under subsection (b) of this section and a choice-of-law rule under subsection (c) of this section, the agreement under subsection (b) of this section prevails.

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

Source: L. 90: Entire article added, p. 362, § 1, effective January 1, 1991.

ARTICLE 5

Letters of Credit

4-5-101. Short title.
4-5-102. Definitions.
4-5-103. Scope.
4-5-104. Formal requirements.
4-5-105. Consideration.
4-5-106. Issuance, amendment, cancellation, and duration.
4-5-107. Confirmer, nominated person, and adviser.
4-5-108. Issuer's rights and obligations.

4-5-109. Fraud and forgery.
4-5-110. Warranties.
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4-5-112. Transfer of letter of credit.
4-5-113. Transfer by operation of law.
4-5-114. Assignment of proceeds.
4-5-115. Statute of limitations.
4-5-116. Choice of law and forum.
4-5-117. Subrogation of issuer, applicant, and nominated person.
4-5-117.5. Security interest of issuer or nominated person.
4-5-118. Applicability.
4-5-119. Saving clause.

4-5-101. Short title.

This article may be cited as "Uniform Commercial Code - Letters of Credit".

Source: L. 96: Entire article R&RE, p. 191, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-101 as it existed prior to 1996.

ANNOTATION

Applied in Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24 (1977).

4-5-102. Definitions.

(a) In this article:

(1) "Adviser" means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.

(2) "Applicant" means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.

(3) "Beneficiary" means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.

(4) "Confirmer" means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.

(5) "Dishonor" of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.

(6) "Document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion (i) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in section 4-5-108 (e) and (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.

(7) "Good faith" means honesty in fact in the conduct or transaction concerned.

(8) "Honor" of a letter of credit means performance of the issuer's undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, "honor" occurs:

(i) Upon payment;

(ii) If the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment; or

(iii) If the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.

(9) "Issuer" means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes.

(10) "Letter of credit" means a definite undertaking that satisfies the requirements of section 4-5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

(11) "Nominated person" means a person whom the issuer (i) designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit and (ii) undertakes by agreement or custom and practice to reimburse.

(12) "Presentation" means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.

(13) "Presenter" means a person making a presentation as or on behalf of a beneficiary or nominated person.

(14) "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) "Successor of a beneficiary" means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver.

(b) Definitions in other articles applying to this article and the sections in which they appear are:

Accept or acceptance	Section 4-3-409
Value	Sections 4-3-303, 4-4-211

(c) Article 1 of this title contains certain additional general definitions and principles of construction and interpretation applicable throughout this article.

Source: L. 96: Entire article R&RE, p. 191, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-103 as it existed prior to 1996.

ANNOTATION

Law reviews. For article, "Commercial Law", which discusses Tenth Circuit decisions dealing with questions of definition and interpretation, see 63 Den. U.L. Rev. 225 (1986).

Annotator's note. Since § 4-5-102 is similar to § 4-5-103 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Letter of credit not similar to surety contract. An analogy between a surety contract and a letter of credit is not well taken. General Ins. Co. of Am. v. City of Colo. Springs, 638 P.2d 752 (Colo. 1981).

But akin to cashier's check. The letter of credit is closely akin to a cashier's check or other negotiable instrument issued by a bank. Leney v. Plum Grove Bank, 670 F.2d 878 (10th Cir. 1982).

Effect of letter of credit on issuing bank. By issuing a letter of credit, the bank substitutes its credit for that of its customer. Leney v. Plum Grove Bank, 670 F.2d 878 (10th Cir. 1982).

One of the uses of credits is to secure performance of a contract between a bank's customer and a third party. Hyland Hills Metro. Park & Recreational Dist. v. McCoy Enters., Inc., 38 Colo. App. 23, 554 P.2d 708 (1976).

Two separate contracts are involved. The bank issuing the letter of credit is bound by its terms and has no obligation or right to investigate the performance of the other contract to which the credit relates. Hyland Hills Metro. Park & Recreational Dist. v. McCoy Enters., Inc., 38 Colo. App. 23, 554 P.2d 708 (1976).

If printed and written, or typed, provisions of a letter of credit cannot be reconciled, the written, or typed, provisions prevail. Hyland Hills Metro. Park & Recreational Dist. v. McCoy Enters., Inc., 38 Colo. App. 23, 554 P.2d 708 (1976).

Liability of bank where payment not in accordance with credit terms. Payment by a bank, if not in accordance with the terms of the credit, would have rendered the bank liable to the customer. Hyland Hills Metro. Park & Recreational Dist. v. McCoy Enters., Inc., 38 Colo. App. 23, 554 P.2d 708 (1976).

Forum for suing out-of-state issuing bank limited. It is unfair to burden an out-of-state issuing bank with having to defend litigation over a letter of credit in any state in which the bank could reasonably expect the credit to be used. Leney v. Plum Grove Bank, 670 F.2d 878 (10th Cir. 1982).

Bank's obligation held terminated. Where a third party was seeking payment under the letter of credit because of the bank customer's failure to construct the tennis courts, it was required to present its "signed statement dated January 5, 1974, and presented on that date", setting forth that fact according to the terms of the letter of credit. Upon its failure to do so, the obligation of the bank terminated. Hyland Hills Metro. Park & Recreational Dist. v. McCoy Enters., Inc., 38 Colo. App. 23, 554 P.2d 708 (1976).

"Guaranty letter of credit" issued by a bank requiring a documentary demand, and conspicuously stating that it was a letter of credit, falls squarely within the definition of letter of credit so that a defendant bank cannot escape its obligation to honor a demand on it. East Bank v. Dovenmuehle, Inc., 196 Colo. 422, 589 P.2d 1361 (1978).

Existence of nondocumentary conditions does not invalidate letters of credit. Raiffeisen-Zentralkasse Tirol v. First Nat'l Bank, 671 P.2d 1008 (Colo. App. 1983).

Applied in Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981).

4-5-103. Scope.

(a) This article applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

(b) The statement of a rule in this article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this article.

(c) With the exception of this subsection (c), subsections (a) and (d) of this section, sections 4-5-102 (a)(9) and (10), 4-5-106 (d), and 4-5-114 (d), and except to the extent prohibited in sections 4-1-302 and 4-5-117 (d), the effect of this article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this article.

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

Source: L. 96: Entire article R&RE, p. 193, § 1, effective July 1. **L. 2006:** (c) amended, p. 498, § 31, effective September 1.

Editor's note: This section is similar to former § 4-5-102 as it existed prior to 1996.

ANNOTATION

Annotator's note. Since § 4-5-103 is similar to § 4-5-102 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

For overview of the law and history concerning letters of credit, see Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981).

A document may be a letter of credit if it requires a documentary draft or documentary demand for payment or, if it contains neither requirement, but conspicuously declares itself to be a letter of credit. Raiffeisen-Zentralkasse Tirol v. First Nat'l Bank, 671 P.2d 1008 (Colo. App. 1983).

"Standby" letters of credit included in this article. Purported "standby" letters of credit, by which the issuer claims to undertake only a secondary liability to pay damages resulting from its customers' failure to perform an underlying contract, which require documentary drafts and which are conspicuously entitled letters of credit, clearly fall within the scope of this article. Bd. of County Comm'rs v. Colo. Nat'l Bank, 43 Colo. App. 186, 607 P.2d 1010 (1979),

aff'd in part, rev'd in part on other grounds, 634 P.2d 32 (Colo. 1981).

Letter of credit is separate and independent from underlying business transaction between the bank's customer and the beneficiary of the letter of credit. Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981).

Letters of credit not ultra vires. Letters of credit issued by a state bank, being authorized by § 11-7-107(2), and falling within the provisions of subsection (1), are binding, primary obligations, dependent solely on presentation of conforming documents, and are, therefore, not ultra vires. United Bank v. Quadrangle, Ltd., 42 Colo. App. 486, 596 P.2d 408 (1979).

Court's remedial powers limited by terms of letter of credit. Where the rights of all parties are defined and established under a letter of credit, a court may not fashion an equitable remedy to benefit a third party. Schmidt-Tiago Constr. Co. v. City of Colo. Springs, 633 P.2d 533 (Colo. App. 1981).

Surety contract not similar. An analogy between a surety contract and a letter of credit is not well taken. Gen. Ins. Co. of Am. v. City of Colo. Springs, 638 P.2d 752 (Colo. 1981).

Applied in Dovenmuehle, Inc. v. E. Bank, 38 Colo. App. 507, 563 P.2d 24 (1977); City of Colo. Springs v. Gen. Ins. Co., 44 Colo. App. 174, 616 P.2d 147 (Colo. 1980).

4-5-104. Formal requirements.

A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a signed record.

Source: L. 96: Entire article R&RE, p. 194, § 1, effective July 1. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 534, § 33, effective August 7.

Editor's note: This section is similar to former § 4-5-104 as it existed prior to 1996.

4-5-105. Consideration.

Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation.

Source: L. 96: Entire article R&RE, p. 194, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-105 as it existed prior to 1996.

4-5-106. Issuance, amendment, cancellation, and duration.

(a) A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.

(b) After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer, and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.

(c) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one year after its stated date of issuance or, if none is stated, after the date on which it is issued.

(d) A letter of credit that states that it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued.

Source: L. 96: Entire article R&RE, p. 194, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-106 as it existed prior to 1996.

4-5-107. Confirmer, nominated person, and adviser.

(a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

(b) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.

(c) A person requested to advise may decline to act as an adviser. An adviser that is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or amendment is enforceable as issued.

(d) A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment, or advice has the rights and obligations of an adviser under subsection (c) of this section. The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment, or advice received by the person who so notifies.

Source: L. 96: Entire article R&RE, p. 194, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-107 as it existed prior to 1996.

4-5-108. Issuer's rights and obligations.

(a) Except as otherwise provided in section 4-5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e) of this section, appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in section 4-5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(b) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:

(1) To honor;

(2) If the letter of credit provides for honor to be completed more than seven business days after presentation, to accept a draft or incur a deferred obligation; or

(3) To give notice to the presenter of discrepancies in the presentation.

(c) Except as otherwise provided in subsection (d) of this section, an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.

(d) Failure to give the notice specified in subsection (b) of this section or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in section 4-5-109 (a) or expiration of the letter of credit before presentation.

(e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

(1) The performance or nonperformance of the underlying contract, arrangement, or transaction;

(2) An act or omission of others; or

(3) Observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e) of this section.

(g) If an undertaking constituting a letter of credit under section 4-5-102 (a)(10) contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(h) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.

(i) An issuer that has honored a presentation as permitted or required by this article:

(1) Is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;

(2) Takes the documents free of claims of the beneficiary or presenter;

(3) Is precluded from asserting a right of recourse on a draft under sections 4-3-414 and 4-3-415;

(4) Except as otherwise provided in sections 4-5-110 and 4-5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and

(5) Is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

Source: L. 96: Entire article R&RE, p. 195, § 1, effective July 1.

Editor's note: This section is similar to former §§ 4-5-109 and 4-5-112 as they existed prior to 1996.

4-5-109. Fraud and forgery.

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or

honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(1) The issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and

(2) The issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

(1) The relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

(2) A beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

(3) All of the conditions to entitle a person to the relief under the law of this State have been met; and

(4) On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1) of this section.

Source: L. 96: Entire article R&RE, p. 196, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-114 as it existed prior to 1996.

4-5-110. Warranties.

(a) If its presentation is honored, the beneficiary warrants:

(1) To the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in section 4-5-109 (a); and

(2) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

(b) The warranties in subsection (a) of this section are in addition to warranties arising under articles 3, 4, 7, and 8 of this title because of the presentation or transfer of documents covered by any of those articles.

Source: L. 96: Entire article R&RE, p. 196, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-111 as it existed prior to 1996.

4-5-111. Remedies.

(a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection (a). If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(b) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.

(c) If an adviser or nominated person other than a confirmer breaches an obligation under this article or an issuer breaches an obligation not covered in subsection (a) or (b) of this section, a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection (c) and subsections (a) and (b) of this section.

(d) An issuer, nominated person, or adviser who is found liable under subsection (a), (b), or (c) of this section shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(e) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article.

(f) Damages that would otherwise be payable by a party for breach of an obligation under this article may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

Source: L. 96: Entire article R&RE, p. 197, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-115 as it existed prior to 1996.

ANNOTATION

Annotator's note. Since § 4-5-111 is similar to § 4-5-115 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

For contractual relationships arising from letter of credit, see Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24 (1977), aff'd, 196 Colo. 422, 589 P.2d 1361 (1978).

Relevant nondocumentary conditions includable in letter of credit. The obligation of the issuer of a letter of credit to honor the letter is wholly separate from the beneficiary's compliance with the terms of the underlying contract and is dependent solely on the terms and conditions contained in the letter of credit. This disjunction between a letter of credit and the underlying obligation does not, however, prohibit including in the letter of credit itself nondocumentary conditions which are relevant both to satisfaction of the terms of the underlying contract and of the letter of credit. Raiffeisen-Zentralkasse Tirol v. First Nat'l Bank, 671 P.2d 1008 (Colo. App. 1983).

Applied in Bd. of County Comm'rs v. Colo. Nat'l Bank, 43 Colo. App. 186, 607 P.2d 1010 (1979); General Ins. Co. of Am. v. City of Colo. Springs, 638 P.2d 752 (Colo. 1981).

4-5-112. Transfer of letter of credit.

(a) Except as otherwise provided in section 4-5-113, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.

(b) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:

(1) The transfer would violate applicable law; or

(2) The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in section 4-5-108 (e) or is otherwise reasonable under the circumstances.

Source: L. 96: Entire article R&RE, p. 198, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-116 as it existed prior to 1996.

4-5-113. Transfer by operation of law.

(a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection (e) of this section, an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in section 4-5-108 (e) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

(c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

(d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) of this section has the consequences specified in section 4-5-108 (i) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of section 4-5-109.

(e) An issuer whose rights of reimbursement are not covered by subsection (d) of this section or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection (b) of this section.

(f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

Source: L. 96: Entire article R&RE, p. 198, § 1, effective July 1.

4-5-114. Assignment of proceeds.

(a) In this section, "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.

(b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(e) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

(f) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by article 9 of this title or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by article 9 of this title or other law.

Source: L. 96: Entire article R&RE, p. 199, § 1, effective July 1.

Editor's note: This section is similar to former § 4-5-116 as it existed prior to 1996.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Contractual relationships arising from letter of credit. See Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24 (1977), aff'd, 196 Colo. 422, 589 P.2d 1361 (1978); Leney v. Plum Grove Bank, 670 F.2d 878 (10th Cir. 1982).

Strict compliance with terms of letter of credit is required to maintain the commercial vitality of the letter of credit device. Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981).

Independence of letters of credit to be preserved. The purpose of the letter of credit requires that the unique feature of the letter of credit, i.e., their independence from the contract between the customer and the beneficiary, be preserved by courts. Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24 (1977), aff'd, 196 Colo. 422, 589 P.2d 1361 (1978).

The transactions or contracts underlying the bank's issuance of a letter of credit have no bearing whatsoever on the bank's primary liability to the beneficiary of the letter. Bd. of County Comm'rs v. Colo. Nat'l Bank, 43 Colo. App. 186, 607 P.2d 1010 (1979), aff'd in part, rev'd in part on other grounds, 634 P.2d 32 (Colo. 1981).

Effect of letter of credit on issuing bank. By issuing a letter of credit, the bank substitutes its credit for that of its customer. Leney v. Plum Grove Bank, 670 F.2d 878 (10th Cir. 1982).

Letters of credit are actual liabilities of a bank. Bank acted properly in freezing accounts of beneficiary even though no demand for payment under letters of credit issued by bank had been made. Balzano v. United Bank of Denver, 761 P.2d 229 (Colo. App. 1988).

Letters of credit do not eradicate the contractual latitude afforded the parties, but are intended to enhance it. Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24 (1977), aff'd, 196 Colo. 422, 589 P.2d 1361 (1978).

Within broad limits, an issuer and the beneficiary may agree that various conditions be satisfied by documentation prior to payment. Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24 (1977), aff'd, 196 Colo. 422, 589 P.2d 1361 (1978).

And contract principles may be considered in deciding controversies. As a result of the flexibility with which the issuer and beneficiary may agree to conditions to payment, contract principles are not necessarily precluded from consideration in deciding controversies involving letters of credit if the parties embody them within the terms of the credit. Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24

(1977), aff'd, 196 Colo. 422, 589 P.2d 1361 (1978).

Issuer may pay on letter of credit despite notice of irregularity. The issuer of a letter of credit may, in good faith, honor a draft or demand for payment notwithstanding notice from its customer that documents are forged or fraudulent or that there is fraud in the transaction; the issuer may, however, be enjoined from honoring such drafts or demands for payment. Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981).

"Fraud in the transaction", as referred to in subsection (2), must stem from conduct by the beneficiary of the letter of credit as against the customer of the bank. Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981).

Fraud must be of such an egregious nature as to vitiate the entire underlying transaction so that the legitimate purposes of the independence of the bank's obligation would no longer be served. Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981).

When issuer confined to stated grounds for dishonor. An issuer is confined to its stated grounds for dishonor where the statements have misled the beneficiary who could have cured the defect but relied on the stated grounds to its injury. Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981).

Waiver of grounds for refusal to pay. In cases involving letters of credit, a refusal to pay by an issuer formally placed on one ground will be deemed a waiver of all others based on the letter of credit. Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24 (1977), aff'd, 196 Colo. 422, 589 P.2d 1361 (1978).

"Guaranty letter of credit" issued by a bank requiring a documentary demand, and conspicuously stating that it was a letter of credit, falls squarely within the definition of letter of credit, so that a defendant bank cannot escape its obligation to honor a demand on it. East Bank v. Dovenmuehle, Inc., 196 Colo. 422, 589 P.2d 1361 (1978).

Standby letters of credit, suretyship and guaranty contracts compared. Colo. Nat'l Bank v. Bd. of County Comm'rs, 634 P.2d 32 (Colo. 1981).

Surety contract not similar. An analogy between a surety contract and a letter of credit is not well taken. General Ins. Co. of Am. v. City of Colo. Springs, 638 P.2d 752 (Colo. 1981).

Forum for suing out-of-state issuing bank limited. It is unfair to burden an out-of-state issuing bank with having to defend litigation over a letter of credit in any state in which the bank could reasonably expect the credit to be used. Leney v. Plum Grove Bank, 670 F.2d 878 (10th Cir. 1982).

4-5-115. Statute of limitations.

An action to enforce a right or obligation arising under this article must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

Source: L. 96: Entire article R&RE, p. 200, § 1, effective July 1.

4-5-116. Choice of law and forum.

(a) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed by the affected parties or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) of this section applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued.

(c) For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities, and a bank is considered to be located at the place where its relevant branch is considered to be located under subsection (d) of this section.

(d) A branch of a bank is considered to be located at the address indicated in the branch's undertaking. If more than one address is indicated, the branch is considered to be located at the address from which the undertaking was issued.

(e) Except as otherwise provided in this subsection (e), the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the "Uniform Customs and Practice for Documentary Credits", to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article 5 would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b) of this section; (ii) the relevant undertaking incorporates rules of custom or practice; and (iii) there is conflict between this article 5 and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in section 4-5-103 (c).

(f) If there is conflict between this article 5 and article 3, 4, 4.5, or 9 of this title 4, this article 5 governs.

(g) The forum for settling disputes arising out of an undertaking within this article 5 may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a) of this section.

Source: L. 96: Entire article R&RE, p. 200, § 1, effective July 1. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 534, § 34, effective August 7.

4-5-117. Subrogation of issuer, applicant, and nominated person.

(a) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

(b) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (a) of this section.

(c) A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:

(1) The issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;

(2) The beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and

(3) The applicant to same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.

(d) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (a) and (b) of this section do not arise until the issuer honors the letter of credit or otherwise pays and the rights in subsection (c) of this section do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person, and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense, or excuse.

Source: L. 96: Entire article R&RE, p. 201, § 1, effective July 1.

4-5-117.5. Security interest of issuer or nominated person.

(a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a) of this section, the security interest continues and is subject to article 9 of this title, but:

(1) A security agreement is not necessary to make the security interest enforceable under section 4-9-203 (b)(3);

(2) If the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and

(3) If the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document.

Source: L. 2001: Entire section added, p. 1441, § 28, effective July 1.

4-5-118. Applicability.

This article applies to a letter of credit that is issued on or after July 1, 1996. This article does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before July 1, 1996.

Source: L. 96: Entire article R&RE, p. 202, § 1, effective July 1.

4-5-119. Saving clause.

A transaction arising out of or associated with a letter of credit that was issued before July 1, 1996, and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed when this article was enacted as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.

Source: L. 96: Entire article R&RE, p. 202, § 1, effective July 1.

ARTICLE 6

Bulk Transfers

4-6-101 to 4-6-111. (Repealed)

Source: L. 91: Entire article repealed, p. 269, § 1, effective July 1.

4-6-112. Savings clause. (Repealed)

Source: L. 91: Entire section repealed, p. 269, § 2, effective July 1, 1992.

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4-7-703. Saving clause.

PART 1

GENERAL

4-7-101. Short title.

This article shall be known and may be cited as the "Uniform Commercial Code - Documents of Title".

Source: L. 2006: Entire article R&RE, p. 469, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-101 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965).

4-7-102. Definitions and index of definitions.

(a) In this article 7, unless the context otherwise requires:

(1) "Bailee" means a person that by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them.

(2) "Carrier" means a person that issues a bill of lading.

(3) "Consignee" means a person named in a bill of lading to which or to whose order the bill promises delivery.

(4) "Consignor" means a person named in a bill of lading as the person from which the goods have been received for shipment.

(5) "Delivery order" means a record that contains an order to deliver goods directed to a warehouse, carrier, or other person that in the ordinary course of business issues warehouse receipts or bills of lading.

(6) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(7) "Goods" means all things that are treated as movable for the purposes of a contract for storage or transportation.

(8) "Issuer" means a bailee that issues a document of title or, in the case of an unaccepted delivery order, the person that orders the possessor of goods to deliver. The term includes a person for which an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, even if the issuer did not receive any goods, the goods were misdescribed, or in any other respect the agent or employee violated the issuer's instructions.

(9) "Person entitled under the document" means the holder, in the case of a negotiable document of title, or the person to which delivery of the goods is to be made by the terms of, or pursuant to instructions in a record under, a nonnegotiable document of title.

(10) Repealed.

(11) "Shipper" means a person that enters into a contract of transportation with a carrier.

(12) Repealed.

(13) "Warehouse" means a person engaged in the business of storing goods for hire.

(b) Definitions in other articles applying to this article and the sections in which they appear are:

(1) "Contract for sale", section 4-2-106;

(2) "Lessee in the ordinary course of business", section 4-2.5-103;

(3) "'Receipt' of goods", section 4-2-103.

(c) In addition, article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article.

Source: L. 2006: Entire article R&RE, p. 469, § 2, effective September 1. **L. 2007:** (b)(2) amended, p. 365, § 1, effective August 3. **L. 2023:** IP(a) amended and (a)(10) and (a)(12) repealed, (SB 23-090), ch. 136, p. 536, § 35, effective August 7.

Editor's note: This section is similar to former § 4-7-102 as it existed prior to 2006.

Cross references: For offenses relating to warehouse, see §§ 18-5-506 to 18-5-510.

ANNOTATION

Drafts to bailee held nonnegotiable documents of title. While a bean company's drafts to a bailee were negotiable instruments, by subsection (1)(a) they were nonnegotiable documents of title since their terms did not require delivery of the beans to "bearer or to the order of a named person". Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976) (decided prior to the 2006 repeal and reenactment).

4-7-103. Relation of article to treaty or statute.

(a) This article is subject to any treaty or statute of the United States or regulatory statute of this state to the extent the treaty, statute, or regulatory statute is applicable.

(b) This article does not modify or repeal any law prescribing the form or content of a document of title or the services or facilities to be afforded by a bailee, or otherwise regulating a bailee's business in respects not specifically treated in this article. However, violation of such a law does not affect the status of a document of title that otherwise is within the definition of a document of title.

(c) This article modifies, limits, and supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or

supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

(d) To the extent there is a conflict between the "Uniform Electronic Transactions Act", article 71.3 of title 24, C.R.S., and this article, this article governs.

Source: L. 2006: Entire article R&RE, p. 470, § 2, effective September 1. **L. 2007:** Entire section amended, p. 365, § 2, effective August 3.

Editor's note: This section is similar to former § 4-7-103 as it existed prior to 2006.

ANNOTATION

Applied in Rio Grande Motor Way v. Resort Graphics, 740 P.2d 517 (Colo. 1987) (decided prior to the 2006 repeal and reenactment).

4-7-104. Negotiable and nonnegotiable document of title.

(a) Except as otherwise provided in subsection (c) of this section, a document of title is negotiable if by its terms the goods are to be delivered to the bearer or to the order of a named person.

(b) A document of title other than one described in subsection (a) of this section, is nonnegotiable. A bill of lading that states 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 an order in a record signed by the same or another named person.

(c) A document of title is nonnegotiable if, at the time it is issued, the document has a conspicuous legend, however expressed, that it is nonnegotiable.

Source: L. 2006: Entire article R&RE, p. 471, § 2, effective September 1. **L. 2007:** (a) amended, p. 366, § 3, effective August 3.

Editor's note: This section is similar to former § 4-7-104 as it existed prior to 2006.

ANNOTATION

Annotator's note. Since § 4-7-104 is similar to § 4-7-104 as it existed prior to the 2006 repeal and reenactment of this article, a relevant case construing that provision has been included in the annotations to this section.

Drafts to bailee held nonnegotiable documents of title. While a bean company's drafts to a bailee were negotiable instruments, by subsection (1)(a) they were nonnegotiable documents of title since their terms did not require delivery of the beans to "bearer or to the order of a named person". Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

4-7-105. Reissuance in alternative medium.

(a) Upon request of a person entitled under an electronic document of title, the issuer of the electronic document may issue a tangible document of title as a substitute for the electronic document if:

(1) The person entitled under the electronic document surrenders control of the document to the issuer; and

(2) The tangible document when issued contains a statement that it is issued in substitution for the electronic document.

(b) Upon issuance of a tangible document of title in substitution for an electronic document of title in accordance with subsection (a) of this section:

(1) The electronic document ceases to have any effect or validity; and

(2) The person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.

(c) Upon request of a person entitled under a tangible document of title, the issuer of the tangible document may issue an electronic document of title as a substitute for the tangible document if:

(1) The person entitled under the tangible document surrenders possession of the document to the issuer; and

(2) The electronic document when issued contains a statement that it is issued in substitution for the tangible document.

(d) Upon issuance of an electronic document of title in substitution for a tangible document of title in accordance with subsection (c) of this section:

(1) The tangible document ceases to have any effect or validity; and

(2) The person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer.

Source: L. 2006: Entire article R&RE, p. 471, § 2, effective September 1. **L. 2007:** IP(d) amended, p. 366, § 4, effective August 3.

4-7-106. Control of electronic document of title.

(a) A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.

(b) A system satisfies subsection (a) of this section, and a person has control of an electronic document of title, if the document is created, stored, and transferred in a manner that:

(1) A single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6) of this subsection (b), unalterable;

(2) The authoritative copy identifies the person asserting control as:

(A) The person to which the document was issued; or

(B) If the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or amendments that add or change an identified transferee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

(c) A system satisfies subsection (a) of this section, and a person has control of an electronic document of title, if an authoritative electronic copy of the document, a record attached to or logically associated with the electronic copy, or a system in which the electronic copy is recorded:

(1) Enables the person readily to identify each electronic copy as either an authoritative copy or a nonauthoritative copy;

(2) Enables the person readily to identify itself in any way, including by name, identifying number, cryptographic key, office, or account number, as the person to which each authoritative electronic copy was issued or transferred; and

(3) Gives the person exclusive power, subject to subsection (d) of this section, to:

(A) Prevent others from adding or changing the person to which each authoritative electronic copy has been issued or transferred; and

(B) Transfer control of each authoritative electronic copy.

(d) Subject to subsection (e) of this section, a power is exclusive under subsections (c)(3)(A) and (c)(3)(B) of this section even if:

(1) The authoritative electronic copy, a record attached to or logically associated with the authoritative electronic copy, or a system in which the authoritative electronic copy is recorded limits the use of the document of title or has a protocol that is programmed to cause a change, including a transfer or loss of control; or

(2) The power is shared with another person.

(e) A power of a person is not shared with another person under subsection (d)(2) of this section and the person's power is not exclusive if:

(1) The person can exercise the power only if the power also is exercised by the other person; and

(2) The other person:

(A) Can exercise the power without exercise of the power by the person; or

(B) Is the transferor to the person of an interest in the document of title.

(f) If a person has the powers specified in subsections (c)(3)(A) and (c)(3)(B) of this section, the powers are presumed to be exclusive.

(g) A person has control of an electronic document of title if another person, other than the transferor to the person of an interest in the document:

(1) Has control of the document and acknowledges that it has control on behalf of the person; or

(2) Obtains control of the document after having acknowledged that it will obtain control of the document on behalf of the person.

(h) A person that has control under this section is not required to acknowledge that it has control on behalf of another person.

(i) If a person acknowledges that it has or will obtain control on behalf of another person, unless the person otherwise agrees or law other than this article 7 or article 9 of this title 4 otherwise provides, the person does not owe any duty to the other person and is not required to confirm the acknowledgment to any other person.

Source: L. 2006: Entire article R&RE, p. 472, § 2, effective September 1. **L. 2007:** (b)(1) amended, p. 366, § 5, effective August 3. **L. 2023:** IP(b) and (b)(4) amended and (c), (d), (e), (f), (g), (h), and (i) added, (SB 23-090), ch. 136, p. 536, § 36, effective August 7.

4-7-107. Relation to federal "Electronic Signatures in Global and National Commerce Act". (Repealed)

Source: L. 2006: Entire article R&RE, p. 473, § 2, effective September 1. **L. 2007:** Entire section repealed, p. 366, § 6, effective August 3.

PART 2

WAREHOUSE RECEIPTS - SPECIAL PROVISIONS

4-7-201. Person that may issue a warehouse receipt - storage under bond.

(a) A warehouse receipt may be issued by any warehouse.

(b) If 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 is deemed to be a warehouse receipt even if issued by a person that is the owner of the goods and is not a warehouse.

Source: L. 2006: Entire article R&RE, p. 473, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-201 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965).

4-7-202. Form of warehouse receipt - effect of omission.

(a) A warehouse receipt need not be in any particular form.

(b) Unless a warehouse receipt provides for each of the following, the warehouse is liable for damages caused to a person injured by its omission:

(1) A statement of the location of the warehouse facility where the goods are stored;

(2) The date of issue of the receipt;

(3) The unique identification code of the receipt;

(4) A statement whether the goods received will be delivered to the bearer, to a named person, or to a named person or on its order;

(5) The rate of storage and handling charges, unless goods are stored under a field warehousing arrangement, in which case a statement of that fact is sufficient on a nonnegotiable receipt;

(6) A description of the goods or the packages containing them;

(7) The signature of the warehouse or its agent;

(8) If the receipt is issued for goods that the warehouse owns, either solely, jointly, or in common with others, a statement of the fact of that ownership; and

(9) A statement of the amount of advances made and of liabilities incurred for which the warehouse claims a lien or security interest, unless the precise amount of advances made or liabilities incurred, at the time of the issue of the receipt, is unknown to the warehouse or to its agent that issued the receipt, in which case a statement of the fact that advances have been made or liabilities incurred and the purpose of the advances or liabilities is sufficient.

(c) A warehouse may insert in its receipt any terms that are not contrary to the provisions of this title and do not impair its obligation of delivery under section 4-7-403 or its duty of care under section 4-7-204. Any contrary provision is ineffective.

Source: L. 2006: Entire article R&RE, p. 473, § 2, effective September 1. **L. 2007:** IP (b), (b)(1), (b)(5), (b)(8), (b)(9), and (c) amended, p. 366, § 7, effective August 3.

Editor's note: This section is similar to former § 4-7-202 as it existed prior to 2006.

4-7-203. 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, that relies upon the description of the goods in the document may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that:

(1) The document conspicuously indicates that the issuer does not know whether all or part of the goods in fact were received or conform to the description, such as a case in which 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 words of similar import, if the indication is true; or

(2) The party or purchaser otherwise has notice of the nonreceipt or misdescription.

Source: L. 2006: Entire article R&RE, p. 474, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-203 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965).

4-7-204. Duty of care - contractual limitation of warehouse's liability.

(a) A warehouse is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. Unless otherwise agreed, the warehouse is not liable for damages that could not have been avoided by the exercise of that care.

(b) 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 beyond which the warehouse is not liable. Such a limitation is not effective with respect to the warehouse's liability for conversion to its own use. On request of the bailor in a record at the time of signing the storage agreement or

within a reasonable time after receipt of the warehouse receipt, the warehouse's liability may be increased on part or all of the goods covered by the storage agreement or the warehouse receipt. In this event, increased rates may be charged based on an increased valuation of the goods.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the bailment may be included in the warehouse receipt or storage agreement.

Source: L. 2006: Entire article R&RE, p. 474, § 2, effective September 1. **L. 2007:** (a) and (b) amended, p. 367, § 8, effective August 3.

Editor's note: This section is similar to former § 4-7-204 as it existed prior to 2006.

ANNOTATION

I. General Consideration.

II. Duty of Care.

III. Contractual Limitation.

I. GENERAL CONSIDERATION.

Annotator's note. Since § 4-7-204 is similar to § 4-7-204 as it existed prior to the 2006 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Measure of damages. Where household goods, wearing apparel, and personal effects of a bailor have a market value, then the measure of damages for negligent harm to personal property bailed with a warehouseman is the difference between the fair market value of the goods at the time the injury was discovered and what would have been the fair market value at that time if the goods had not been damaged. Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

Original costs of goods which were damaged while in possession of a warehouseman may be considered in determining market value, but only if combined with other factors such as the length of time the property has been used, its condition just before, and its salvage value after the damage occurred. Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

Where an item, while in the possession of a warehouseman, is merely damaged and is repairable at reasonable expense, the cost of repairs may be used as the measure of damages. Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

Where articles which have been damaged while in the possession of a warehouseman have no market value in the ordinary sense, they may be given a reasonable value on the basis of their value to the owner, and for this purpose, original cost and the practicability

and expense of replacement can be considered. Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

II. DUTY OF CARE.

Law reviews. For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965).

Annotator's note. Since § 4-7-204(1) is similar to repealed § 147-2-14, C.R.S. 1963, § 146-2-14, CRS 53, and laws antecedent to CSA, C. 173, § 21 (uniform warehouse receipts act), relevant cases construing those provisions have been included in the annotations to this section.

The legal relationship created in warehousing is that of bailor-bailee. Burroughs Corp. v. Rocky Mt. Prestress, Inc., 431 F.2d 1185 (10th Cir. 1970).

Bound only to common care. It is well settled that warehousemen are not like common carriers, insurers of goods committed to their care and liable for all losses not occasioned by the act of God or a public enemy, but are ordinary bailees for hire, bound only to common care and diligence and liable only for want of such diligence and care. Benedict Whse. & Transf. Co. v. McKannon Piano Co., 62 Colo. 180, 161 P. 145 (1916).

Warehousemen are liable for loss due to their negligence. See Denver Union Term. Ry. v. Cullinan, 72 Colo. 248, 210 P. 602 (1922).

When there is substantial evidence upon the issue, the question of reasonable care is for the jury, in view of all the surrounding circumstances. Benedict Whse. & Transf. Co. v. McKannon Piano Co., 62 Colo. 180, 161 P. 145 (1916).

In the absence of evidence, the question of reasonable care is for the court. Benedict Whse. & Transf. Co. v. McKannon Piano Co., 62 Colo. 180, 161 P. 145 (1916).

Appellate court must accept trier of fact's conclusion. The issues of negligence and proximate cause are to be resolved by the trier of the fact, and upon review the appellate court must view the evidence in the light most favorable to the party in whose favor the trier of the fact resolved the inferences to be drawn from the evidence. Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

An appellate court can reach a conclusion of what constitutes reasonable care or proximate cause different from the one reached by the trier of the fact, only in the clearest cases where the facts are undisputed and reasonable minds could draw but one inference from them. Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

It cannot be said that a warehouseman is required to foresee, as a matter of law, that the distribution of keys to other tenants or users of the building could result in a fire being set. Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

It cannot be said that as a matter of law all warehousemen must employ a night watchman or put in an automatic sprinkler system, and that the failure to do so subjects the warehouseman to liability for any fire which occurs on the premises.

Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

To establish a prima facie case the bailor need only show that the goods were delivered to the bailee in good condition and that the bailee returned the goods in a damaged condition. Burroughs Corp. v. Rocky Mt. Prestress, Inc., 431 F.2d 1185 (10th Cir. 1970). See Bankers Whse. Co. v. Bennett, 148 Colo. 323, 365 P.2d 889 (1961).

As a presumption of negligence arises. Once goods are delivered in good condition to a warehouseman who accepts them, but cannot redeliver them, or can redeliver them only in a damaged condition, a presumption of negligence on the part of the warehouseman arises. Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968); Burroughs Corp. v. Rocky Mt. Prestress, Inc., 431 F.2d 1185 (10th Cir. 1970).

Where in February 1973, a warehouseman accepted the bailor's goods for storage and redelivered them in September, 1973, in a water-damaged condition, under these circumstances a presumption of negligence on the part of the warehouseman arose. Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

The burden of going forward with evidence to rebut that presumption rests on the warehouseman. Bankers Whse. Co. v. Bennett, 148 Colo. 323, 365 P.2d 889 (1961); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968); Burroughs Corp. v. Rocky Mt. Prestress, Inc., 431 F.2d 1185 (10th Cir. 1970); Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

Once the bailor has established these facts, it is incumbent on the bailee to come forward with evidence to show that the goods were returned in good condition, or that there exists some acceptable explanation as to why they were returned in a damaged condition. Burroughs Corp. v. Rocky Mt. Prestress, Inc., 431 F.2d 1185 (10th Cir. 1970).

The effect of this rule requiring the bailee to meet the presumption of negligence is to place the burden upon the one best able to discharge it. Bankers Whse. Co. v. Bennett, 148 Colo. 323, 365 P.2d 889 (1961).

An essential part of every bailment contract is the obligation to deliver over the property at the termination of the bailment. The bailor must prove the contract, the delivery of the goods to the bailee, and their return in a damaged condition. When he has done this, the inference is deducible that the bailee is at fault and must answer, and especially is this true if the loss could not ordinarily have occurred without negligence. His failure to return the goods as delivered to him is inconsistent with what he agreed to do. The property was in his possession, under his care and oversight, and away from that of the bailor, who in most cases could not know under what circumstances it was damaged. Bankers Whse. Co. v. Bennett, 148 Colo. 323, 365 P.2d 889 (1961).

There is, however, no shift in the burden of proof which still remains with the bailor. Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968); Burroughs Corp. v.

Rocky Mt. Prestress, Inc., 431 F.2d 1185 (10th Cir. 1970).

Where foodstuffs are received by a warehouse in good marketable condition but are later contaminated while in storage, the question is, whether the warehouseman, if he had been the owner engaged in the sale, storage, and distribution of such would permit them to be stored with or come in contact with anything which would impregnate them with an odor, inasmuch as one engaged in such a business as storage of foodstuffs would presumably know of their susceptibility to absorb or acquire the taste and odor of other substances and take measures to guard against resulting contamination. Bankers Whse. Co. v. Bennett, 148 Colo. 323, 365 P.2d 889 (1961).

III. CONTRACTUAL LIMITATION.

Annotator's note. Since § 4-7-204(2) is similar to repealed CSA, C. 173, § 3 (uniform warehouse receipts act), a relevant case construing that provision has been included in the annotations to this section.

Any attempt by provision in a warehouse receipt to absolve warehousemen from all liability resulting from failure to exercise ordinary care is invalid, and it has been so held in some jurisdictions independent of statute on the ground of public policy. French v. Bekins Moving & Storage Co., 118 Colo. 424, 195 P.2d 968 (1948).

A provision in the contract between the parties declaring an agreed valuation of the goods stored which is less than their true value for the purpose of determining the measure of the warehousemen's obligation does not impair the obligation under this section if: (a) the parties fairly agree as to the valuation, and (b) the fact of actually greater value is unknown to the warehousemen. French v. Bekins Moving & Storage Co., 118 Colo. 424, 195 P.2d 968 (1948).

Limitation not called to bailor's attention. Under the plain language of subsection (2), the liability of a warehouseman can be limited to the amount specified in a warehouse receipt, even though this limitation was not called specifically to the bailor's attention by the warehouseman. Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

4-7-205. Title under warehouse receipt defeated in certain cases.

A buyer in ordinary course of business of fungible goods sold and delivered by a warehouse that is also in the business of buying and selling such goods takes the goods free of any claim under a warehouse receipt even if the receipt is negotiable and has been duly negotiated.

Source: L. 2006: Entire article R&RE, p. 474, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-205 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Annotator's note. Since § 4-7-205 is similar to § 4-7-205 as it existed prior to the 2006 repeal and reenactment of this article, a relevant case construing that provision has been included in the annotations to this section.

This section requires that the goods in question be delivered. Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

"Delivered" under this section means delivered in fact, not symbolic delivery by means of a transfer of documents. Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

4-7-206. Termination of storage at warehouse's option.

(a) A warehouse, by giving notice to the person on whose account the goods are held and any other person known to claim an interest in the goods, may 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 of title or, if a period is not fixed, within a stated period not less than thirty days after the warehouse gives notice. If the goods are not removed before the date specified in the notice, the warehouse may sell them pursuant to section 4-7-210.

(b) If a warehouse in good faith believes that goods are about to deteriorate or decline in value to less than the amount of its lien within the time provided in subsection (a) of this section and section 4-7-210, the warehouse may specify in the notice given under subsection (a) of this section any reasonable shorter time for removal of the goods and, if the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting.

(c) If, as a result of a quality or condition of the goods of which the warehouse did not have notice at the time of deposit, the goods are a hazard to other property, the warehouse facilities, or other persons, the warehouse may sell the goods at public or private sale without advertisement or posting on reasonable notification to all persons known to claim an interest in the goods. If the warehouse, after a reasonable effort, is unable to sell the goods, it may dispose of them in any lawful manner and does not incur liability by reason of that disposition.

(d) A warehouse shall deliver the goods to any person entitled to them under this article upon due demand made at any time before sale or other disposition under this section.

(e) A warehouse may satisfy its lien from the proceeds of any sale or disposition under this section but shall hold the balance for delivery on the demand of any person to which the warehouse would have been bound to deliver the goods.

Source: L. 2006: Entire article R&RE, p. 475, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-206 as it existed prior to 2006.

4-7-207. Goods must be kept separate - fungible goods.

(a) Unless the warehouse receipt provides otherwise, a warehouse shall keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods. However, different lots of fungible goods may be commingled.

(b) If different lots of fungible goods are commingled, the goods are owned in common by the persons entitled thereto and the warehouse is severally liable to each owner for that owner's share. If, because of overissue, a mass of fungible goods is insufficient to meet all the receipts the warehouse has issued against it, the persons entitled include all holders to which overissued receipts have been duly negotiated.

Source: L. 2006: Entire article R&RE, p. 475, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-207 as it existed prior to 2006.

ANNOTATION

Applied in Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976) (decided prior to the 2006 repeal and reenactment).

4-7-208. Altered warehouse receipts.

If a blank in a negotiable tangible warehouse receipt has been filled in without authority, a good-faith purchaser for value and without notice of the lack of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any tangible or electronic warehouse receipt enforceable against the issuer according to its original tenor.

Source: L. 2006: Entire article R&RE, p. 476, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-208 as it existed prior to 2006.

4-7-209. Lien of warehouse.

(a) A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other 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 similar charges or expenses in relation to other goods whenever deposited and it is stated in the warehouse receipt or storage agreement that a lien is claimed for charges and expenses in relation to other goods, the warehouse also has a lien against the goods covered by the warehouse receipt or storage agreement or on the proceeds thereof in its possession for those charges and expenses, whether or not the other goods have been delivered by the warehouse. However, as against a person to which a negotiable warehouse receipt is duly negotiated, a warehouse's lien is limited to charges in an amount or at a rate specified in the warehouse receipt or, if no charges are so specified, to a reasonable charge for storage of the specific goods covered by the receipt subsequent to the date of the receipt.

(b) A warehouse may also reserve a security interest against the bailor for the maximum amount specified on the receipt for charges other than those specified in subsection (a) of this section, such as for money advanced and interest. The security interest is governed by article 9 of this title.

(c) A warehouse's lien for charges and expenses under subsection (a) of this section or a security interest under subsection (b) of this section is also effective against any person that so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good-faith purchaser for value would have been valid. However, the lien or security interest is not effective against a person that before issuance of a document of title had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with:

(A) Actual or apparent authority to ship, store, or sell;

(B) Power to obtain delivery under section 4-7-403; or

(C) Power of disposition under section 4-2-403, 4-2.5-304 (2), 4-2.5-305 (2), 4-9-320, or 4-9-321 (c) or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(d) A warehouse's lien on household goods for charges and expenses in relation to the goods under subsection (a) of this section is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. In this subsection (d), "household goods" means furniture, furnishings, or personal effects used by the depositor in a dwelling.

(e) A warehouse loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver.

Source: L. 2006: Entire article R&RE, p. 476, § 2, effective September 1. **L. 2007:** (b) and (c)(1) amended, p. 367, § 9, effective August 3.

Editor's note: This section is similar to former §§ 4-7-209 and 4-7-503 as they existed prior to 2006.

4-7-210. Enforcement of warehouse's lien.

(a) Except as otherwise provided in subsection (b) of this section, a warehouse's lien may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The 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 method different from that selected by the warehouse is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The warehouse sells in a commercially reasonable manner if the warehouse sells the goods in the usual manner in any recognized market therefore, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. 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.

(b) A warehouse may enforce its lien on goods, other than goods stored by a merchant in the course of its business, only if the following requirements are satisfied:

(1) All persons known to claim an interest in the goods are notified.

(2) The notification includes 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.

(3) The sale conforms to the terms of the notification.

(4) The sale is held at the nearest suitable place to where the goods are held or stored.

(5) 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 the goods 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 fewer than six conspicuous places in the neighborhood of the proposed sale.

(c) Before any sale held 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 in complying with this section. In that event, the goods may not be sold but must be retained by the warehouse subject to the terms of the receipt and this article.

(d) A warehouse may buy at any public sale held pursuant to this section.

(e) A purchaser in good faith of goods sold to enforce a warehouse's lien takes the goods free of any rights of persons against which the lien was valid, despite the warehouse's noncompliance with this section.

(f) A warehouse may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to which the warehouse would have been bound to deliver the goods.

(g) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(h) If a lien is on goods stored by a merchant in the course of its business, the lien may be enforced in accordance with subsection (a) or (b) of this section.

(i) A warehouse 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.

Source: L. 2006: Entire article R&RE, p. 477, § 2, effective September 1. **L. 2007:** (a), IP(b), and (b)(5) amended, p. 368, § 10, effective August 3.

Editor's note: This section is similar to former § 4-7-210 as it existed prior to 2006.

ANNOTATION

For the liability of a warehouseman for failure to follow statutory procedures for enforcement of a lien under prior law, see Schmidt v. Cowan Transfer and Storage Co., 170 Colo. 550, 463 P.2d 445 (1970) (decided prior to the 2006 repeal and reenactment).

PART 3

BILLS OF LADING - SPECIAL PROVISIONS

4-7-301. Liability for nonreceipt or misdescription - "said to contain" - "shipper's weight, load, and count" - improper handling.

(a) A consignee of a nonnegotiable bill of lading which has given value in good faith, or a holder to which a negotiable bill has been duly negotiated, relying upon the description of the goods in the bill or upon the date shown in the bill, 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 bill indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, such as in a case in which 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 words of similar import, if that indication is true.

(b) If goods are loaded by the issuer of a bill of lading:

(1) The issuer shall count the packages of goods if shipped in packages and ascertain the kind and quantity if shipped in bulk; and

(2) Words such as "shipper's weight, load, and count" or words of similar import indicating that the description was made by the shipper are ineffective except as to goods concealed in packages.

(c) If bulk goods are loaded by a shipper that makes available to the issuer of a bill of lading adequate facilities for weighing those goods, the issuer shall ascertain the kind and quantity within a reasonable time after receiving the shipper's request in a record to do so. In that case, "shipper's weight" or words of similar import are ineffective.

(d) The issuer of a bill of lading, by including in the bill the words "shipper's weight, load, and count" or words of similar import, may indicate that the goods were loaded by the shipper,

and, if that statement is true, the issuer is not liable for damages caused by the improper loading. However, omission of such words does not imply liability for damages caused by improper loading.

(e) A shipper guarantees to an issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition, and weight, as furnished by the shipper, and the shipper shall indemnify the issuer against damage caused by inaccuracies in those particulars. This right of indemnity does not limit the issuer's responsibility or liability under the contract of carriage to any person other than the shipper.

Source: L. 2006: Entire article R&RE, p. 478, § 2, effective September 1. **L. 2007:** Entire section amended, p. 368, § 11, effective August 3.

Editor's note: This section is similar to former § 4-7-301 as it existed prior to 2006.

4-7-302. Through bills of lading and similar documents of title.

(a) The issuer of a through bill of lading, or other document of title embodying an undertaking to be performed in part by a person acting as its agent or by a performing carrier, is liable to any person entitled to recover on the bill or other document for any breach by the other person or the performing carrier of its obligation under the bill or other document. However, to the extent that the bill or other document 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 for breach by the other person or the performing carrier may be varied by agreement of the parties.

(b) If goods covered by a through bill of lading or other document of title embodying an undertaking to be performed in part by a person other than the issuer are received by that person, the person is subject, with respect to its own performance while the goods are in its possession, to the obligation of the issuer. The person's obligation is discharged by delivery of the goods to another person pursuant to the bill or other document and does not include liability for breach by any other person or by the issuer.

(c) The issuer of a through bill of lading or other document of title described in subsection (a) of this section is entitled to recover from the performing carrier, or other person in possession of the goods when the breach of the obligation under the bill or other document occurred:

(1) The amount it may be required to pay to any person entitled to recover on the bill or other document for the breach, as may be evidenced by any receipt, judgment, or transcript of judgment; and

(2) The amount of any expense reasonably incurred by the issuer in defending any action commenced by any person entitled to recover on the bill or other document for the breach.

Source: L. 2006: Entire article R&RE, p. 479, § 2, effective September 1. **L. 2007:** Entire section amended, p. 369, § 12, effective August 3.

Editor's note: This section is similar to former § 4-7-302 as it existed prior to 2006.

4-7-303. Diversion - reconsignment - change of instructions.

(a) Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods, without liability for misdelivery, on instructions from:

(1) The holder of a negotiable bill;

(2) The consignor on a nonnegotiable bill, even if the consignee has given contrary instructions;

(3) 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 tangible bill or in control of the electronic bill; or

(4) The consignee on a nonnegotiable bill, if the consignee is entitled as against the consignor to dispose of the goods.

(b) Unless instructions described in subsection (a) of this section are included in a negotiable bill of lading, a person to which the bill is duly negotiated may hold the bailee according to the original terms.

Source: L. 2006: Entire article R&RE, p. 480, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-303 as it existed prior to 2006.

4-7-304. Tangible bills of lading in a set.

(a) Except as customary in international transportation, a tangible bill of lading may not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection (a).

(b) If a tangible bill of lading is lawfully issued in a set of parts, each of which contains an identification code and is expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitutes one bill.

(c) If a tangible negotiable 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 which the first due negotiation is made prevails as to both the document of title and the goods even if any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrendering its part.

(d) A person that negotiates or transfers a single part of a tangible bill of lading issued in a set is liable to holders of that part as if it were the whole set.

(e) The bailee shall deliver in accordance with part 4 of this article against the first presented part of a tangible bill of lading lawfully issued in a set. Delivery in this manner discharges the bailee's obligation on the whole bill.

Source: L. 2006: Entire article R&RE, p. 480, § 2, effective September 1. **L. 2007:** (e) amended, p. 370, § 13, effective August 3.

Editor's note: This section is similar to former § 4-7-304 as it existed prior to 2006.

4-7-305. Destination bills.

(a) Instead of issuing a bill of lading to the consignor at the place of shipment, a carrier, at the request of the consignor, may procure the bill to be issued at destination or at any other place designated in the request.

(b) Upon request of any person entitled as against a carrier to control the goods while in transit and on surrender of possession or control of any outstanding bill of lading or other receipt covering the goods, the issuer, subject to section 4-7-105, may procure a substitute bill to be issued at any place designated in the request.

Source: L. 2006: Entire article R&RE, p. 481, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-305 as it existed prior to 2006.

4-7-306. 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.

Source: L. 2006: Entire article R&RE, p. 481, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-306 as it existed prior to 2006.

4-7-307. Lien of carrier.

(a) A carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's 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. However, 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, a reasonable charge.

(b) A lien for charges and expenses under subsection (a) of this section on goods that 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 those charges and expenses. Any other lien under subsection (a) of this section is effective against the consignor and any person that permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked authority.

(c) A carrier loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver.

(d) A mover, as defined in section 40-10.1-101, C.R.S., that does not have a current and valid permit issued under part 5 of article 10.1 of title 40, C.R.S., does not have a lien under this section. A mover that acquires a lien under this section and whose permit lapses or is revoked during the pendency of the lien loses its lien.

Source: L. 2006: Entire article R&RE, p. 481, § 2, effective September 1. **L. 2007:** (d) added, p. 1919, § 7, effective July 1. **L. 2011:** (d) amended, (HB 11-1198), ch. 127, p. 416, § 4, effective August 10.

Editor's note: This section is similar to former § 4-7-307 as it existed prior to 2006.

ANNOTATION

Applied in Resort Graphics v. Rio Grande Motor Way, 707 P.2d 1011 (Colo. App. 1985), rev'd on other grounds, 740 P.2d 517 (Colo. 1987) (decided prior to the 2006 repeal and reenactment).

4-7-308. Enforcement of carrier's lien.

(a) A carrier's lien on goods may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The 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 method different from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The carrier sells goods in a commercially reasonable manner if the carrier sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. 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.

(b) Before any sale is held 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 in complying with this section. In that event, the goods may not be sold but must be retained by the carrier, subject to the terms of the bill of lading and this article.

(c) A carrier may buy at any public sale pursuant to this section.

(d) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against which the lien was valid, despite the carrier's noncompliance with this section.

(e) A carrier may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to which the carrier would have been bound to deliver the goods.

(f) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(g) A carrier's lien may be enforced pursuant to either subsection (a) of this section or the procedure set forth in section 4-7-210 (b).

(h) A 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.

Source: L. 2006: Entire article R&RE, p. 482, § 2, effective September 1. **L. 2007:** (a) amended, p. 370, § 14, effective August 3.

Editor's note: This section is similar to former § 4-7-308 as it existed prior to 2006.

4-7-309. Duty of care - contractual limitation of carrier's liability.

(a) A carrier that issues a bill of lading, whether negotiable or nonnegotiable, shall exercise the degree of care in relation to the goods which a reasonably careful person would exercise under similar circumstances. This subsection (a) does not affect any statute, regulation, or rule of law that imposes liability upon a common carrier for damages not caused by its negligence.

(b) Damages may be limited by a term in the bill of lading that the carrier's liability may not exceed a value stated in the bill if the carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the shipment may be included in a bill of lading.

Source: L. 2006: Entire article R&RE, p. 482, § 2, effective September 1. **L. 2007:** (a) and (b) amended, p. 370, § 15, effective August 3.

Editor's note: This section is similar to former § 4-7-309 as it existed prior to 2006.

PART 4

WAREHOUSE RECEIPTS AND BILLS OF LADING - GENERAL OBLIGATIONS

4-7-401. 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 even if:

(1) The document does not comply with the requirements of this article or of any other statute, rule, or regulation regarding its issuance, form, or content;

(2) The issuer violated laws regulating the conduct of its business;

(3) The goods covered by the document were owned by the bailee when the document was issued; or

(4) The person issuing the document is not a warehouse but the document purports to be a warehouse receipt.

Source: L. 2006: Entire article R&RE, p. 483, § 2, effective September 1. **L. 2007:** (1) amended, p. 371, § 16, effective August 3.

Editor's note: This section is similar to former § 4-7-401 as it existed prior to 2006.

4-7-402. Duplicate document of title - overissue.

A duplicate or any other document of title purporting to cover goods already represented by an outstanding document of the same issuer does not confer any right in the goods, except as provided in the case of tangible bills of lading in a set of parts, overissue of documents for fungible goods, substitutes for lost, stolen, or destroyed documents, or substitute documents issued pursuant to section 4-7-105. The issuer is liable for damages caused by its overissue or failure to identify a duplicate document by a conspicuous notation.

Source: L. 2006: Entire article R&RE, p. 483, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-402 as it existed prior to 2006.

4-7-403. Obligation of bailee to deliver - excuse.

(a) A bailee shall deliver the goods to a person entitled under a document of title if the person complies with subsections (b) and (c) of this section, unless and to the extent that the bailee establishes any of the following:

(1) Delivery of the goods to a person whose receipt was rightful as against the claimant;

(2) Damage to or delay, loss, or destruction of the goods for which the bailee is not liable;

(3) Previous sale or other disposition of the goods in lawful enforcement of a lien or on a warehouse's lawful termination of storage;

(4) The exercise by a seller of its right to stop delivery pursuant to section 4-2-705 or by a lessor of its right to stop delivery pursuant to section 4-2.5-526;

(5) A diversion, reconsignment, or other disposition pursuant to section 4-7-303;

(6) Release, satisfaction, or any other personal defense against the claimant; or

(7) Any other lawful excuse.

(b) A person claiming goods covered by a document of title shall satisfy the bailee's lien if the bailee so requests or if the bailee is prohibited by law from delivering the goods until the charges are paid.

(c) Unless a person claiming the goods is a person against which the document of title does not confer a right under section 4-7-503 (a):

(1) The person claiming under a document shall surrender possession or control of any outstanding negotiable document covering the goods for cancellation or indication of partial deliveries; and

(2) The bailee shall cancel the document or conspicuously indicate in the document the partial delivery or the bailee is liable to any person to which the document is duly negotiated.

Source: L. 2006: Entire article R&RE, p. 483, § 2, effective September 1. **L. 2007:** IP(a), (a)(6), (b), IP(c), and (c)(2) amended, p. 371, § 17, effective August 3.

Editor's note: This section is similar to former § 4-7-403 as it existed prior to 2006.

ANNOTATION

Release of goods to dealer as defense. In action for conversion of goods stored by plaintiff with named defendant, if the plaintiff either instructed defendant to receive and store the goods for a dealer or delivered them under such circumstances as to give defendant reasonable ground to believe that plaintiff intended that the goods be held for the dealer, and defendant released said goods to the dealer, in good faith, without knowledge or information that plaintiff intended to hold the goods until payment by dealer, such constitutes a defense to plaintiff's action; but defendant warehouseman, having admitted the receipt of goods from plaintiff in the usual course of its warehouse business, the burden of going forward with the evidence is on defendant to justify delivery to one other than plaintiff. Wheelock Bros. v. Bankers Whse. Co., 115 Colo. 197, 171 P.2d 405 (1946) (decided under repealed CSA, C. 173, § 8, uniform warehouse receipts act).

4-7-404. No liability for good-faith delivery pursuant to document of title.

A bailee that in good faith has received goods and delivered or otherwise disposed of the goods according to the terms of a document of title or pursuant to this article is not liable for the goods even if:

(1) The person from which the bailee received the goods did not have authority to procure the document or to dispose of the goods; or

(2) The person to which the bailee delivered the goods did not have authority to receive the goods.

Source: L. 2006: Entire article R&RE, p. 484, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-404 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

PART 5

WAREHOUSE RECEIPTS AND BILLS OF LADING - NEGOTIATION AND TRANSFER

4-7-501. Form of negotiation and requirements of due negotiation.

(a) The following rules apply to a negotiable tangible document of title:

(1) If the document's original terms run to the order of a named person, the document is negotiated by the named person's indorsement and delivery. After the named person's indorsement in blank or to bearer, any person may negotiate the document by delivery alone.

(2) If the document's original terms run to bearer, it is negotiated by delivery alone.

(3) If the document's original terms run to the order of a named person and it is delivered to the named person, the effect is the same as if the document had been negotiated.

(4) Negotiation of the document after it has been indorsed to a named person requires indorsement by the named person and delivery.

(5) A document is duly negotiated if it is negotiated in the manner stated in this subsection (a) to a holder that 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 monetary obligation.

(b) The following rules apply to a negotiable electronic document of title:

(1) If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.

(2) If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.

(3) A document is duly negotiated if it is negotiated in the manner stated in this subsection (b) to a holder that 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 taking delivery of the document in settlement or payment of a monetary obligation.

(c) Indorsement of a nonnegotiable document of title neither makes it negotiable nor adds to the transferee's rights.

(d) The naming in a negotiable bill of lading of a person to be notified of the arrival of the goods does not limit the negotiability of the bill or constitute notice to a purchaser of the bill of any interest of that person in the goods.

Source: L. 2006: Entire article R&RE, p. 485, § 2, effective September 1. **L. 2007:** (a)(4) amended, p. 371, § 18, effective August 3.

Editor's note: This section is similar to former § 4-7-501 as it existed prior to 2006.

4-7-502. Rights acquired by due negotiation.

(a) Subject to sections 4-7-205 and 4-7-503, a holder to which a negotiable document of title has been duly negotiated acquires thereby:

(1) Title to the document;

(2) Title to the goods;

(3) All rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(4) 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 the issuer except those arising under the terms of the document or under this article, but in the case of a delivery order, the bailee's obligation accrues only upon the bailee's acceptance of the delivery order and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(b) Subject to section 4-7-503, title and rights acquired by due negotiation are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired even if:

(1) The due negotiation or any prior due negotiation constituted a breach of duty;

(2) Any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion; or

(3) A previous sale or other transfer of the goods or document has been made to a third person.

Source: L. 2006: Entire article R&RE, p. 486, § 2, effective September 1. **L. 2007:** (a)(4) amended, p. 372, § 19, effective August 3.

Editor's note: This section is similar to former § 4-7-502 as it existed prior to 2006.

4-7-503. Document of title to goods defeated in certain cases.

(a) A document of title confers no right in goods against a person that before issuance of the document had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with:

(A) Actual or apparent authority to ship, store, or sell;

(B) Power to obtain delivery under section 4-7-403; or

(C) Power of disposition under section 4-2-403, 4-2.5-304 (2), 4-2.5-305 (2), 4-9-320, or 4-9-321 (c) or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(b) Title to goods based upon an unaccepted delivery order is subject to the rights of any person to which a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. That title may be defeated under section 4-7-504 to the same extent as the rights of the issuer or a transferee from the issuer.

(c) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of any person to which a bill issued by the freight forwarder is duly negotiated. However, 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.

Source: L. 2006: Entire article R&RE, p. 486, § 2, effective September 1. **L. 2007:** (a)(1) amended, p. 372, § 20, effective August 3.

Editor's note: This section is similar to former § 4-7-503 as it existed prior to 2006.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

4-7-504. Rights acquired in absence of due negotiation - effect of diversion - stoppage of delivery.

(a) A transferee of a document of title, whether negotiable or nonnegotiable, to which the document has been delivered but not duly negotiated, acquires the title and rights that its transferor had or had actual authority to convey.

(b) In the case of a transfer of a nonnegotiable document of title, until but not after the bailee receives notice of the transfer, the rights of the transferee may be defeated:

(1) By those creditors of the transferor which could treat the transfer as void under section 4-2-402 or 4-2.5-308;

(2) 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 the buyer's rights;

(3) By a lessee from the transferor in ordinary course of business if the bailee has delivered the goods to the lessee or received notification of the lessee's rights; or

(4) As against the bailee, by good-faith dealings of the bailee with the transferor.

(c) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver the goods to the consignee defeats the consignee's title to the goods if the goods have been delivered to a buyer in ordinary course of business or a lessee in ordinary course of business and, in any event, defeats the consignee's rights against the bailee.

(d) Delivery of the goods pursuant to a nonnegotiable document of title may be stopped by a seller under section 4-2-705 or a lessor under section 4-2.5-526, subject to the requirements of due notification in those sections. A bailee that honors the seller's or lessor's instructions is entitled to be indemnified by the seller or lessor against any resulting loss or expense.

Source: L. 2006: Entire article R&RE, p. 487, § 2, effective September 1. **L. 2007:** IP(b), (b)(1), (c), and (d) amended, p. 372, § 21, effective August 3.

Editor's note: This section is similar to former § 4-7-504 as it existed prior to 2006.

4-7-505. Indorser not guarantor for other parties.

The indorsement of a tangible document of title issued by a bailee does not make the indorser liable for any default by the bailee or previous indorsers.

Source: L. 2006: Entire article R&RE, p. 487, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-505 as it existed prior to 2006.

4-7-506. Delivery without indorsement - right to compel indorsement.

The transferee of a negotiable tangible document of title has a specifically enforceable right to have its transferor supply any necessary indorsement, but the transfer becomes a negotiation only as of the time the indorsement is supplied.

Source: L. 2006: Entire article R&RE, p. 488, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-506 as it existed prior to 2006.

4-7-507. Warranties on negotiation or delivery of document of title.

If a person negotiates or delivers a document of title for value, otherwise than as a mere intermediary under section 4-7-508, unless otherwise agreed, the transferor, in addition to any warranty made in selling or leasing the goods, warrants to its immediate purchaser only that:

(1) The document is genuine;

(2) The transferor does not have knowledge of any fact that would impair the document's validity or worth; and

(3) The negotiation or delivery is rightful and fully effective with respect to the title to the document and the goods it represents.

Source: L. 2006: Entire article R&RE, p. 488, § 2, effective September 1. **L. 2007:** IP amended, p. 373, § 22, effective August 3.

Editor's note: This section is similar to former § 4-7-507 as it existed prior to 2006.

4-7-508. Warranties of collecting bank as to documents of title.

A collecting bank or other intermediary known to be entrusted with documents of title on behalf of another or with collection of a draft or other claim against delivery of documents warrants by the delivery of the documents only its own good faith and authority even if the collecting bank or other intermediary has purchased or made advances against the claim or draft to be collected.

Source: L. 2006: Entire article R&RE, p. 488, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-508 as it existed prior to 2006.

4-7-509. Adequate compliance with commercial contract.

Whether a document of title is adequate to fulfill the obligations of a contract for sale, a contract for lease, or the conditions of a letter of credit is determined by article 2, 2.5, or 5 of this title.

Source: L. 2006: Entire article R&RE, p. 488, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-509 as it existed prior to 2006.

PART 6

WAREHOUSE RECEIPTS AND BILLS OF LADING - MISCELLANEOUS PROVISIONS

4-7-601. Lost, stolen, or destroyed documents of title.

(a) If a document of title is 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 the order. If the document was negotiable, a court may not order delivery of the goods or issuance of a substitute document without the claimant's posting security unless it finds that any person that may suffer loss as a result of nonsurrender of possession or control of the document is adequately protected against the loss. If the document was nonnegotiable, the court may require security. The court may also order payment of the bailee's reasonable costs and attorney's fees in any action under this subsection (a).

(b) A bailee that, without a court order, delivers goods to a person claiming under a missing negotiable document of title is liable to any person injured thereby. If the delivery is not in good faith, the bailee is liable for conversion. Delivery in good faith is not conversion 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 that is injured by the delivery and that files a notice of claim within one year after the delivery.

Source: L. 2006: Entire article R&RE, p. 488, § 2, effective September 1. **L. 2007:** Entire section amended, p. 373, § 23, effective August 3.

Editor's note: This section is similar to former § 4-7-601 as it existed prior to 2006.

4-7-602. Attachment of goods covered by negotiable document of title.

Unless a document of title was originally issued upon delivery of the goods by a person that did not have power to dispose of them, a lien does not attach by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless possession or control of the document is first surrendered to the bailee or the document's negotiation is enjoined. The bailee may not be compelled to deliver the goods pursuant to process until possession or control of the document is surrendered to the bailee or to the court. A purchaser of the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

Source: L. 2006: Entire article R&RE, p. 489, § 2, effective September 1. **L. 2007:** Entire section amended, p. 373, § 24, effective August 3.

Editor's note: This section is similar to former § 4-7-602 as it existed prior to 2006.

4-7-603. Conflicting claims - interpleader.

If more than one person claims title to or possession of the goods, the bailee is excused from delivery until the bailee has a reasonable time to ascertain the validity of the adverse claims or to commence an action for interpleader. The bailee may assert an interpleader either in defending an action for nondelivery of the goods or by original action.

Source: L. 2006: Entire article R&RE, p. 489, § 2, effective September 1.

Editor's note: This section is similar to former § 4-7-603 as it existed prior to 2006.

ANNOTATION

Annotator's note. Since § 4-7-603 is similar to repealed § 146-2-11, CRS 53, uniform warehouse receipts act, a relevant case construing that provision, CRS 53 has been included in the annotations to this section.

The intent of this section is to protect warehousemen from situations whereby they would be required to determine adverse claims at their peril. Petzoldt v. Lawrence Whse. Co., 157 F. Supp. 184 (D. Colo. 1957), aff'd sub nom. First Nat'l Bank v. Petzoldt, 262 F.2d 540 (10th Cir. 1958).

Where adverse claims are made on a warehouseman for goods and their possession, then, under this section the warehouseman is under no duty to deliver to either claimant until the lapse of reasonable time. Petzoldt v. Lawrence Whse. Co., 157 F. Supp. 184 (D. Colo. 1957), aff'd sub nom. First Nat'l Bank v. Petzoldt, 262 F.2d 540 (10th Cir. 1958).

Its sole duty, after demand is made, is either to compel interpleader or to make reasonable efforts to investigate the validity of the adverse claims. Petzoldt v. Lawrence Whse. Co., 157 F. Supp. 184 (D. Colo. 1957), aff'd sub nom. First Nat'l Bank v. Petzoldt, 262 F.2d 540 (10th Cir. 1958).

Where before the warehouseman has time to determine the claims or to interplead the claimants, the goods are replevied, and therefore, are no longer under the warehouseman's control, then for subsequent nondelivery, when it is no longer in its power to do so, the warehouseman cannot be under any liability. Petzoldt v. Lawrence Whse. Co., 157 F. Supp. 184 (D. Colo. 1957), aff'd sub nom. First Nat'l Bank v. Petzoldt, 262 F.2d 540 (10th Cir. 1958).

A warehouseman may excuse his failure to deliver property by showing that it has been taken under judicial process, and that he gave due notice to the depositor, or made reasonable efforts to do so. Petzoldt v. Lawrence Whse. Co., 157 F. Supp. 184 (D. Colo. 1957), aff'd sub nom. First Nat'l Bank v. Pelzoldt, 262 F.2d 540 (10th Cir. 1958).

A warehouseman is not the guarantor of title to goods for which he gave a receipt and is not liable for failure of the title thereunder. Petzoldt v. Lawrence Whse. Co., 157 F. Supp. 184 (D. Colo. 1957), aff'd sub nom. First Nat'l Bank v. Petzoldt, 262 F.2d 540 (10th Cir. 1958).

PART 7

TRANSITION PROVISIONS

4-7-701. Effective date.

This article shall take effect on September 1, 2006.

Source: L. 2006: Entire article R&RE, p. 489, § 2, effective September 1.

4-7-702. Applicability.

This article applies to a document of title that is issued or a bailment that arises on or after September 1, 2006. This article does not apply to a document of title that is issued or a bailment that arises before September 1, 2006, even if the document of title or bailment would be subject to this article if the document of title had been issued or bailment had arisen on or after September 1, 2006. This article does not apply to a right of action that has accrued before September 1, 2006.

Source: L. 2006: Entire article R&RE, p. 489, § 2, effective September 1. **L. 2007:** Entire section amended, p. 373, § 25, effective August 3.

4-7-703. Saving clause.

A document of title issued or a bailment that arises before September 1, 2006, and the rights, obligations, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this article as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.

Source: L. 2006: Entire article R&RE, p. 489, § 2, effective September 1.

ARTICLE 8

Investment Securities

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PART 1

SHORT TITLE AND GENERAL MATTERS

4-8-101. Short title.

This article may be cited as "Uniform Commercial Code - Investment Securities".

Source: L. 96: Entire article R&RE, p. 202, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-101 as it existed prior to 1996.

ANNOTATION

Law reviews. For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Article 8 provides special rules for investment securities, which are meant to ensure rapid and effective negotiation of such instruments. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

This article governs acquisition of legal ownership of certificated shares of a corporation and generally requires that a purchaser receive the security certificate or certified stock of the corporation. Mortgage Invs. Corp. v. Battle Mtn. Corp., 70 P.3d 1176 (Colo. 2003).

4-8-102. Definitions.

(a) In this article 8:

(1) "Adverse claim" means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.

(2) "Bearer form", as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.

(3) "Broker" means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.

(4) "Certificated security" means a security that is represented by a certificate.

(5) "Clearing corporation" means:

(i) A person that is registered as a "clearing agency" under the federal securities laws;

(ii) A federal reserve bank; or

(iii) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.

(6) "Communicate" means to:

(i) Send a signed record; or

(ii) Transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.

(7) "Entitlement holder" means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of section 4-8-501 (b)(2) or (b)(3), that person is the entitlement holder.

(8) "Entitlement order" means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.

(9) "Financial asset," except as otherwise provided in section 4-8-103, means:

(i) A security;

(ii) An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this article. As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

(10) "Good faith," for purposes of the obligation of good faith in the performance or enforcement of contracts or duties within this article, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(11) "Indorsement" means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.

(12) "Instruction" means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.

(13) "Registered form," as applied to a certificated security, means a form in which:

(i) The security certificate specifies a person entitled to the security; and

(ii) A transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.

(14) "Securities intermediary" means:

(i) A clearing corporation; or

(ii) A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

(15) "Security," except as otherwise provided in section 4-8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

(i) Which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

(ii) Which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

(iii) Which:

(A) Is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(B) Is a medium for investment and by its terms expressly provides that it is a security governed by this article.

(16) "Security certificate" means a certificate representing a security.

(17) "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in part 5 of this article.

(18) "Uncertificated security" means a security that is not represented by a certificate.

(b) The following definitions in this article 8 and other articles apply to this article 8:

Appropriate person	Section 4-8-107
Control	Section 4-8-106
Controllable account	Section 4-9-102
Controllable electronic record	Section 4-12-102
Controllable payment intangible	Section 4-9-102
Delivery	Section 4-8-301
Investment company security	Section 4-8-103
Issuer	Section 4-8-201
Overissue	Section 4-8-210
Protected purchaser	Section 4-8-303
Securities account	Section 4-8-501

(c) In addition, article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article.

(d) The characterization of a person, business, or transaction for purposes of this article does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule.

Source: L. 96: Entire article R&RE, p. 202, § 2, effective July 1. **L. 2023:** IP(a), (a)(6)(i), and (b) amended, (SB 23-090), ch. 136, p. 538, § 37, effective August 7.

Editor's note: This section is similar to former §§ 4-8-102, 4-8-302, 4-8-303, 4-8-308, and 4-8-313 as they existed prior to 1996.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Claim to limited tax bond rose to the level of a "property interest" sufficient to constitute an adverse claim. Meadow Homes Dev. Corp. v. Bowens, 211 P.3d 743 (Colo. App. 2009).

Absent unusual circumstances, a simple breach of contract does not itself establish a property interest required for an adverse claim to be a security. An adverse claim may, however, be based on principles of equitable remedies that give rise to property claims. Meadow Homes Dev. Corp. v. Bowens, 211 P.3d 743 (Colo. App. 2009).

Unusual circumstances entitled claimant to equitable remedies where seller of bond did more than simply breach a contract. Seller acted in a fraudulent manner intended to hinder and defraud the rights of the claimant. In addition, the bond was not a fungible investment security but rather was created as part of a land development project and ownership of the bond pivoted on which party ultimately bought and developed the land. Meadow Homes Dev. Corp. v. Bowens, 211 P.3d 743 (Colo. App. 2009).

Stocks for which certificates are created only after transfer are uncertificated securities. Atlas Biologicals, Inc. v. Kutrubes, 474 F. Supp. 3d 1188 (D. Colo. 2020), aff'd on other grounds, 50 F.4th 1307 (10th Cir. 2022).

Applied in Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

4-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

(b) An "investment company security" is a security. "Investment company security" means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is

a security governed by this article, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.

(d) A writing that is a security certificate is governed by this article and not by article 3 of this title, even though it also meets the requirements of that article. However, a negotiable instrument governed by article 3 of this title is a financial asset if it is held in a securities account.

(e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.

(f) A commodity contract, as defined in section 4-9-102 (a)(15), is not a security or a financial asset.

(g) A document of title is not a financial asset unless section 4-8-102 (a)(9)(iii) applies.

(h) A controllable account, controllable electronic record, or controllable payment intangible is not a financial asset unless section 4-8-102 (a)(9)(iii) applies.

Source: L. 96: Entire article R&RE, p. 205, § 2, effective July 1. **L. 2001:** (f) amended, p. 1442, § 30, effective July 1. **L. 2006:** (g) added, p. 498, § 32, effective September 1. **L. 2007:** (g) amended, p. 375, § 29, effective August 3. **L. 2023:** (h) added, (SB 23-090), ch. 136, p. 538, § 38, effective August 7.

4-8-104. Acquisition of security or financial asset or interest therein.

(a) A person acquires a security or an interest therein, under this article, if:

(1) The person is a purchaser to whom a security is delivered pursuant to section 4-8-301; or

(2) The person acquires a security entitlement to the security pursuant to section 4-8-501.

(b) A person acquires a financial asset, other than a security, or an interest therein, under this article, if the person acquires a security entitlement to the financial asset.

(c) A person who acquires a security entitlement to a security or other financial asset has the rights specified in part 5 of this article, but is a purchaser of any security, security entitlement, or other financial asset held by the securities intermediary only to the extent provided in section 4-8-503.

(d) Unless the context shows that a different meaning is intended, a person who is required by other law, regulation, rule, or agreement to transfer, deliver, present, surrender, exchange, or otherwise put in the possession of another person a security or financial asset satisfies that

requirement by causing the other person to acquire an interest in the security or financial asset pursuant to subsection (a) or (b) of this section.

Source: L. 96: Entire article R&RE, p. 206, § 2, effective July 1.

4-8-105. Notice of adverse claim.

(a) A person has notice of an adverse claim if:

(1) The person knows of the adverse claim;

(2) The person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim; or

(3) The person has a duty, imposed by statute or regulation, to investigate whether an adverse claim exists, and the investigation so required would establish the existence of the adverse claim.

(b) Having knowledge that a financial asset or interest therein is or has been transferred by a representative imposes no duty of inquiry into the rightfulness of a transaction and is not notice of an adverse claim. However, a person who knows that a representative has transferred a financial asset or interest therein in a transaction that is, or whose proceeds are being used, for the individual benefit of the representative or otherwise in breach of duty has notice of an adverse claim.

(c) An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate or sets a date on or after which the certificate is to be presented or surrendered for redemption or exchange does not itself constitute notice of an adverse claim except in the case of a transfer more than:

(1) One year after a date set for presentment or surrender for redemption or exchange; or

(2) Six months after a date set for payment of money against presentation or surrender of the certificate, if money was available for payment on that date.

(d) A purchaser of a certificated security has notice of an adverse claim if the security certificate:

(1) Whether in bearer or registered form, has been indorsed "for collection" or "for surrender" or for some other purpose not involving transfer; or

(2) Is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor, but the mere writing of a name on the certificate is not such a statement.

(e) Filing of a financing statement under article 9 of this title is not notice of an adverse claim to a financial asset.

Source: L. 96: Entire article R&RE, p. 207, § 2, effective July 1.

Editor's note: This section is similar to former §§ 4-8-304 and 4-8-305 as they existed prior to 1996.

ANNOTATION

Purchaser of limited tax bond was not a "protected purchaser" acquiring rights greater than the seller held because purchaser had prior notice of another's adverse claim. Meadow Homes Dev. Corp. v. Bowens, 211 P.3d 743 (Colo. App. 2009).

4-8-106. Control.

(a) A purchaser has "control" of a certificated security in bearer form if the certificated security is delivered to the purchaser.

(b) A purchaser has "control" of a certificated security in registered form if the certificated security is delivered to the purchaser, and:

(1) The certificate is indorsed to the purchaser or in blank by an effective indorsement; or

(2) The certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.

(c) A purchaser has "control" of an uncertificated security if:

(1) The uncertificated security is delivered to the purchaser; or

(2) The issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.

(d) A purchaser has "control" of a security entitlement if:

(1) The purchaser becomes the entitlement holder;

(2) The securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder; or

(3) Another person, other than the transferor to the purchaser of an interest in the security entitlement:

(A) Has control of the security entitlement and acknowledges that it has control on behalf of the purchaser; or

(B) Obtains control of the security entitlement after having acknowledged that it will obtain control of the security entitlement on behalf of the purchaser.

(e) If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder's own securities intermediary, the securities intermediary has control.

(f) A purchaser who has satisfied the requirements of subsection (c) or (d) of this section has control even if the registered owner in the case of subsection (c) of this section or the entitlement holder in the case of subsection (d) of this section retains the right to make substitutions for the uncertificated security or security entitlement, to originate instructions or entitlement orders to the issuer or securities intermediary, or otherwise to deal with the uncertificated security or security entitlement.

(g) An issuer or a securities intermediary may not enter into an agreement of the kind described in subsection (c)(2) or (d)(2) of this section without the consent of the registered owner or entitlement holder, but an issuer or a securities intermediary is not required to enter into such an agreement even though the registered owner or entitlement holder so directs. An issuer or securities intermediary that has entered into such an agreement is not required to confirm the existence of the agreement to another party unless requested to do so by the registered owner or entitlement holder.

(h) A person that has control under this section is not required to acknowledge that it has control on behalf of a purchaser.

(i) If a person acknowledges that it has or will obtain control on behalf of a purchaser, unless the person otherwise agrees or law other than this article 8 or article 9 of this title 4 otherwise provides, the person does not owe any duty to the purchaser and is not required to confirm the acknowledgment to any other person.

Source: L. 96: Entire article R&RE, p. 208, § 2, effective July 1. **L. 2001:** (d) and (f) amended, p. 1442, § 31, effective July 1. **L. 2023:** (d)(3) amended and (h) and (i) added, (SB 23-090), ch. 136, p. 538, § 39, effective August 7.

Editor's note: This section is similar to former § 4-8-311 as it existed prior to 1996.

4-8-107. Whether indorsement, instruction, or entitlement order is effective.

(a) "Appropriate person" means:

(1) With respect to an indorsement, the person specified by a security certificate or by an effective special indorsement to be entitled to the security;

(2) With respect to an instruction, the registered owner of an uncertificated security;

(3) With respect to an entitlement order, the entitlement holder;

(4) If the person designated in paragraph (1), (2), or (3) of this subsection (a) is deceased, the designated person's successor taking under other law or the designated person's personal representative acting for the estate of the decedent; or

(5) If the person designated in paragraph (1), (2), or (3) of this subsection (a) lacks capacity, the designated person's guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset.

(b) An indorsement, instruction, or entitlement order is effective if:

(1) It is made by the appropriate person;

(2) It is made by a person who has power under the law of agency to transfer the security or financial asset on behalf of the appropriate person, including, in the case of an instruction or entitlement order, a person who has control under section 4-8-106 (c)(2) or (d)(2); or

(3) The appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness.

(c) An indorsement, instruction, or entitlement order made by a representative is effective even if:

(1) The representative has failed to comply with a controlling instrument or with the law of the State having jurisdiction of the representative relationship, including any law requiring the representative to obtain court approval of the transaction; or

(2) The representative's action in making the indorsement, instruction, or entitlement order or using the proceeds of the transaction is otherwise a breach of duty.

(d) If a security is registered in the name of or specially indorsed to a person described as a representative, or if a securities account is maintained in the name of a person described as a representative, an indorsement, instruction, or entitlement order made by the person is effective even though the person is no longer serving in the described capacity.

(e) Effectiveness of an indorsement, instruction, or entitlement order is determined as of the date the indorsement, instruction, or entitlement order is made, and an indorsement, instruction, or entitlement order does not become ineffective by reason of any later change of circumstances.

Source: L. 96: Entire article R&RE, p. 209, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-308 as it existed prior to 1996.

ANNOTATION

Stock properly indorsed pursuant to subsection (2) where stock pledge agreement specifically authorized lender to sell or transfer stock and retain profits in the event of loan default without need for further authorization. Knappenberger v. Shea, 874 P.2d 498 (Colo. App. 1994) (decided under former § 4-8-308 as it existed prior to the 1996 repeal and reenactment of this article).

4-8-108. Warranties in direct holding.

(a) A person who transfers a certificated security to a purchaser for value warrants to the purchaser, and an indorser, if the transfer is by indorsement, warrants to any subsequent purchaser, that:

(1) The certificate is genuine and has not been materially altered;

(2) The transferor or indorser does not know of any fact that might impair the validity of the security;

(3) There is no adverse claim to the security;

(4) The transfer does not violate any restriction on transfer;

(5) If the transfer is by indorsement, the indorsement is made by an appropriate person, or if the indorsement is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(6) The transfer is otherwise effective and rightful.

(b) A person who originates an instruction for registration of transfer of an uncertificated security to a purchaser for value warrants to the purchaser that:

(1) The instruction is made by an appropriate person, or if the instruction is by an agent, the agent has actual authority to act on behalf of the appropriate person;

(2) The security is valid;

(3) There is no adverse claim to the security; and

(4) At the time the instruction is presented to the issuer:

(i) The purchaser will be entitled to the registration of transfer;

(ii) The transfer will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction;

(iii) The transfer will not violate any restriction on transfer; and

(iv) The requested transfer will otherwise be effective and rightful.

(c) A person who transfers an uncertificated security to a purchaser for value and does not originate an instruction in connection with the transfer warrants that:

(1) The uncertificated security is valid;

(2) There is no adverse claim to the security;

(3) The transfer does not violate any restriction on transfer; and

(4) The transfer is otherwise effective and rightful.

(d) A person who indorses a security certificate warrants to the issuer that:

(1) There is no adverse claim to the security; and

(2) The indorsement is effective.

(e) A person who originates an instruction for registration of transfer of an uncertificated security warrants to the issuer that:

(1) The instruction is effective; and

(2) At the time the instruction is presented to the issuer the purchaser will be entitled to the registration of transfer.

(f) A person who presents a certificated security for registration of transfer or for payment or exchange warrants to the issuer that the person is entitled to the registration, payment, or exchange, but a purchaser for value and without notice of adverse claims to whom transfer is registered warrants only that the person has no knowledge of any unauthorized signature in a necessary indorsement.

(g) If a person acts as agent of another in delivering a certificated security to a purchaser, the identity of the principal was known to the person to whom the certificate was delivered, and the certificate delivered by the agent was received by the agent from the principal or received by the agent from another person at the direction of the principal, the person delivering the security certificate warrants only that the delivering person has authority to act for the principal and does not know of any adverse claim to the certificated security.

(h) A secured party who redelivers a security certificate received, or after payment and on order of the debtor delivers the security certificate to another person, makes only the warranties of an agent under subsection (g) of this section.

(i) Except as otherwise provided in subsection (g) of this section, a broker acting for a customer makes to the issuer and a purchaser the warranties provided in subsections (a) through (f) of this section. A broker that delivers a security certificate to its customer, or causes its customer to be registered as the owner of an uncertificated security, makes to the customer the warranties provided in subsection (a) or (b) of 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 the customer.

Source: L. 96: Entire article R&RE, p. 210, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-306 as it existed prior to 1996.

4-8-109. Warranties in indirect holding.

(a) A person who originates an entitlement order to a securities intermediary warrants to the securities intermediary that:

(1) The entitlement order is made by an appropriate person, or if the entitlement order is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(2) There is no adverse claim to the security entitlement.

(b) A person who delivers a security certificate to a securities intermediary for credit to a securities account or originates an instruction with respect to an uncertificated security directing that the uncertificated security be credited to a securities account makes to the securities intermediary the warranties specified in section 4-8-108 (a) or (b).

(c) If a securities intermediary delivers a security certificate to its entitlement holder or causes its entitlement holder to be registered as the owner of an uncertificated security, the securities intermediary makes to the entitlement holder the warranties specified in section 4-8-108 (a) or (b).

Source: L. 96: Entire article R&RE, p. 212, § 2, effective July 1.

4-8-110. Applicability - choice of law.

(a) The local law of the issuer's jurisdiction, as specified in subsection (d) of this section, governs:

(1) The validity of a security;

(2) The rights and duties of the issuer with respect to registration of transfer;

(3) The effectiveness of registration of transfer by the issuer;

(4) Whether the issuer owes any duties to an adverse claimant to a security; and

(5) Whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

(b) The local law of the securities intermediary's jurisdiction, as specified in subsection (e) of this section, governs:

(1) Acquisition of a security entitlement from the securities intermediary;

(2) The rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;

(3) Whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and

(4) Whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

(c) The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.

(d) "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this state may specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2) through (a)(5) of this section.

(e) The following rules determine a "securities intermediary's jurisdiction" for purposes of this section:

(1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities

intermediary's jurisdiction for purposes of this part 1, this article, or this title, that jurisdiction is the securities intermediary's jurisdiction.

(2) If paragraph (1) of this subsection (e) does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) of this subsection (e) applies and an agreement between the securities intermediary and its entitlement holder expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(4) If none of paragraphs (1), (2), or (3) of this subsection (e) applies, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.

(5) If none of paragraphs (1), (2), (3), or (4) of this subsection (e) applies, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

(f) A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other record keeping concerning the account.

(g) The local law of the issuer's jurisdiction or the securities intermediary's jurisdiction governs a matter or transaction specified in subsection (a) or (b) of this section even if the matter or transaction does not bear any relation to the jurisdiction.

Source: L. 96: Entire article R&RE, p. 212, § 2, effective July 1. **L. 2001:** (e) R&RE, p. 1442, § 32, effective July 1. **L. 2023:** (g) added, (SB 23-090), ch. 136, p. 539, § 40, effective August 7.

Editor's note: This section is similar to former § 4-8-106 as it existed prior to 1996.

ANNOTATION

Law reviews. For article, "Security Transactions and the Conflict of Laws", see 27 Dicta 119 (1950).

Annotator's note. Since § 4-8-110 is similar to § 4-8-106 as it existed prior to the 1996 repeal and reenactment of this article, a relevant case construing that provision has

been included in the annotations to this section.

Applied in Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

4-8-111. Clearing corporation rules.

A rule adopted by a clearing corporation governing rights and obligations among the clearing corporation and its participants in the clearing corporation is effective even if the rule conflicts with this article and affects another party who does not consent to the rule.

Source: L. 96: Entire article R&RE, p. 214, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-313 as it existed prior to 1996.

4-8-112. Creditor's legal process.

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d) of this section. However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d) of this section.

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d) of this section.

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

Source: L. 96: Entire article R&RE, p. 214, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-317 as it existed prior to 1996.

ANNOTATION

I. Attachment or Levy.

II. Aid of Courts.

I. ATTACHMENT OR LEVY.

These cases decided under former provisions which provided for a levy on corporate shares. Conway v. John, 14 Colo. 30, 23 P. 170 (1890); Pullen v. Headberg, 53 Colo. 502, 127 P. 954 (1912); Ellis v. Gibbons, 26 Colo. App. 454, 145 P. 285 (1914); Carlton v. Camfield, 64 Colo. 373, 171 P. 1140 (1918); Snider v. Bourquin, 68 Colo. 207, 188 P. 727 (1920); Hollingsworth v. Multa Trina Ditch Co., 51 F.2d 649 (10th Cir. 1931) (decided under repealed C. L. §§ 5905 through 5910, and laws antecedent thereto).

C.R.C.P. 102, C.R.C.P. 103, and this section may be harmonized so that stock certificates may be reached by a creditor either by actual physical seizure, by a writ of attachment, if actually seized, or by serving the person who possesses the certificate with a writ of garnishment. Moreland v. Alpert, 124 P.3d 896 (Colo. App. 2005).

II. AID OF COURTS.

Section subject to civil rule on injunctions. This section, though adopted as an aid to creditors in reaching corporate stock owned by a debtor and authorizing the courts to aid in securing such assets by injunction or otherwise, is subject to Rule 65, C.R.C.P., there being no special requirements or procedure provided therein by which an injunction or other relief shall be granted. Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957) (decided under repealed § 31-9-13, CRS 53, uniform stock transfer act).

4-8-113. Statute of frauds inapplicable.

A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making.

Source: L. 96: Entire article R&RE, p. 215, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-319 as it existed prior to 1996.

ANNOTATION

Annotator's note. Since § 4-8-113 is similar to § 4-8-319 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

The statute of frauds set out in this section is more limited in its requirements than are more old-fashioned statutes having to do with the sale of goods. Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

The purpose of this section is to prevent fraud and perjury in the enforcement of obligations depending for their evidence on the unassisted memory of witnesses. Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

When parties agree to the tape recording of an oral agreement, such tape recording satisfies the requirements of § 4-8-319. Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

Where the identity of the contractors is established. With respect to the requirement for signature contained in this section, then, since the clear purpose of this provision is to require identification of the contracting party, where the identity of oral contractors is established a tape recording itself is enough. Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

The tape recording of an oral contract would be a "reduction to tangible form", under the U.C.C. provisions found in section 4-1-201, defining "written" and "writing". Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

Where a party admits in his testimony the accuracy of a tape recorded oral contract, then accordingly, he has admitted "in his pleading, testimony, or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price". Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

As to the applicability of the statute of frauds, the retention and enjoyment of the benefits of a bargain validate the alleged unauthorized part of the transaction. Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

Sufficient part performance is found to take oral agreement out of statute. See Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

Detrimental reliance on oral promises may compel performance. The principle embodied in section 139 of the restatement (second) of contracts that detrimental action performed in justifiable reliance upon oral promises may be sufficient to compel full or partial performance of the promise in spite

of the applicability of a statute of frauds defense that was applicable in a case involving an oral agreement to sell securities. Kiely v. St. Germain, 670 P.2d 764 (Colo. 1983).

4-8-114. Evidentiary rules concerning certificated securities.

The following rules apply in an action on a certificated security against the issuer:

(1) Unless specifically denied in the pleadings, each signature on a security certificate or in a necessary indorsement is admitted.

(2) If the effectiveness of a signature is put in issue, the burden of establishing effectiveness is on the party claiming under the signature, but the signature is presumed to be genuine or authorized.

(3) If signatures on a security certificate are admitted or established, production of the certificate entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security.

(4) If it is shown that a defense or defect exists, the plaintiff has the burden of establishing that the plaintiff or some person under whom the plaintiff claims is a person against whom the defense or defect cannot be asserted.

Source: L. 96: Entire article R&RE, p. 215, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-105 as it existed prior to 1996.

ANNOTATION

Annotator's note. Since § 4-8-114 is similar to § 4-8-105 as it existed prior to the 1996 repeal and reenactment of this article, a relevant case construing that provision has been included in the annotations to this section.

Applied in Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

4-8-115. Securities intermediary and others not liable to adverse claimant.

A securities intermediary that has transferred a financial asset pursuant to an effective entitlement order, or a broker or other agent or bailee that has dealt with a financial asset at the direction of its customer or principal, is not liable to a person having an adverse claim to the financial asset, unless the securities intermediary, or broker or other agent or bailee:

(1) Took the action after it had been served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(2) Acted in collusion with the wrongdoer in violating the rights of the adverse claimant; or

(3) In the case of a security certificate that has been stolen, acted with notice of the adverse claim.

Source: L. 96: Entire article R&RE, p. 215, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-318 as it existed prior to 1996.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Broker's disregard of suspicious circumstances is evidence of bad faith, and constitutes failure to observe commercially reasonable standards. First Nat. Bank v. Gilbert Marshall, 780 P.2d 73 (Colo. App. 1989) (decided under former § 4-8-318 as it existed prior to the 1996 repeal and reenactment of this article).

4-8-116. Securities intermediary as purchaser for value.

A securities intermediary that receives a financial asset and establishes a security entitlement to the financial asset in favor of an entitlement holder is a purchaser for value of the financial asset. A securities intermediary that acquires a security entitlement to a financial asset from another securities intermediary acquires the security entitlement for value if the securities intermediary acquiring the security entitlement establishes a security entitlement to the financial asset in favor of an entitlement holder.

Source: L. 96: Entire article R&RE, p. 216, § 2, effective July 1.

PART 2

ISSUE AND ISSUER

4-8-201. Issuer.

(a) With respect to an obligation on or a defense to a security, an "issuer" includes a person that:

(1) Places or authorizes the placing of its name on a security certificate, other than as authenticating trustee, registrar, transfer agent, or the like, to evidence a share, participation, or other interest in its property or in an enterprise, or to evidence its duty to perform an obligation represented by the certificate;

(2) Creates a share, participation, or other interest in its property or in an enterprise, or undertakes an obligation, that is an uncertificated security;

(3) Directly or indirectly creates a fractional interest in its rights or property, if the fractional interest is represented by a security certificate; or

(4) Becomes responsible for, or in place of, another person described as an issuer in this section.

(b) With respect to an obligation on or defense to a security, a guarantor is an issuer to the extent of its guaranty, whether or not its obligation is noted on a security certificate.

(c) With respect to a registration of a transfer, issuer means a person on whose behalf transfer books are maintained.

Source: L. 96: Entire article R&RE, p. 216, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-201 as it existed prior to 1996.

4-8-202. Issuer's responsibility and defenses - notice of defect or defense.

(a) Even against a purchaser for value and without notice, the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, to the extent the terms referred to do not conflict with terms

stated on the certificate. A reference under this subsection (a) does not of itself charge a purchaser for value with notice of a defect going to the validity of the security, even if the certificate expressly states that a person accepting it admits notice. The terms of an uncertificated security include those stated in any instrument, indenture, or document or in a constitution, statute, ordinance, rule, regulation, order, or the like, pursuant to which the security is issued.

(b) The following rules apply if an issuer asserts that a security is not valid:

(1) A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.

(2) Paragraph (1) of this subsection (b) applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if 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.

(c) Except as otherwise provided in section 4-8-205, lack of genuineness of a certificated security is a complete defense, even against a purchaser for value and without notice.

(d) All other defenses of the issuer of a security, including nondelivery and conditional delivery of a certificated security, are ineffective against a purchaser for value who has taken the certificated security without notice of the particular defense.

(e) This section does not affect the right of a party to cancel a contract for a security "when, as, and if issued" or "when distributed" 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.

(f) If a security is held by a securities intermediary against whom an entitlement holder has a security entitlement with respect to the security, the issuer may not assert any defense that the issuer could not assert if the entitlement holder held the security directly.

Source: L. 96: Entire article R&RE, p. 216, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-202 as it existed prior to 1996.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

In order for one to be entitled to the protection afforded by § 4-8-202(2), he must prove that he was a purchaser for value and that either he or his transferor was without notice of the defect in the certificates. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

Stock certificates issued with facsimile signatures of corporate president and secretary are "genuine" under § 4-8-202(3) of the uniform commercial code, though not countersigned by a transfer agent as required. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

"Genuine" means free of forgery or counterfeiting. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

4-8-203. Staleness as notice of defect or defense.

After an act or event, other than a call that has been revoked, creating a right to immediate performance of the principal obligation represented by a certificated security or setting 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 the act or event:

(1) Requires the payment of money, the delivery of a certificated security, the registration of transfer of an uncertificated security, or any of them on presentation or surrender of the security certificate, the money or security is available on the date set for payment or exchange, and the purchaser takes the security more than one year after that date; or

(2) Is not covered by paragraph (1) of this section and the purchaser takes the security more than two years after the date set for surrender or presentation or the date on which performance became due.

Source: L. 96: Entire article R&RE, p. 217, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-203 as it existed prior to 1996.

4-8-204. Effect of issuer's restriction on transfer.

A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless:

(1) The security is certificated and the restriction is noted conspicuously on the security certificate; or

(2) The security is uncertificated and the registered owner has been notified of the restriction.

Source: L. 96: Entire article R&RE, p. 218, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-204 as it existed prior to 1996.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Unless this section is followed, any restriction is void, and a purchaser can compel transfer. Age Publ'g Co. v. Becker, 110 Colo. 319, 134 P.2d 205 (1943) (decided under repealed CSA, C. 41, § 100, uniform stock transfer act).

Comments on this section emphasize that it imposes strict requirement for notice on issuer. Edina State Bank v. Mr. Steak, Inc., 487 F.2d 640 (10th Cir. 1973).

This section represents a change in phraseology, but not in the practical effect. Irwin v. W. End Dev. Co., 342 F. Supp. 687 (D. Colo. 1972).

Failure to note the transfer restriction on certificates is no bar to enforcement against one who had actual notice of it. Irwin v. W. End Dev. Co., 342 F. Supp. 687 (D. Colo. 1972).

Section does not protect those with actual notice. The purpose of this section was to make ineffective restrictions on transfers to persons without notice. The failure to note the restriction on the certificates is no bar to its enforcement against a person who had actual notice of it. Irwin v. W. End Dev. Co., 481 F.2d 34 (10th Cir. 1973).

Those on inquiry notice not denied protection of section. This section clearly placed the duty on the issuer to note the restriction conspicuously on the certificate, not on the bank to inquire. And the statute's protection was extended to all against an unnoted restriction except those with "actual knowledge of it". Those who are only on inquiry notice are not denied protection by the code. Edina State Bank v. Mr. Steak, Inc., 487 F.2d 640 (10th Cir. 1973).

Bank as pledgee was among the persons protected generally by this section against a restriction not conspicuously noted on the security, except

as to a person with actual knowledge. The wrongful refusal to transfer gave rise to a right to sue as for conversion by the bank as transferor. Edina State Bank v. Mr. Steak, Inc., 487 F.2d 640 (10th Cir. 1973).

Federal securities act does not override section. The absence of a requirement for a notation of the restriction in the federal securities act does not override this section under the doctrine of preemption. This important provision of the code may be read in harmony with the federal statute. Both regulations can be enforced without impairing federal superintendence of the field and thus the state statute need not give way. The securities act shows no intent to prevent such significant regulation by state law. Edina State Bank v. Mr. Steak, Inc., 487 F.2d 640 (10th Cir. 1973).

Bank's right to damages not defeated by federal statute. The prohibition of the federal statute against carrying out transfers of unregistered stock did not defeat the bank's right to damages under this section. The court did not have to decide whether the bank as a bona fide pledgee could enforce specifically the transfer of the collateral to the purchaser. The only question was whether the bank was entitled to damages when the issuer asserted its own restriction which was not conspicuously noted on its stock certificate as a ground for refusing to register a transfer. In these circumstances the bank was entitled to damages for its loss and the recovery of them was not violative of the federal prohibition against transfer. Edina State Bank v. Mr. Steak, Inc., 487 F.2d 640 (10th Cir. 1973).

4-8-205. Effect of unauthorized signature on security certificate.

An unauthorized signature placed on a security certificate before or in the course of issue is ineffective, but the signature is effective in favor of a purchaser for value of the certificated security if the purchaser is without notice of the lack of authority and the signing has been done by:

(1) An authenticating trustee, registrar, transfer agent, or other person entrusted by the issuer with the signing of the security certificate or of similar security certificates, or the immediate preparation for signing of any of them; or

(2) An employee of the issuer, or of any of the persons listed in paragraph (1) of this section, entrusted with responsible handling of the security certificate.

Source: L. 96: Entire article R&RE, p. 218, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-205 as it existed prior to 1996.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Where transferees are purchasers for value without notice of lack of authority, and the signing is done by the secretary of the issuer who is an employee entrusted with responsible handling of securities, it is readily apparent that facsimile signatures are effective against the issuer, and therefore, the certificates are genuine even though the signatures of the president and secretary of the issuer are unauthorized. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

4-8-206. Completion or alteration of security certificate.

(a) If a security certificate contains the signatures necessary to its issue or transfer but is incomplete in any other respect:

(1) Any person may complete it by filling in the blanks as authorized; and

(2) Even if the blanks are incorrectly filled in, the security certificate as completed is enforceable by a purchaser who took it for value and without notice of the incorrectness.

(b) A complete security certificate that has been improperly altered, even if fraudulently, remains enforceable, but only according to its original terms.

Source: L. 96: Entire article R&RE, p. 218, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-206 as it existed prior to 1996.

4-8-207. Rights and duties of issuer with respect to registered owners.

(a) Before due presentment for registration of transfer of a certificated security in registered form or of an instruction requesting registration of transfer of an uncertificated security, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, receive notifications, and otherwise exercise all the rights and powers of an owner.

(b) This article does not affect the liability of the registered owner of a security for a call, assessment, or the like.

Source: L. 96: Entire article R&RE, p. 219, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-207 as it existed prior to 1996.

ANNOTATION

Law reviews. For article, "One Year Review of Corporations, Partnerships, and Agency", see 34 Dicta 129 (1957).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Under this section, unless otherwise provided, every shareholder of record of a corporation shall have the right at every shareholders' meeting to vote one vote for every share standing in his name on the books of the corporation, even though at some time in the future he intends to dispose of his stock. Fehr v. Hadden, 134 Colo. 102, 300 P.2d 533 (1956).

The argument that equitable owners are entitled to vote is without merit, inasmuch as "title" to corporate stock means "legal title" and does not include a merely equitable or beneficial ownership or interest. Fehr v. Hadden, 134 Colo. 102, 300 P.2d 533 (1956).

4-8-208. Effect of signature of authenticating trustee, registrar, or transfer agent.

(a) A person signing a security certificate as authenticating trustee, registrar, transfer agent, or the like, warrants to a purchaser for value of the certificated security, if the purchaser is without notice of a particular defect, that:

(1) The certificate is genuine;

(2) The person's own participation in the issue of the security is within the person's capacity and within the scope of the authority received by the person from the issuer; and

(3) The person has reasonable grounds to believe that the certificated security is in the form and within the amount the issuer is authorized to issue.

(b) Unless otherwise agreed, a person signing under subsection (a) of this section does not assume responsibility for the validity of the security in other respects.

Source: L. 96: Entire article R&RE, p. 219, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-208 as it existed prior to 1996.

4-8-209. Issuer's lien.

A lien in favor of an issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate.

Source: L. 96: Entire article R&RE, p. 219, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-103 as it existed prior to 1996.

ANNOTATION

Law reviews. For article, "The Pledgee's Right to Stock Dividends Without Shareholder's Liability", see 7 Rocky Mt. L. Rev. 13 (1934). For note, "Stock Liens and Transfer Restrictions Under the Uniform Stock Transfer Act", see 10 Rocky Mt. L. Rev. 117 (1938).

4-8-210. Overissue.

(a) In this section, "overissue" means the issue of securities in excess of the amount the issuer has corporate power to issue, but an overissue does not occur if appropriate action has cured the overissue.

(b) Except as otherwise provided in subsections (c) and (d) of this section, 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.

(c) If an identical security not constituting an overissue is reasonably available for purchase, a person entitled to issue or validation may compel the issuer to purchase the security and deliver it if certificated or register its transfer if uncertificated, against surrender of any security certificate the person holds.

(d) If a security is not reasonably available for purchase, a person entitled to issue or validation may recover from the issuer the price the person or the last purchaser for value paid for it with interest from the date of the person's demand.

Source: L. 96: Entire article R&RE, p. 219, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-104 as it existed prior to 1996.

PART 3

TRANSFER OF CERTIFICATED AND UNCERTIFICATED SECURITIES

Law reviews: For article, "Security ‘Tokens’: Blockchain Technology and Article 8 of the UCC", see 52 Colo. Law. 34 (Nov. 2023).

4-8-301. Delivery.

(a) Delivery of a certificated security to a purchaser occurs when:

(1) The purchaser acquires possession of the security certificate;

(2) Another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or

(3) A securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.

(b) Delivery of an uncertificated security to a purchaser occurs when:

(1) The issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or

(2) Another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser.

Source: L. 96: Entire article R&RE, p. 220, § 2, effective July 1. **L. 2001:** (a)(3) amended, p. 1443, § 33, effective July 1.

Editor's note: This section is similar to former §§ 4-8-311 and 4-8-313 as they existed prior to 1996.

ANNOTATION

Applied in Atlas Biologicals, Inc. v. Kutrubes, 474 F. Supp. 3d 1188 (D. Colo. 2020), aff'd, 50 F.4th 1307 (10th Cir. 2022).

4-8-302. Rights of purchaser.

(a) Except as otherwise provided in subsections (b) and (c) of this section, a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.

(b) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.

(c) A purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking from a protected purchaser.

Source: L. 96: Entire article R&RE, p. 220, § 2, effective July 1. **L. 2001:** (a) amended, p. 1443, § 34, effective July 1.

Editor's note: This section is similar to former §§ 4-8-301 and 4-8-302 as they existed prior to 1996.

ANNOTATION

Law reviews. For article, "One Year Review of Corporations, Partnerships, and Agency", see 34 Dicta 129 (1957).

Annotator's note. Since § 4-8-302 is similar to § 4-8-301 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Under this section, one acquires the rights in a security which his transferor had. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

In order for one to be entitled to the protection afforded by this section, he must prove that he was a purchaser for value, and that either he or his transferor was without notice of a defect in the certificates. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

If one's transferor was without notice of a defect in the certificates, then the defect is ineffective against the transferor by virtue of § 8-4-202(2)(a), and he has the right to require the transfer of the certificates; therefore, when such an individual purchases the certificates from his transferor

he acquires his transferor's right to require the issuer to transfer the certificates. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

Purchaser of limited tax bond was not a "protected purchaser" acquiring rights greater than the seller held because purchaser had prior notice of another's adverse claim. Meadow Homes Dev. Corp. v. Bowens, 211 P.3d 743 (Colo. App. 2009).

For the construction of "title" under prior provisions, see Fehr v. Hadden, 134 Colo. 102, 300 P.2d 533 (1956); Arfsten v. Higby, 150 Colo. 254, 372 P.2d 166 (1962) (decided under repealed § 31-9-21, CRS 53, uniform stock transfer act).

4-8-303. Protected purchaser.

(a) "Protected purchaser" means a purchaser of a certificated or uncertificated security, or of an interest therein, who:

(1) Gives value;

(2) Does not have notice of any adverse claim to the security; and

(3) Obtains control of the certificated or uncertificated security.

(b) A protected purchaser also acquires its interest in the security free of any adverse claim.

Source: L. 96: Entire article R&RE, p. 221, § 2, effective July 1. **L. 2023:** (b) amended, (SB 23-090), ch. 136, p. 539, § 41, effective August 7.

Editor's note: This section is similar to former §§ 4-8-302 and 4-8-311 as they existed prior to 1996.

ANNOTATION

Annotator's note. Since § 4-8-303 is similar to § 4-8-302 as it existed prior to the 1996 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Where evidence establishes that one had been informed that stock certificates were not validly issued before he accepted delivery, and that he had not acquired them for value and in good faith, he is not a bona fide purchaser. Folsom v. Sec. Nat'l Bank, 32 Colo. App. 91, 507 P.2d 1114 (1973).

Lenders were purchasers of security interest rather than bailees or holders of stock where stock owner voluntarily

delivered and pledged stock as security for loans made to third parties and where lender gave value in exchange for pledge. Under the circumstances, lender was entitled to sell stock to recover losses upon third party default. Knappenberger v. Shea, 874 P.2d 498 (Colo. App. 1994).

Lenders were "bona fide purchasers" in absence of evidence that lender associated with or had notice of alleged fraud prior to completion of loan and stock transactions and in absence of evidence establishing unconscionability of stock pledge agreement. Knappenberger v. Shea, 874 P.2d 498 (Colo. App. 1994).

Lenders who were "bona fide purchasers" belonged to favored sub-class of purchasers who prevail against all other claimants in the exercise of security interest where stock pledge agreement specifically authorized lender to sell or transfer stock and retain profits in the event of loan default. Knappenberger v. Shea, 874 P.2d 498 (Colo. App. 1994).

A party requesting reissuance of a stock certificate cannot claim status as a purchaser for value. Am. Sec. Transfer, Inc. v. Pantheon Indus., Inc., 871 F. Supp. 400 (D. Colo. 1994).

Purchaser of limited tax bond was not a "protected purchaser" acquiring rights greater than the seller held because purchaser had prior notice of another's adverse claim. Meadow Homes Dev. Corp. v. Bowens, 211 P.3d 743 (Colo. App. 2009).

4-8-304. Indorsement.

(a) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies to whom a security is to be transferred or who has power to transfer it. A holder may convert a blank indorsement to a special indorsement.

(b) An indorsement purporting to be only of part of a security certificate representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(c) An indorsement, whether special or in blank, does not constitute a transfer until delivery of the certificate on which it appears or, if the indorsement is on a separate document, until delivery of both the document and the certificate.

(d) If a security certificate in registered form has been delivered to a purchaser without a necessary indorsement, the purchaser may become a protected purchaser only when the indorsement is supplied. However, against a transferor, a transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

(e) An indorsement of a security certificate in bearer form may give notice of an adverse claim to the certificate, but it does not otherwise affect a right to registration that the holder possesses.

(f) Unless otherwise agreed, a person making an indorsement assumes only the obligations provided in section 4-8-108 and not an obligation that the security will be honored by the issuer.

Source: L. 96: Entire article R&RE, p. 221, § 2, effective July 1.

Editor's note: This section is similar to former §§ 4-8-307, 4-8-308, 4-8-309, and 4-8-310 as they existed prior to 1996.

ANNOTATION

I. General Consideration.

II. Transfer.

III. Attempted Transfer Without Delivery.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Attachment of Corporate Stock Where the Method is Not Prescribed by Statute", see 2 Rocky Mt. L. Rev. 190 (1930). For article, "When Corporate Stock Becomes Real Estate", see 21 Dicta 53 (1944). For article, "Application of the Uniform Stock Transfer Act to Gifts of Stock", see 20 Rocky Mt. L. Rev. 67 (1947). For article, "One Year Review of Agency, Partnerships, Corporations, and Municipal Corporations", see 41 Den. L. Ctr. J. 61 (1964). For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965).

II. TRANSFER.

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Title to corporate stock can only be transferred as provided by statute. Quandary Land Dev. Co. v. Porter, 159 Colo. 8, 408 P.2d 978 (1965).

The statutory methods are exclusive. Brennan v. W. A. Wills, Ltd., 263 F.2d 1 (10th Cir. 1959); Goeddel v. Aircraft Fin., Inc., 152 Colo. 419, 382 P.2d 812 (1963); Quandary Land Dev. Co. v. Porter, 159 Colo. 8, 408 P.2d 978 (1965).

This section requires delivery of the certificate to effect a transfer of title. Brennan v. Korholz, 293 F.2d 751 (10th Cir. 1961).

Any attempt to transfer stock without delivery of the certificate does not have the effect of passing title, but merely constitutes a promise to transfer. Brennan v. W. A. Wills, Ltd., 263 F.2d 1 (10th Cir. 1959); Goeddel v. Aircraft Fin., Inc., 152 Colo. 419, 382 P.2d 812 (1963); Quandary Land Dev. Co. v. Porter, 159 Colo. 8, 408 P.2d 978 (1965).

Under the uniform stock transfer act, title to a certificate and to the shares represented thereby could be transferred only by (1) delivery of the certificate indorsed either in blank or to a specified

person by the person appearing by the certificate to be the owner of the shares represented thereby, or by (2) delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby signed by the person appearing by the certificate to be the owner of the shares represented thereby. Brennan v. W. A. Wills, Ltd., 263 F.2d 1 (10th Cir. 1959); Arfsten v. Higby, 150 Colo. 254, 372 P.2d 166 (1962); Goeddel v. Aircraft Fin., Inc., 152 Colo. 419, 382 P.2d 812 (1963).

An assignment of a shareholder's interest without delivery of the certificates operates to vest an equitable title in the assignee. Arfsten v. Higby, 150 Colo. 254, 372 P.2d 166 (1962).

Under prior stock transfer statutes the holder of an equitable title to stock had an enforceable status, where rights of third parties were not involved. Arfsten v. Higby, 150 Colo. 254, 372 P.2d 166 (1962).

III. ATTEMPTED TRANSFER WITHOUT DELIVERY.

Law reviews. For article, "One Year Review of Agency, Partnerships, Corporations, and Municipal Corporations", see 41 Den. L. Ctr. J. 61 (1964).

For prior provisions making attempted transfers without delivery a matter of contract, see Brennan v. W. A. Wills, Ltd., 263 F.2d 1 (10th Cir. 1959); Brennan v. Korholz, 293 F.2d 751 (10th Cir. 1961); Goeddel v. Aircraft Fin., Inc., 152 Colo. 419, 382 P.2d 812 (1963) (decided under repealed § 31-9-10, CRS 53, uniform stock transfer act).

4-8-305. Instruction.

(a) 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.

(b) Unless otherwise agreed, a person initiating an instruction assumes only the obligations imposed by section 4-8-108 and not an obligation that the security will be honored by the issuer.

Source: L. 96: Entire article R&RE, p. 221, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-308 as it existed prior to 1996.

4-8-306. Effect of guaranteeing signature, indorsement, or instruction.

(a) A person who guarantees a signature of an indorser of a security certificate warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to indorse, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person; and

(3) The signer had legal capacity to sign.

(b) A person who guarantees a signature of the originator of an instruction warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to originate the instruction, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person, if the person specified in the instruction as the registered owner was, in fact, the registered owner, as to which fact the signature guarantor does not make a warranty; and

(3) The signer had legal capacity to sign.

(c) A person who specially guarantees the signature of an originator of an instruction makes the warranties of a signature guarantor under subsection (b) of this section and also warrants that at the time the instruction is presented to the issuer:

(1) The person specified in the instruction as the registered owner of the uncertificated security will be the registered owner; and

(2) The transfer 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.

(d) A guarantor under subsections (a) and (b) of this section or a special guarantor under subsection (c) of this section does not otherwise warrant the rightfulness of the transfer.

(e) A person who guarantees an indorsement of a security certificate makes the warranties of a signature guarantor under subsection (a) of this section and also warrants the rightfulness of the transfer in all respects.

(f) A person who guarantees an instruction requesting the transfer of an uncertificated security makes the warranties of a special signature guarantor under subsection (c) of this section and also warrants the rightfulness of the transfer in all respects.

(g) An issuer may not require a special guaranty of signature, a guaranty of indorsement, or a guaranty of instruction as a condition to registration of transfer.

(h) The warranties under this section are made to a person taking or dealing with the security in reliance on the guaranty, and the guarantor is liable to the person for loss resulting from their breach. An indorser or originator of an instruction whose signature, indorsement, or instruction has been guaranteed is liable to a guarantor for any loss suffered by the guarantor as a result of breach of the warranties of the guarantor.

Source: L. 96: Entire article R&RE, p. 222, § 2, effective July 1.

Editor's note: This section is similar to former §§ 4-8-306 and 4-8-312 as they existed prior to 1996.

4-8-307. Purchaser's right to requisites for registration of transfer.

Unless otherwise agreed, the transferor of a security on due demand shall supply the purchaser with proof of authority to transfer or with any other requisite necessary to obtain registration of the transfer of the security, but if the transfer is not for value, a transferor need not comply unless the purchaser pays the necessary expenses. If the transferor fails within a reasonable time to comply with the demand, the purchaser may reject or rescind the transfer.

Source: L. 96: Entire article R&RE, p. 223, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-316 as it existed prior to 1996.

PART 4

REGISTRATION

4-8-401. Duty of issuer to register transfer.

(a) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security, the issuer shall register the transfer as requested if:

(1) Under the terms of the security the person seeking registration of transfer is eligible to have the security registered in its name;

(2) The indorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;

(3) Reasonable assurance is given that the indorsement or instruction is genuine and authorized (section 4-8-402);

(4) Any applicable law relating to the collection of taxes has been complied with;

(5) The transfer does not violate any restriction on transfer imposed by the issuer in accordance with section 4-8-204;

(6) A demand that the issuer not register transfer has not become effective under section 4-8-403, or the issuer has complied with section 4-8-403 (b) but no legal process or indemnity bond is obtained as provided in section 4-8-403 (d); and

(7) The transfer is in fact rightful or is to a protected purchaser.

(b) If an issuer is under a duty to register a transfer of a security, the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer.

Source: L. 96: Entire article R&RE, p. 223, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-401 as it existed prior to 1996.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Under this section an issuer has a duty to register the transfer of securities as requested if certain preconditions are clearly met. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

The transfer of cancelled certificates is not rightful. Where evidence establishes that stock certificates are no longer valid, having been cancelled on the books of the company, and no evidence is offered to contradict the correctness of the company records or to establish that the certificates are in fact valid, there is not a rightful transfer, since transfer of cancelled, invalidated, certificates does not constitute a rightful transfer. Folsom v. Sec. Nat'l Bank, 32 Colo. App. 91, 507 P.2d 1114 (1973).

The court could not conclude, as a matter of law, that a transfer agent was immune from liability absent a legal

opinion that the proposed transfer was permissible. Am. Sec. Transfer, Inc. v. Pantheon Indus., Inc., 871 F. Supp. 400 (D. Colo. 1994).

Request to reissue a stock certificate without the restrictive legend is considered a "request to transfer shares" within the meaning of this section. Therefore it falls within the duties of § 4-8-406. Am. Sec. Transfer, Inc. v. Pantheon Indus., Inc., 871 F. Supp. 400 (D. Colo. 1994).

This section preempts common law remedies relating to the placement and removal of restrictive legends. Clancy Sys. Int'l, Inc. v. Salazar, 177 P.3d 1235 (Colo. 2008).

A party requesting reissuance of a stock certificate cannot claim status as a purchaser for value. Am. Sec. Transfer, Inc. v. Pantheon Indus., Inc., 871 F. Supp. 400 (D. Colo. 1994).

Former provisions voided all transfers unless they were recorded on the books of the company within 60 days. Conway v. John, 14 Colo. 30, 23 P. 170 (1890); Weber v. Bullock, 19 Colo. 214, 35 P. 183 (1893); First Nat'l Bank v. Hastings, 7 Colo. App. 129, 42 P. 691 (1895); Nat'l Bank v. Graham, 16 Colo. App. 498, 66 P. 684 (1901); Richardson v. Longmont Supply Ditch Co., 19 Colo. App. 483, 76 P. 546 (1904); Isbell v. Graybill, 19 Colo. App. 508, 76 P. 550 (1904); Equitable Sec. Co. v. Johnson, 36 Colo. 377, 85 P. 840 (1906); Pueblo Sav. Bank v. Richardson, 39 Colo. 319, 89P. 799 (1907); Central Sav. Bank v. Smith, 43 Colo. 90, 95 P. 307 (1908); O'Neil v. Wolcott Mining Co., 174 F. 527 (8th Cir. 1909); Shires v. Allen, 47 Colo. 440, 107 P. 1072 (1910); Ironstone Ditch Co. v. Equitable Sec. Co., 52 Colo. 268, 121 P. 174 (1911); Lucifer Coal Co. v. Buster, 64 Colo. 179, 171 P. 61 (1918); Carlton v. Camfield, 64 Colo. 373, 171 P. 1140 (1918); Hexter v. Shahan, 66 Colo. 156, 180 P. 92 (1919); Valleyview Consol. Gold Mining Co. v. Whitehead, 66 Colo. 237, 180 P. 737 (1919); Capitol Petroleum Co. v. Haldeman, 66 Colo. 265, 180 P. 758 (1919); Snider v. Bourquin, 68 Colo. 207, 188 P. 727 (1920); McClelland v. Merchants' & Miners' Nat'l Bank, 77 Colo. 302, 236 P. 774 (1925); Hawkins v. Hershey, 78 Colo. 539, 242 P. 975 (1925); Mulvihill v. First Nat'l Bank, 80 Colo. 72, 249 P. 504 (1926); Hollingsworth v. Multa Trina Ditch Co., 51 F.2d 649 (10th Cir. 1931); Hertz Drive-Ur-Self Sys. v. Doak, 94 Colo. 200, 29 P.2d 625 (1934) (decided under repealed C.L. 1921, § 2268 and laws antecedent thereto).

4-8-402. Assurance that indorsement or instruction is effective.

(a) An issuer may require the following assurance that each necessary indorsement or each instruction is genuine and authorized:

(1) In all cases, a guaranty of the signature of the person making an indorsement or originating an instruction including, in the case of an instruction, reasonable assurance of identity;

(2) If the indorsement is made or the instruction is originated by an agent, appropriate assurance of actual authority to sign;

(3) If the indorsement is made or the instruction is originated by a fiduciary pursuant to section 4-8-107 (a)(4) or (a)(5), appropriate evidence of appointment or incumbency;

(4) If there is more than one fiduciary, reasonable assurance that all who are required to sign have done so; and

(5) If the indorsement is made or the instruction is originated by a person not covered by another provision of this subsection (a), assurance appropriate to the case corresponding as nearly as may be to the provisions of this subsection (a).

(b) An issuer may elect to require reasonable assurance beyond that specified in this section.

(c) In this section:

(1) "Guaranty of the signature" means a guaranty signed by or on behalf of a person reasonably believed by the issuer to be responsible. An issuer may adopt standards with respect to responsibility if they are not manifestly unreasonable.

(2) "Appropriate evidence of appointment or incumbency" means:

(i) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of the court or an officer thereof and dated within sixty days before the date of presentation for transfer; or

(ii) 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 an issuer to be responsible or, in the absence of that document or certificate, other evidence the issuer reasonably considers appropriate.

Source: L. 96: Entire article R&RE, p. 223, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-402 as it existed prior to 1996.

4-8-403. Demand that issuer not register transfer.

(a) A person who is an appropriate person to make an indorsement or originate an instruction may demand that the issuer not register transfer of a security by communicating to the issuer a notification that identifies the registered owner and the issue of which the security is a part and provides an address for communications directed to the person making the demand. The demand

is effective only if it is received by the issuer at a time and in a manner affording the issuer reasonable opportunity to act on it.

(b) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security after a demand that the issuer not register transfer has become effective, the issuer shall promptly communicate to (i) the person who initiated the demand at the address provided in the demand and (ii) the person who presented the security for registration of transfer or initiated the instruction requesting registration of transfer a notification stating that:

(1) The certificated security has been presented for registration of transfer or the instruction for registration of transfer of the uncertificated security has been received;

(2) A demand that the issuer not register transfer had previously been received; and

(3) The issuer will withhold registration of transfer for a period of time stated in the notification in order to provide the person who initiated the demand an opportunity to obtain legal process or an indemnity bond.

(c) The period described in subsection (b)(3) of this section may not exceed thirty days after the date of communication of the notification. A shorter period may be specified by the issuer if it is not manifestly unreasonable.

(d) An issuer is not liable to a person who initiated a demand that the issuer not register transfer for any loss the person suffers as a result of registration of a transfer pursuant to an effective indorsement or instruction if the person who initiated the demand does not, within the time stated in the issuer's communication, either:

(1) Obtain an appropriate restraining order, injunction, or other process from a court of competent jurisdiction enjoining the issuer from registering the transfer; or

(2) File 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 refusing to register the transfer.

(e) This section does not relieve an issuer from liability for registering transfer pursuant to an indorsement or instruction that was not effective.

Source: L. 96: Entire article R&RE, p. 224, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-403 as it existed prior to 1996.

4-8-404. Wrongful registration.

(a) Except as otherwise provided in section 4-8-406, an issuer is liable for wrongful registration of transfer if the issuer has registered a transfer of a security to a person not entitled to it, and the transfer was registered:

(1) Pursuant to an ineffective indorsement or instruction;

(2) After a demand that the issuer not register transfer became effective under section 4-8-403 (a) and the issuer did not comply with section 4-8-403 (b);

(3) After the issuer had been served with an injunction, restraining order, or other legal process enjoining it from registering the transfer, issued by a court of competent jurisdiction, and the issuer had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(4) By an issuer acting in collusion with the wrongdoer.

(b) An issuer that is liable for wrongful registration of transfer under subsection (a) of this section on demand shall provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration. If an overissue would result, the issuer's liability to provide the person with a like security is governed by section 4-8-210.

(c) Except as otherwise provided in subsection (a) of this section or in a law relating to the collection of taxes, an issuer is not liable to an owner or other person suffering loss as a result of the registration of a transfer of a security if registration was made pursuant to an effective indorsement or instruction.

Source: L. 96: Entire article R&RE, p. 226, § 2, effective July 1.

Editor's note: This section is similar to former §§ 4-8-311 and 4-8-404 as they existed prior to 1996.

4-8-405. Replacement of lost, destroyed, or wrongfully taken security certificate.

(a) If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed, or wrongfully taken, the issuer shall issue a new certificate if the owner:

(1) So requests before the issuer has notice that the certificate has been acquired by a protected purchaser;

(2) Files with the issuer a sufficient indemnity bond; and

(3) Satisfies other reasonable requirements imposed by the issuer.

(b) If, after the issue of a new security certificate, a protected purchaser of the original certificate presents it for registration of transfer, the issuer shall register the transfer unless an overissue would result. In that case, the issuer's liability is governed by section 4-8-210. In addition to any rights on the indemnity bond, an issuer may recover the new certificate from a person to whom it was issued or any person taking under that person, except a protected purchaser.

Source: L. 96: Entire article R&RE, p. 226, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-405 as it existed prior to 1996.

4-8-406. Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.

If a security certificate has been lost, apparently destroyed, or wrongfully taken, and the owner fails to notify the issuer of that fact within a reasonable time after the owner has notice of it and the issuer registers a transfer of the security before receiving notification, the owner may not assert against the issuer a claim for registering the transfer under section 4-8-404 or a claim to a new security certificate under section 4-8-405.

Source: L. 96: Entire article R&RE, p. 227, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-405 as it existed prior to 1996.

4-8-407. Authenticating trustee, transfer agent, and registrar.

A person acting as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of a transfer of its securities, in the issue of new security certificates or uncertificated securities, or in the cancellation of surrendered security certificates has the same obligation to the holder or owner of a certificated or uncertificated security with regard to the particular functions performed as the issuer has in regard to those functions.

Source: L. 96: Entire article R&RE, p. 227, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-406 as it existed prior to 1996.

ANNOTATION

Request to reissue a stock certificate without the restrictive legend is considered a "request to transfer shares" within the meaning of § 4-8-401. Therefore it falls within the duties of this section. Am. Sec. Transfer, Inc. v. Pantheon Indus., Inc., 871 F. Supp. 400 (D. Colo. 1994) (decided under former § 4-8-406 as it existed prior to the 1996 repeal and reenactment of this article).

PART 5

SECURITY ENTITLEMENTS

4-8-501. Securities account - acquisition of security entitlement from securities intermediary.

(a) "Securities account" means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.

(b) Except as otherwise provided in subsections (d) and (e) of this section, a person acquires a security entitlement if a securities intermediary:

(1) Indicates by book entry that a financial asset has been credited to the person's securities account;

(2) Receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or

(3) Becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account.

(c) If a condition of subsection (b) of this section has been met, a person has a security entitlement even though the securities intermediary does not itself hold the financial asset.

(d) If a securities intermediary holds a financial asset for another person, and the financial asset is registered in the name of, payable to the order of, or specially indorsed to the other person, and has not been indorsed to the securities intermediary or in blank, the other person is

treated as holding the financial asset directly rather than as having a security entitlement with respect to the financial asset.

(e) Issuance of a security is not establishment of a security entitlement.

Source: L. 96: Entire article R&RE, p. 227, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-313 as it existed prior to 1996.

4-8-502. Assertion of adverse claim against entitlement holder.

An action based on an adverse claim to a financial asset, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who acquires a security entitlement under section 4-8-501 for value and without notice of the adverse claim.

Source: L. 96: Entire article R&RE, p. 228, § 2, effective July 1.

4-8-503. Property interest of entitlement holder in financial asset held by securities intermediary.

(a) To the extent necessary for a securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are held by the securities intermediary for the entitlement holders, are not property of the securities intermediary, and are not subject to claims of creditors of the securities intermediary, except as otherwise provided in section 4-8-511.

(b) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this section is a pro rata property interest in all interests in that financial asset held by the securities intermediary, without regard to the time the entitlement holder acquired the security entitlement or the time the securities intermediary acquired the interest in that financial asset.

(c) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this section may be enforced against the securities intermediary only by exercise of the entitlement holder's rights under sections 4-8-505 through 4-8-508.

(d) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this section may be enforced against a purchaser of the financial asset or interest therein only if:

(1) Insolvency proceedings have been initiated by or against the securities intermediary;

(2) The securities intermediary does not have sufficient interests in the financial asset to satisfy the security entitlements of all of its entitlement holders to that financial asset;

(3) The securities intermediary violated its obligations under section 4-8-504 by transferring the financial asset or interest therein to the purchaser; and

(4) The purchaser is not protected under subsection (e) of this section. The trustee or other liquidator, acting on behalf of all entitlement holders having security entitlements with respect to a particular financial asset, may recover the financial asset, or interest therein, from the purchaser. If the trustee or other liquidator elects not to pursue that right, an entitlement holder whose security entitlement remains unsatisfied has the right to recover its interest in the financial asset from the purchaser.

(e) An action based on the entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this section, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against any purchaser of a financial asset or interest therein who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary's obligations under section 4-8-504.

Source: L. 96: Entire article R&RE, p. 228, § 2, effective July 1.

Editor's note: This section is similar to former § 4-8-313 as it existed prior to 1996.

4-8-504. Duty of securities intermediary to maintain financial asset.

(a) A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one or more other securities intermediaries.

(b) Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection (a) of this section.

(c) A securities intermediary satisfies the duty in subsection (a) of this section if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.

(d) This section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements.

Source: L. 96: Entire article R&RE, p. 229, § 2, effective July 1.

4-8-505. Duty of securities intermediary with respect to payments and distributions.

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

Source: L. 96: Entire article R&RE, p. 230, § 2, effective July 1.

4-8-506. Duty of securities intermediary to exercise rights as directed by entitlement holder.

A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

Source: L. 96: Entire article R&RE, p. 230, § 2, effective July 1.

4-8-507. Duty of securities intermediary to comply with entitlement order.

(a) A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to comply with the entitlement order. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.

(b) If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.

Source: L. 96: Entire article R&RE, p. 230, § 2, effective July 1.

4-8-508. Duty of securities intermediary to change entitlement holder's position to other form of security holding.

A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

Source: L. 96: Entire article R&RE, p. 231, § 2, effective July 1.

4-8-509. Specification of duties of securities intermediary by other statute or regulation - manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.

(a) If the substance of a duty imposed upon a securities intermediary by sections 4-8-504 through 4-8-508 is the subject of other statute, regulation, or rule, compliance with that statute, regulation, or rule satisfies the duty.

(b) To the extent that specific standards for the performance of the duties of a securities intermediary or the exercise of the rights of an entitlement holder are not specified by other statute, regulation, or rule or by agreement between the securities intermediary and entitlement holder, the securities intermediary shall perform its duties and the entitlement holder shall exercise its rights in a commercially reasonable manner.

(c) The obligation of a securities intermediary to perform the duties imposed by sections 4-8-504 through 4-8-508 is subject to:

(1) Rights of the securities intermediary arising out of a security interest under a security agreement with the entitlement holder or otherwise; and

(2) Rights of the securities intermediary under other law, regulation, rule, or agreement to withhold performance of its duties as a result of unfulfilled obligations of the entitlement holder to the securities intermediary.

(d) Sections 4-8-504 through 4-8-508 do not require a securities intermediary to take any action that is prohibited by other statute, regulation, or rule.

Source: L. 96: Entire article R&RE, p. 231, § 2, effective July 1.

4-8-510. Rights of purchaser of security entitlement from entitlement holder.

(a) In a case not covered by the priority rules in article 9 of this title or the rules stated in subsection (c) of this section, an action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest

therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control.

(b) If an adverse claim could not have been asserted against an entitlement holder under section 4-8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.

(c) In a case not covered by the priority rules in article 9 of this title, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Except as otherwise provided in subsection (d) of this section, purchasers who have control rank according to priority in time of:

(1) The purchaser's becoming the person for whom the securities account, in which the security entitlement is carried, is maintained, if the purchaser obtained control under section 4-8-106 (d)(1);

(2) The securities intermediary's agreement to comply with the purchaser's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried, if the purchaser obtained control under section 4-8-106 (d)(2); or

(3) If the purchaser obtained control through another person under section 4-8-106 (d)(3), the time on which priority would be based under this subsection (c) if the other person were the secured party.

(d) A securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary.

Source: L. 96: Entire article R&RE, p. 232, § 2, effective July 1. **L. 2001:** Entire section amended, p. 1443, § 35, effective July 1.

4-8-511. Priority among security interests and entitlement holders.

(a) Except as otherwise provided in subsections (b) and (c) of this section, if a securities intermediary does not have sufficient interests in a particular financial asset to satisfy both its obligations to entitlement holders who have security entitlements to that financial asset and its obligation to a creditor of the securities intermediary who has a security interest in that financial asset, the claims of entitlement holders, other than the creditor, have priority over the claim of the creditor.

(b) A claim of a creditor of a securities intermediary who has a security interest in a financial asset held by a securities intermediary has priority over claims of the securities intermediary's

entitlement holders who have security entitlements with respect to that financial asset if the creditor has control over the financial asset.

(c) If a clearing corporation does not have sufficient financial assets to satisfy both its obligations to entitlement holders who have security entitlements with respect to a financial asset and its obligation to a creditor of the clearing corporation who has a security interest in that financial asset, the claim of the creditor has priority over the claims of entitlement holders.

Source: L. 96: Entire article R&RE, p. 232, § 2, effective July 1.

PART 6

TRANSITION PROVISIONS FOR REVISED ARTICLE 8

4-8-601. Effective date.

This article takes effect on July 1, 1996.

Source: L. 96: Entire article R&RE, p. 233, § 2, effective July 1.

4-8-602. Repeals. (Reserved)

4-8-603. Saving clause.

(a) This article does not affect an action or proceeding commenced before this article takes effect.

(b) If a security interest in a security is perfected at the date this article takes effect, and the action by which the security interest was perfected would suffice to perfect a security interest under this article, no further action is required to continue perfection. If a security interest in a security is perfected at the date this article takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this article, the security interest remains perfected for a period of four months after the effective date and continues perfected thereafter if appropriate action to perfect under this article is taken within that period. If a security interest is perfected at the date this article takes effect and the security interest can be perfected by filing under this article, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect.

Source: L. 96: Entire article R&RE, p. 233, § 2, effective July 1.

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PART 1

GENERAL PROVISIONS

4-9-101. Short title.

This article may be cited as the "Uniform Commercial Code - Secured Transactions".

Source: L. 2001: Entire article R&RE, p. 1313, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-101 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Corporate Organization: A Manual of Colorado Procedure", see 1 Rocky Mt. L. Rev. 3 (1928). For note, "The Necessity for Recording Trust Receipts", see 4 Rocky Mt. L. Rev. 139 (1932). For note, "A Survey of the Colorado Torrens Act", see 5 Rocky Mt. L. Rev. 149 (1933). For note, "Leases of Personal Property as Security Transactions", see 5 Rocky Mt. L. Rev. 279 (1933). For note, "The Meaning of 'Third Persons' Under the Colorado Chattel Mortgage Act", see 6 Rocky Mt. L. Rev. 70 (1933). For note, "The Effect of the Extra-State Chattel Mortgage", see 20 Rocky Mt. L. Rev. 217 (1948). For article, "Security Transactions and the Conflict of Laws", see 37 Dicta 119 (1950). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For article, "Installment Selling in Colorado and Needed Legislation", see 29 Dicta 81 (1952). For article, "The Perennial Problem of Security Priority and Recordation", see 24 Rocky Mt. L. Rev. 180 (1952). For article, "Enforcement of Security Interests in Colorado", see 25 Rocky Mt. L. Rev. 1 (1952). For article, "Discharge of Security Transactions", see 26 Rocky Mt. L. Rev. 115 (1954). For article, "Highlights of the 1955 Colorado Legislative Session — Security Transactions", see 28 Rocky Mt. L. Rev. 76 (1955). For note, "Validity of 'Myself' Notes and Deeds of Trust", see 30 Rocky Mt. L. Rev. 195 (1958). For article, "The New Colorado Chattel Mortgage Act", see 38 Dicta 231 (1961). For note, "The 1961 Colorado Chattel Mortgage Act", see 34 Rocky Mt. L. Rev. 222 (1962). For article,

"Article 9 of the Uniform Commercial Code and Colorado Security Law", see 37 U. Colo. L. Rev. 11 (1964). For article, "Impact of the Uniform Commercial Code on Colorado Law", see 42 Den. L. Ctr. J. 67 (1965). For article, "U.C.C. Articles 9 and 10: Some Problems Solved and Some Problems Created", see 38 U. Colo. L. Rev. 99 (1965). For article, "Oil and Gas Financing Under the Uniform Commercial Code as Enacted in Colorado", see 43 Den. L.J. 129 (1966). For article, "Some Problems in Agricultural Lending Under UCC", see 39 U. Colo. L. Rev. 352 (1967). For note, "Creditor's Rights in Colorado and the Federal Tax Lien Act of 1966", see 40 U. Colo. L. Rev. 433 (1968).

Annotator's note. The following annotations include a case decided under this section as it existed prior to its 2001 repeal and reenactment.

Doctrine of unjust enrichment has not been displaced by the provisions of this code. Ninth Dist. Prod. Credit v. Ed Duggan, 821 P.2d 788 (Colo. 1991).

4-9-102. Definitions and index of definitions.

(a) In this article 9:

(1) "Accession" means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.

(2) "Account", except as used in "account for", "account statement", "account to", "commodity account" in subsection (a)(14) of this section, "customer's account", "deposit account" in subsection (a)(29) of this section, "on account of", and "statement of account", means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of; (ii) for services rendered or to be rendered; (iii) for a policy of insurance issued or to be issued; (iv) for a secondary obligation incurred or to be incurred; (v) for energy provided or to be provided; (vi) for the use or hire of a vessel under a charter or other contract; (vii) arising out of the use of a credit or charge card or information contained on or for use with the card; or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes controllable accounts and health-care-insurance receivables. The term does not include (i) chattel paper; (ii) commercial tort claims; (iii) deposit accounts; (iv) investment property; (v) letter-of-credit rights or letters of credit; (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card; or (vii) rights to payment evidenced by an instrument.

(3) "Account debtor" means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the negotiable instrument evidences chattel paper.

(4) "Accounting", except as used in "accounting for", means a record:

(A) Signed by a secured party;

(B) Indicating the aggregate unpaid secured obligations as of a date not more than thirty-five days earlier or thirty-five days later than the date of the record; and

(C) Identifying the components of the obligations in reasonable detail.

(5) "Agricultural lien" means an interest in farm products:

(A) Which secures payment or performance of an obligation for:

(i) Goods or services furnished in connection with a debtor's farming operation; or

(ii) Rent on real property leased by a debtor in connection with its farming operation;

(B) Which is created by statute in favor of a person that:

(i) In the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or

(ii) Leased real property to a debtor in connection with the debtor's farming operation; and

(C) Whose effectiveness does not depend on the person's possession of the personal property.

(6) "As-extracted collateral" means:

(A) Oil, gas, minerals, or other substances of value that may be extracted from the earth that are subject to a security interest that:

(i) Is created by a debtor having an interest in the minerals or such other substances before extraction; and

(ii) Attaches to the minerals or such other substances as extracted; or

(B) Accounts arising out of the sale at the wellhead or minehead of oil, gas, minerals, or other substances of value that may be extracted from the earth in which the debtor had an interest before extraction.

(7) Repealed.

(7.3) "Assignee", except as used in "assignee for benefit of creditors", means a person (i) in whose favor a security interest that secures an obligation is created or provided for under a security agreement, whether or not the obligation is outstanding or (ii) to which an account,

chattel paper, payment intangible, or promissory note has been sold. The term includes a person to which a security interest has been transferred by a secured party.

(7.5) "Assignor" means a person that (i) under a security agreement creates or provides for a security interest that secures an obligation or (ii) sells an account, chattel paper, payment intangible, or promissory note. The term includes a secured party that has transferred a security interest to another person.

(8) "Bank" means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.

(8.5) "Business day" means any day other than Saturday, Sunday, or a state of Colorado or federal legal holiday.

(9) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like.

(10) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. The term includes another record maintained as an alternative to a certificate of title by the governmental unit that issues certificates of title if a statute permits the security interest in question to be indicated on the record as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

(11) "Chattel paper" means:

(A) A right to payment of a monetary obligation secured by specific goods, if the right to payment and security agreement are evidenced by a record; or

(B) A right to payment of a monetary obligation owed by a lessee under a lease agreement with respect to specific goods and a monetary obligation owed by the lessee in connection with the transaction giving rise to the lease, if:

(i) The right to payment and lease agreement are evidenced by a record; and

(ii) The predominant purpose of the transaction giving rise to the lease was to give the lessee the right to possession and use of the goods. The term does not include a right to payment arising out of a charter or other contract involving the use or hire of a vessel or a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

(12) "Collateral" means the property subject to a security interest or agricultural lien. The term includes:

(A) Proceeds to which a security interest attaches;

(B) Accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and

(C) Goods that are the subject of a consignment.

(13) "Commercial tort claim" means a claim arising in tort with respect to which:

(A) The claimant is an organization; or

(B) The claimant is an individual and the claim:

(i) Arose in the course of the claimant's business or profession; and

(ii) Does not include damages arising out of personal injury to or the death of an individual.

(14) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(15) "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:

(A) Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or

(B) Traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.

(16) "Commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books.

(17) "Commodity intermediary" means a person that:

(A) Is registered as a futures commission merchant under federal commodities law; or

(B) In the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.

(18) "Communicate" means:

(A) To send a written or other tangible record;

(B) To transmit a record by any means agreed upon by the persons sending and receiving the record; or

(C) In the case of transmission of a record to or by a filing office, to transmit a record by any means prescribed by filing-office rule.

(19) "Consignee" means a merchant to which goods are delivered in a consignment.

(20) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) The merchant:

(i) Deals in goods of that kind under a name other than the name of the person making delivery;

(ii) Is not an auctioneer; and

(iii) Is not generally known by its creditors to be substantially engaged in selling the goods of others;

(B) With respect to each delivery, the aggregate value of the goods is one thousand dollars or more at the time of delivery;

(C) The goods are not consumer goods immediately before delivery; and

(D) The transaction does not create a security interest that secures an obligation.

(21) "Consignor" means a person that delivers goods to a consignee in a consignment.

(22) "Consumer debtor" means a debtor in a consumer transaction.

(22.5) "Consumer deposit account" means a deposit account held in the name of one or more natural persons and used by him, her, or them primarily for personal, family, or household purposes.

(23) "Consumer goods" means goods that are used or bought for use primarily for personal, family, or household purposes.

(24) "Consumer-goods transaction" means a consumer transaction in which:

(A) An individual incurs an obligation primarily for personal, family, or household purposes; and

(B) A security interest in consumer goods secures the obligation.

(25) "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes.

(26) "Consumer transaction" means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

(27) "Continuation statement" means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

(27.5) "Controllable account" means an account evidenced by a controllable electronic record that provides that the account debtor undertakes to pay the person that has control under section 4-12-105 of the controllable electronic record.

(27.7) "Controllable payment intangible" means a payment intangible evidenced by a controllable electronic record that provides that the account debtor undertakes to pay the person that has control under section 4-12-105 of the controllable electronic record.

(28) "Debtor" means:

(A) A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) A seller of accounts, chattel paper, payment intangibles, or promissory notes; or

(C) A consignee.

(29) "Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

(30) "Document" means a document of title or a receipt of the type described in section 4-7-201 (b).

(31) Repealed.

(32) "Encumbrance" means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.

(33) "Equipment" means goods other than inventory, farm products, or consumer goods.

(34) "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:

(A) Crops grown, growing, or to be grown, including:

(i) Crops produced on trees, vines, and bushes; and

(ii) Aquatic goods produced in aquacultural operations;

(B) Livestock, born or unborn, including aquatic goods produced in aquacultural operations;

(C) Supplies used or produced in a farming operation; or

(D) Products of crops or livestock in their unmanufactured states.

(35) "Farming operation" means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation.

(36) "File number" means the number assigned to an initial financing statement pursuant to section 4-9-519 (a).

(37) "Filing office" means an office designated in section 4-9-501 as the place to file a financing statement.

(38) "Filing-office rule" means a rule adopted pursuant to section 4-9-526.

(39) "Financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(40) "Fixture filing" means the filing of a financing statement covering goods that are or are to become fixtures and satisfying section 4-9-502 (a) and (b). The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

(41) "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.

(42) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes controllable electronic records, payment intangibles, and software.

(43) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(44) "Goods" means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

(45) "Governmental unit" means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a state, or a foreign country. The term includes an organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States.

(46) "Health-care-insurance receivable" means an interest in or claim under a policy of insurance that is a right to payment of a monetary obligation for health-care goods or services provided or to be provided.

(47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property; (ii) letters of credit; (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card; or (iv) writings that evidence chattel paper.

(48) "Inventory" means goods, other than farm products, which:

(A) Are leased by a person as lessor;

(B) Are held by a person for sale or lease or to be furnished under a contract of service;

(C) Are furnished by a person under a contract of service; or

(D) Consist of raw materials, work in process, or materials used or consumed in a business.

(49) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.

(50) "Jurisdiction of organization", with respect to a registered organization, means the jurisdiction under whose law the organization is organized.

(51) "Letter-of-credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.

(52) "Lien creditor" means:

(A) A creditor that has acquired a lien on the property involved by attachment, levy, or the like;

(B) An assignee for benefit of creditors from the time of assignment;

(C) A trustee in bankruptcy from the date of the filing of the petition; or

(D) A receiver in equity from the time of appointment.

(53) "Manufactured home" means a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this paragraph (53) except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States secretary of housing and urban development and complies with the standards established under Title 42 of the United States Code.

(54) "Manufactured-home transaction" means a secured transaction:

(A) That creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or

(B) In which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

(54.5) "Money" has the meaning in section 4-1-201 (b)(23), but does not include a deposit account.

(55) "Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation.

(56) "New debtor" means a person that becomes bound as debtor under section 4-9-203 (d) by a security agreement previously entered into by another person.

(57) "New value" means (i) money, (ii) money's worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(58) "Noncash proceeds" means proceeds other than cash proceeds.

(59) "Obligor" means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

(60) "Original debtor", except as used in section 4-9-310 (c), means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under section 4-9-203 (d).

(61) "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation. The term includes a controllable payment intangible.

(62) "Person related to", with respect to an individual, means:

(A) The spouse of the individual;

(B) A brother, brother-in-law, sister, or sister-in-law of the individual;

(C) An ancestor or lineal descendant of the individual or the individual's spouse; or

(D) Any other relative, by blood or marriage, of the individual or the individual's spouse who shares the same home with the individual.

(63) "Person related to", with respect to an organization, means:

(A) A person directly or indirectly controlling, controlled by, or under common control with the organization;

(B) An officer or director of, or a person performing similar functions with respect to, the organization;

(C) An officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A) of this paragraph (63);

(D) The spouse of an individual described in subparagraph (A), (B), or (C) of this paragraph (63); or

(E) An individual who is related by blood or marriage to an individual described in subparagraph (A), (B), (C), or (D) of this paragraph (63) and shares the same home with the individual.

(64) "Proceeds", except as used in section 4-9-609 (b), means the following property:

(A) Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;

(B) Whatever is collected on, or distributed on account of, collateral;

(C) Rights arising out of collateral;

(D) To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or

(E) To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

(65) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(66) "Proposal" means a record signed by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to sections 4-9-620, 4-9-621, and 4-9-622.

(67) Reserved.

(68) "Public organic record" means a record that is available to the public for inspection and is:

(A) A record consisting of the record initially filed with or issued by a state or the United States to form or organize an organization and any record filed with or issued by the state or the United States that amends or restates the initial record;

(B) An organic record of a business trust consisting of the record initially filed with a state and any record filed with the state that amends or restates the initial record, if a statute of the state governing business trusts requires that the record be filed with the state; or

(C) A record consisting of legislation enacted by the legislature of a state or the congress of the United States that forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the state or the United States that amends or restates the name of the organization.

(69) Repealed.

(70) Reserved.

(71) "Pursuant to commitment", with respect to an advance made or other value given by a secured party, means pursuant to the secured party's obligation, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation.

(72) "Record", except as used in "for record", "of record", "record or legal title", and "record owner", means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(73) "Registered organization" means an organization formed or organized solely under the law of a single state or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the state or the United States. The term includes a business trust that is formed or organized under the law of a single state if a statute of the state governing business trusts requires that the business trust's organic record be filed with the state.

(74) "Secondary obligor" means an obligor to the extent that:

(A) The obligor's obligation is secondary; or

(B) The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

(75) "Secured party" means:

(A) A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

(B) A person that holds an agricultural lien;

(C) A consignor;

(D) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;

(E) A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or

(F) A person that holds a security interest arising under section 4-2-401, 4-2-505, 4-2-711 (3), 4-2.5-508 (5), 4-4-210, or 4-5-117.5.

(76) "Security agreement" means an agreement that creates or provides for a security interest.

(77) Repealed.

(78) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.

(79) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(80) "Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.

(81) Repealed.

(82) "Termination statement" means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates either that it is a termination statement or that the identified financing statement is no longer effective.

(83) "Transmitting utility" means a person primarily engaged in the business of:

(A) Operating a railroad, subway, street railway, or trolley bus;

(B) Transmitting communications electrically, electromagnetically, or by light;

(C) Transmitting goods by pipeline or sewer; or

(D) Transmitting or producing and transmitting electricity, steam, gas, or water.

(b) "Control" as provided in section 4-7-106 and the following definitions in other articles apply to this article 9:

"Applicant"	Section 4-5-102.
"Beneficiary"	Section 4-5-102.
"Broker"	Section 4-8-102.
"Certificated security"	Section 4-8-102.
"Check"	Section 4-3-104.
"Clearing corporation"	Section 4-8-102.
"Contract for sale"	Section 4-2-106.
"Controllable electronic record"	Section 4-12-102.
"Customer"	Section 4-4-104.
"Entitlement holder"	Section 4-8-102.
"Financial asset"	Section 4-8-102.
"Holder in due course"	Section 4-3-302.
"Issuer" (with respect to a letter of credit or letter-of-credit right)	Section 4-5-102.
"Issuer" (with respect to a security)	Section 4-8-201.
"Issuer" (with respect to documents of title)	Section 4-7-102.
"Lease"	Section 4-2.5-103.
"Lease agreement"	Section 4-2.5-103.
"Lease contract"	Section 4-2.5-103.

"Leasehold interest"	Section 4-2.5-103.
"Lessee"	Section 4-2.5-103.
"Lessee in ordinary course of business"	Section 4-2.5-103.
"Lessor"	Section 4-2.5-103.
"Lessor's residual interest"	Section 4-2.5-103.
"Letter of credit"	Section 4-5-102.
"Merchant"	Section 4-2-104.
"Negotiable instrument"	Section 4-3-104.
"Nominated person"	Section 4-5-102.
"Note"	Section 4-3-104.
"Proceeds of a letter of credit"	Section 4-5-114.
"Protected purchaser"	Section 4-8-303.
"Prove"	Section 4-3-103.
"Qualifying purchaser"	Section 4-12-102.
"Sale"	Section 4-2-106.
"Securities account"	Section 4-8-501.
"Securities intermediary"	Section 4-8-102.
"Security"	Section 4-8-102.
"Security certificate"	Section 4-8-102.
"Security entitlement"	Section 4-8-102.
"Uncertificated security"	Section 4-8-102.

(c) Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article.

Source: L. 2001: Entire article R&RE, p. 1313, § 1, effective July 1. **L. 2002:** IP(a)(5) and (a)(46) amended, p. 937, § 1, effective August 7. **L. 2004:** (a)(77) amended, p. 1187, § 5, effective August 4. **L. 2006:** (a)(30) and (b) amended, p. 498, § 33, effective September 1. **L. 2007:** (b) amended, p. 376, § 30, effective August 3. **L. 2012:** (a)(7)(B), (a)(10), (a)(68), and (a)(73) amended and (a)(65) and (a)(66) added, (HB 12-1262), ch. 170, p. 595, § 1, effective July

1, 2013, and (a)(69)(B) added by revision, (HB 12-1262), ch. 170, pp. 595, 609, §§ 1, 18. **L. 2023:** IP(a), (a)(2), (a)(3), (a)(4)(A), (a)(11), (a)(42), (a)(47), (a)(61), (a)(66), and (b) amended, (a)(7), (a)(31), (a)(77), and (a)(81) repealed, and (a)(7.3), (a)(7.5), (a)(27.5), (a)(27.7), and (a)(54.5) added, (SB 23-090), ch. 136, p. 539, § 42, effective August 7.

Editor's note: (1) The provisions of this section are similar to provisions of several former sections as they existed prior to 2001. For a detailed comparison, see the comparative tables located in the back of the index.

(2) **Colorado legislative change:** Colorado substituted the phrase "Oil, gas, minerals, or other substances of value that may be extracted from the earth" for the phrase "Oil, gas, or other minerals" in subsection (a)(6) and added subsection (a)(8.5). Colorado added clause (ii) in subsection (a)(11), added subsection (a)(22.5), added the phrase "except as used in section 4-9-310 (c)," in subsection (a)(60), and added the phrase "except as used in section 4-9-609 (b)," in subsection (a)(64). Colorado reserved three definitional subsections, (a)(65) through (a)(67); all subsequent definitions are numbered correspondingly different from the uniform act. Colorado did not adopt the definition of a "public finance transaction".

(3) Subsections (65) and (66) are similar to subsections (68) and (69), respectively, as they existed prior to 2012.

(4) Subsection (a)(69)(B) provided for the repeal of subsection (69), effective July 1, 2013. (See L. 2012, pp. 595, 609.)

Cross references: For offenses relating to account, see § 18-5-502.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Commercial Law", see 58 Den. L.J. 279 (1981). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Commercial and Corporate Law", which discusses a Tenth Circuit decision dealing with perfection in proceeds in event of insolvency proceedings, see 65 Den. U. L. Rev. 469 (1988). For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2108 (1988).

Annotator's note. Since § 4-9-102 is similar to §§ 4-9-105, 4-9-106, 4-9-301, and 4-9-306 as they existed prior to the 2001 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

A debtor who makes representations in a security agreement regarding the intended use of collateral should be bound by those representations. That is especially true where the debtors fail to inform the creditor that they intend to use the collateral for other than personal, family, or household purposes. The classification of the collateral, for purposes of perfection of the security interest, is determined when the security interest attaches. The later use of the collateral for another purpose than as stated in the security agreement is irrelevant in determining whether the security interest is perfected. Nelson v. John Deere Credit, 340 B.R. 86 (Bankr. D. Colo. 2006).

A client's interest in property held in trust by a lawyer is not an "account" under subsection (a)(2). In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

Bank has security interest in proceeds generating "account". A bank has no security interest in the proceeds of either chickens or eggs, except to the extent such proceeds generated a prepetition "account" as defined in this section. K.L. Smith Enters., Ltd. v. United Bank, 2 B.R. 280 (Bankr. D. Colo. 1980).

"General intangible" does not include "a thing in action" to recover from an "account". Millennium Bank v. UPS Capital Bus. Credit, 2014 COA 30, 327 P.3d 335.

A chose in action arising from a right to the return of property advanced to a law firm in trust is a general intangible and does not constitute "cash proceeds". In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

Whether recovery from a lawsuit is categorized as proceeds of an "account" or a "general intangible" depends on the nature of the claim for which the damages are awarded. Arbitration award for a breach of an express warranty related to excess costs in labor and materials is a "general intangible", and the award is not attributable to an unrelated contractual relationship the debtor had with another party. Millennium Bank v. UPS Capital Bus. Credit, 2014 COA 30, 327 P.3d 335.

The right to collect annual campground membership dues is a right to payment for services rendered, which is an ordinary commercial account receivable. If the security interest is in accounts, the law of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or nonperfection of the security interest. Therefore, since the debtor was located at its place of business in Florida, Florida was the proper jurisdiction in which to file in order to perfect a security interest in the collateral, making the location of the collateral in Colorado irrelevant. Capitran Inc. v. Great W. Bank, 872 P.2d 1370 (Colo. App. 1994).

"Debtor" construed. Accommodation comakers and those others who will be called upon to pay deficiencies are "debtors" within the meaning of subsection (1)(d) and § 4-9-504 (3), and are entitled to notice of the disposition of the collateral. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

"Debtor" includes both the owner of the collateral and the obligor when they are not the same person. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

Subsection (1)(d) does not require "debtor" to be owner or have rights in the collateral. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

"Debtor" includes a guarantor and as a debtor the guarantor may not waive debtor's right to insist on a commercially reasonable disposition of collateral. May v. Women's Bank, N.A., 807 P.2d 1145 (Colo. 1991).

Because only an attorney can withdraw from a COLTAF account, a client's interest in property held in the account is the right to demand payment from the law firm, not from a bank. Under subsection (a)(29), this right to payment cannot be a "deposit account" because the demand goes from the client to the lawyer, rather than to a bank. In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

Definition of "goods" includes motor homes. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

An unperfected security interest becomes subordinate to the rights acquired by a lien creditor when a writ of garnishment is served on the garnishee at a time when the garnishor has no notice of the security interest. Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970).

For the inconsistency between § 4-9-203 and this section on subject of proceeds, see Fort Collins Prod. Credit Ass'n v. Carroll Dairy, 37 Colo. App. 536, 553 P.2d 95 (1976) (decided prior to the 1977 amendment of this section and § 4-9-203).

Nothing in the language of subsection (1) requires that the disposition of collateral must be final in order to generate proceeds. In re Clancy & Co. Const., Inc., 214 B.R. 387 (Bankr. D. Colo. 1997).

Effect of failure to use word "proceeds" in security agreement. Even absent use of the specific word "proceeds" in a security agreement, the lender continues, under the uniform commercial code, to have a secured interest in money received from the sale of personalty covered specifically in the agreement. Fort Collins Prod. Credit Ass'n v. Carroll Dairy, 37 Colo. App. 536, 553 P.2d 95 (1976).

Cattle which eat feed in which there is a security interest do not constitute proceeds of the collateral by application of this section. First Nat'l Bank v. Bostron, 39 Colo. App. 107, 564 P.2d 964 (1977).

There could be no traceable "proceeds" to which a security interest in cattle feed may be said to have attached when the cattle have consumed the feed, and therefore such a security interest could not survive consumption of the feed by the cattle. First Nat'l Bank v. Bostron, 37 Colo. App. 107, 564 P.2d 964 (1977).

Wool incentive payments are "proceeds" of the wool. In re Mahleres, 53 B.R. 86 (Bankr. D. Colo. 1985).

Satisfaction of judgment constituted only "identifiable proceeds in the hands

of the debtor", when the debtor paid to judgment creditor the cash proceeds of sale of equipment in which bank held security interest, and thus bank in enforcing its security interest in identifiable proceeds of sale was not entitled to recover from judgment creditor the amount paid by debtor. First Interstate Bank v. Ariz. Agrochemical, 731 P.2d 746 (Colo. App. 1986).

Applied in Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970); Rocky Mt. Ass'n of Credit Mgt. v. Hessler Mfg. Co., 37 Colo. App. 551, 553 P.2d 840 (1976); Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977); Bd. of County Comm'rs v. Berkeley Vill., 40 Colo. App. 431, 580 P.2d 1251 (1978); Dept. of Natural Res. v. Benjamin, 41 Colo. App. 520, 587 P.2d 1207 (1978); Weld Colo. Bank v. E & E Constr., Inc., 653 P.2d 758 (Colo. App. 1982); Heinrichsdorff v. Raat, 655 P.2d 860 (Colo. App. 1982); In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

4-9-103. Purchase-money security interest - application of payments - burden of establishing - definitions.

(a) In this section:

(1) "Purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and

(2) "Purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

(b) A security interest in goods is a purchase-money security interest:

(1) To the extent that the goods are purchase-money collateral with respect to that security interest;

(2) If the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest; and

(3) Also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.

(c) A security interest in software is a purchase-money security interest to the extent that the security interest also secures a purchase-money obligation incurred with respect to goods in which the secured party holds or held a purchase-money security interest if:

(1) The debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and

(2) The debtor acquired its interest in the software for the principal purpose of using the software in the goods.

(d) The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.

(e) In a transaction other than a consumer-goods transaction, if the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) In accordance with any reasonable method of application to which the parties agree;

(2) In the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(A) To obligations that are not secured; and

(B) If more than one obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

(f) In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:

(1) The purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(2) Collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(3) The purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

(g) In a transaction other than a consumer-goods transaction, a secured party claiming a purchase-money security interest has the burden of establishing the extent to which the security interest is a purchase-money security interest.

(h) The limitation of the rules in subsections (e), (f), and (g) of this section to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches.

Source: L. 2001: Entire article R&RE, p. 1327, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-107 as it existed prior to 2001.

ANNOTATION

Annotator's note. Since § 4-9-103 is similar to § 4-9-107 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

A purchase money security interest in property takes precedence over any preexisting lien. Chambers v. Nation, 178 Colo. 124, 497 P.2d 5 (1972).

If property comes into the hands of a purchaser already encumbered with a purchase money lien, a prior lien remains subordinate to the purchase money mortgage, and it cannot displace the security interest which is the subject matter of the purchase money agreement. Chambers v. Nation, 178 Colo. 124, 497 P.2d 5 (1972).

Loan may be partly purchase money and partly nonpurchase money. There is no requirement that an item secure only its purchase price, and a loan may be partly purchase money and partly nonpurchase money. In re Stevens, 24 B.R. 536 (Bankr. D. Colo. 1982).

The purchase money security interest portion of a debt is not destroyed or transformed by the nominal nonpurchase money security interest portion of the debt attributable to financing insurance. In re Madrid-Baskin, 619 B.R. 710 (Bankr. D. Colo. 2020).

The purchase money character of a security interest should be determined from all the surrounding circumstances. In re Stevens, 24 B.R. 536 (Bankr. D. Colo. 1982); In re Billings, 63 B.R. 717 (Bankr. D. Colo. 1986).

Refinancing will not always have the effect of destroying the purchase money security interest. In re Billings, 63 B.R. 717 (Bankr. D. Colo. 1986).

Refinancing of a purchase money loan does not automatically extinguish the creditor's purchase money security interest in the debtor's collateral and, thus, debtors could not avoid creditor's interest in bankruptcy proceeding. In re Billings, 838 F.2d 405 (10th Cir. 1988).

Negative equity financing of a vehicle trade-in is not a purchase-money obligation. In re McCauley, 398 B.R. 41 (Bankr. D. Colo. 2008).

Bankruptcy court applied dual status rule to case involving financing of negative equity on a vehicle trade-in. Lender had a purchase-money security interest only to the extent of the purchase

price of the new vehicle and the incidental transactional expenses. Financing of negative equity for trade-in vehicle was not entitled to purchase-money security interest treatment. Thus debtors had to treat proportion of debt attributable to purchase price of new vehicle and the incidental expenses as a secured claim. In re McCauley, 398 B.R. 41 (Bankr. D. Colo. 2008).

4-9-104. Control of deposit account.

(a) A secured party has control of a deposit account if:

(1) The secured party is the bank with which the deposit account is maintained;

(2) The debtor, secured party, and bank have agreed in a signed record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor;

(3) The secured party becomes the bank's customer with respect to the deposit account; or

(4) Another person, other than the debtor:

(A) Has control of the deposit account and acknowledges that it has control on behalf of the secured party; or

(B) Obtains control of the deposit account after having acknowledged that it will obtain control of the deposit account on behalf of the secured party.

(b) A secured party that has satisfied subsection (a) of this section has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.

Source: L. 2001: Entire article R&RE, p. 1328, § 1, effective July 1. **L. 2023:** (a)(2) and (a)(3) amended and (a)(4) added, (SB 23-090), ch. 136, p. 544, § 43, effective August 7.

4-9-105. Control of electronic copy of record evidencing chattel paper.

(a) A purchaser has control of an authoritative electronic copy of a record evidencing chattel paper if a system employed for evidencing the assignment of interests in the chattel paper reliably establishes the purchaser as the person to which the authoritative electronic copy was assigned.

(b) A system satisfies subsection (a) of this section if the record or records evidencing the chattel paper are created, stored, and assigned in a manner that:

(1) A single authoritative copy of the record or records exists which is unique, identifiable, and, except as otherwise provided in subsections (a)(4), (a)(5), and (a)(6) of this section, unalterable;

(2) The authoritative copy identifies the purchaser as the assignee of the record or records;

(3) The authoritative copy is communicated to and maintained by the purchaser or its designated custodian;

(4) Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the purchaser;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

(c) A system satisfies subsection (a) of this section, and a purchaser has control of an authoritative electronic copy of a record evidencing chattel paper, if the electronic copy, a record attached to or logically associated with the electronic copy, or a system in which the electronic copy is recorded:

(1) Enables the purchaser readily to identify each electronic copy as either an authoritative copy or a nonauthoritative copy;

(2) Enables the purchaser readily to identify itself in any way, including by name, identifying number, cryptographic key, office, or account number, as the assignee of the authoritative electronic copy; and

(3) Gives the purchaser exclusive power, subject to subsection (d) of this section, to:

(A) Prevent others from adding or changing an identified assignee of the authoritative electronic copy; and

(B) Transfer control of the authoritative electronic copy.

(d) Subject to subsection (e) of this section, a power is exclusive under subsections (c)(3)(A) and (c)(3)(B) of this section even if:

(1) The authoritative electronic copy, a record attached to or logically associated with the authoritative electronic copy, or a system in which the authoritative electronic copy is recorded limits the use of the authoritative electronic copy or has a protocol programmed to cause a change, including a transfer or loss of control; or

(2) The power is shared with another person.

(e) A power of a purchaser is not shared with another person under subsection (d)(2) of this section and the purchaser's power is not exclusive if:

(1) The purchaser can exercise the power only if the power also is exercised by the other person; and

(2) The other person:

(A) Can exercise the power without exercise of the power by the purchaser; or

(B) Is the transferor to the purchaser of an interest in the chattel paper.

(f) If a purchaser has the powers specified in subsections (c)(3)(A) and (c)(3)(B) of this section, the powers are presumed to be exclusive.

(g) A purchaser has control of an authoritative electronic copy of a record evidencing chattel paper if another person, other than the transferor to the purchaser of an interest in the chattel paper:

(1) Has control of the authoritative electronic copy and acknowledges that it has control on behalf of the purchaser; or

(2) Obtains control of the authoritative electronic copy after having acknowledged that it will obtain control of the electronic copy on behalf of the purchaser.

Source: L. 2001: Entire article R&RE, p. 1329, § 1, effective July 1. **L. 2012:** Entire section amended, (HB 12-1262), ch. 170, p. 596, § 2, effective July 1, 2013. **L. 2023:** (a), IP(b), (b)(1), (b)(2), (b)(3), and (b)(4) amended and (c), (d), (e), (f), and (g) added, (SB 23-090), ch. 136, p. 544, § 44, effective August 7.

4-9-106. Control of investment property.

(a) A person has control of a certificated security, uncertificated security, or security entitlement as provided in section 4-8-106.

(b) A secured party has control of a commodity contract if:

(1) The secured party is the commodity intermediary with which the commodity contract is carried; or

(2) The commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer.

(c) A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account.

Source: L. 2001: Entire article R&RE, p. 1329, § 1, effective July 1.

Editor's note: The provisions of this section are similar to former §§ 4-9-115 (e) and 4-8-106 as they existed prior to 2001.

4-9-107. Control of letter-of-credit right.

A secured party has control of a letter-of-credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under section 4-5-114 (c) or otherwise applicable law or practice.

Source: L. 2001: Entire article R&RE, p. 1330, § 1, effective July 1.

4-9-107.5. Control of controllable electronic record, controllable account, or controllable payment intangible.

(a) A secured party has control of a controllable electronic record as provided in section 4-12-105.

(b) A secured party has control of a controllable account or controllable payment intangible if the secured party has control of the controllable electronic record that evidences the controllable account or controllable payment intangible.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 546, § 45, effective August 7.

4-9-108. Sufficiency of description.

(a) Except as otherwise provided in subsections (c), (d), (e), and (f) of this section, a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Except as otherwise provided in subsection (d) of this section, a description of collateral reasonably identifies the collateral if it identifies the collateral by:

(1) Specific listing;

(2) Category, including a category determined by use of a numerical or other code included in forms and formats adopted from time to time by the secretary of state;

(3) Except as otherwise provided in subsection (e) of this section, a type of collateral defined in this title;

(4) Quantity;

(5) Computational or allocational formula or procedure; or

(6) Except as otherwise provided in subsection (c) of this section, any other method, if the identity of the collateral is objectively determinable.

(c) A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral.

(d) Except as otherwise provided in subsection (e) of this section, a description of a security entitlement, securities account, or commodity account is sufficient if it describes:

(1) The collateral by those terms or as investment property; or

(2) The underlying financial asset or commodity contract.

(e) A description only by type of collateral defined in this title is an insufficient description of:

(1) A commercial tort claim;

(2) In a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account; or

(3) A deposit account.

(f) Any description in the security agreement of personal property that includes consumer goods is sufficient as to the consumer goods only if it specifically identifies and itemizes such consumer goods.

Source: L. 2001: Entire article R&RE, p. 1330, § 1, effective July 1.

Editor's note: (1) The provisions of this section are similar to former §§ 4-9-110 and 4- 9-115 (3) as they existed prior to 2001.

(2) **Colorado legislative change:** Colorado added the phrase "including a category determined by use of a numerical or other code included in forms and formats adopted from time to time by the secretary of state;" in subsection (b)(2), added a new paragraph (3) to subsection (e), and added a new subsection (f).

ANNOTATION

Law reviews. For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968). For comment on In re Lehner appearing below, see 48 Den. L.J. 146 (1971). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

Annotator's note. Since § 4-9-108 is similar to § 4-9-110 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

This section is intended to demand specificity only in the security agreement. In re Lehner, 303 F. Supp. 317 (D. Colo. 1969), aff'd per curiam and reh'g denied, 427 F.2d 357 (10th Cir. 1970).

The sufficiency of the description in the financing statement is to be determined by § 4-9-402 (1). In re Lehner, 303 F. Supp. 317 (D. Colo. 1969), aff'd per curiam and reh'g denied, 427 F.2d 357 (10th Cir. 1970).

Use of terms defined in § 4-9-102 sufficient under subsection (b)(3) of this section to describe items of collateral. In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

The use of the term "consumer goods" fails to satisfy this section. In re Lehner, 303 F. Supp. 317, (D. Colo. 1969), aff'd per curiam and reh'g denied, 427 F.2d 357 (10th Cir. 1970).

The combination of defined collateral terms used as descriptions, preceding the grant of a lien in all personal property now owned or thereafter acquired, is sufficient to create a blanket lien notwithstanding subsection (c). In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

Collateral description in lease for use of landlord's building created an enforceable security interest in debtor's personal property where the lease described the collateral as all of the debtor's personal property and identified the location of the property. The collateral description in debtor's lease reasonably identified the secured collateral as all of the debtor's property at the jewelry store, including the scrap gold, merchandise, and business equipment and fixtures sold at a liquidation sale. This description is reasonably identified and objectively determinable under subsection (b)(6). In re Estate of Wheeler, 2013 COA 101, 410 P.3d 483.

Applied in Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977).

4-9-109. Scope.

(a) Except as otherwise provided in subsections (c), (d), and (e) of this section, this article applies to:

(1) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

(2) An agricultural lien;

(3) A sale of accounts, chattel paper, payment intangibles, or promissory notes;

(4) A consignment;

(5) A security interest arising under section 4-2-401, 4-2-505, 4-2-711 (3), or 4-2.5-508 (5), as provided in section 4-9-110; and

(6) A security interest arising under section 4-4-210 or 4-5-117.5.

(b) 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.

(c) This article does not apply to the extent that:

(1) A statute, regulation, or treaty of the United States preempts this article;

(2) A statute of this state governs or a constitutional provision provides authority for the creation, perfection, priority, or enforcement of tax liens;

(3) A statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the state, country, or governmental unit; or

(4) The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under section 4-5-114.

(d) This article does not apply to:

(1) A landlord's lien, other than an agricultural lien;

(2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but section 4-9-333 applies with respect to priority of the lien;

(3) An assignment of a claim for wages, salary, or other compensation of an employee;

(4) A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;

(5) An assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;

(6) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;

(7) An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;

(8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but sections 4-9-315 and 4-9-322 apply with respect to proceeds and priorities in proceeds;

(9) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;

(10) A right of recoupment or set-off, but:

(A) Section 4-9-340 applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and

(B) Section 4-9-404 applies with respect to defenses or claims of an account debtor;

(11) The creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:

(A) Liens on real property in sections 4-9-203 and 4-9-308;

(B) Fixtures in section 4-9-334;

(C) Fixture filings in sections 4-9-501, 4-9-502, 4-9-512, 4-9-516, and 4-9-519; and

(D) Security agreements covering personal and real property in section 4-9-604;

(12) An assignment of a claim arising in tort, other than a commercial tort claim, but sections 4-9-315 and 4-9-322 apply with respect to proceeds and priorities in proceeds;

(13) An assignment of a consumer deposit account in any transaction, but sections 4-9-315 and 4-9-322 apply with respect to proceeds and priorities in proceeds;

(13.5) An assignment of a deposit account in transactions where the principal or the maximum line of credit on a revolving loan account do not exceed one hundred thousand dollars, but sections 4-9-315 and 4-9-322 apply with respect to proceeds and priorities in proceeds. A "revolving loan account" means an arrangement between a creditor and a debtor whereby the

lender may permit the debtor, from time to time, to purchase or lease on credit or to obtain loans from the creditor.

(14) An assignment of an individual retirement account as defined in 26 U.S.C. sec. 408; or

(15) An assignment of any plan as defined in 26 U.S.C. sec. 401.

(e) The creation, perfection, priority, and enforcement of a security interest, lien, or pledge created by this state or a governmental unit of this state shall be governed by section 11-57-208 (2), C.R.S., and this article shall not apply to such a security interest, lien, or pledge regardless of whether, pursuant to section 11-57-204 (1), C.R.S., the state or such governmental unit elected to apply part 2 of article 57 of title 11, C.R.S., to such a security interest, lien, or pledge.

Source: L. 2001: Entire article R&RE, p. 1331, § 1, effective July 1.

Editor's note: (1) The provisions of this section are similar to former §§ 4-9-102 and 4-9-104 as they existed prior to 2001.

(2) **Colorado legislative change:** Colorado added subsection (e) to the list of exceptions in subsection (a) and added a new subsection (e). In subsection (c)(2), Colorado did not adopt the word "expressly" before the word "governs", added the phrase "or a constitutional provision provides authority for", and substituted the phrase "tax liens" for the phrase "a security interest created by this State or a governmental unit of this State". Colorado added new paragraphs (13.5), (14), and (15) to subsection (d).

ANNOTATION

Law reviews. For comment on Ware v. Barr appearing below, see 25 Rocky Mt. L. Rev. 98 (1952). For comment on Exch. Nat'l Bank v. Hough appearing below, see 31 Rocky Mt. L. Rev. 232 (1959). For note, "Filing Under the Uniform Commercial Code Act 9", see 38 U. Colo. L. Rev. 598 (1966). For comment on Rosenthal v. Whitehead appearing below, see 39 U. Colo. L. Rev. 167 (1966). For note, "The Landlord's Lien in Colorado Practice and Under the Bankruptcy Act", see 40 U. Colo. L. Rev. 402 (1968). For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L.J. 685 (1980). For article, "Commercial Law", see 59 Den. L.J. 227 (1982). For article, "Secured Transactions -- Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2108 (1988). For article, "Mastering the Maze of Secured Transactions -- Part 1", see 21 Colo. Law. 2329 (1992).

Annotator's note. Since § 4-9-109 is similar to §§ 4-9-102 and 4-9-104 as they existed prior to the 2001 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

The law pertaining to the assignment of contract rights is set forth in this section. Farmers Acceptance Corp. v. DeLozier, 178 Colo. 291, 496 P.2d 1016 (1972).

A court cannot through ancillary proceedings place a judgment creditor in a better or more favorable position than he would be in if levy were made upon the property. Hilst v. Bennett, 175 Colo. 78, 485 P.2d 880 (1971).

A court cannot require posting of bond. In ancillary proceedings in aid of execution on a judgment there is no jurisdiction in the courts to require a creditor to post a bond to secure payment of the judgment. Hilst v. Bennett, 175 Colo. 78, 485 P.2d 880 (1971).

For cases which construe provisions prior to U.C.C. concerning chattel mortgages, see Machette v. Wanless, 1 Colo. 225 (1870); Machette v. Wanless, 2 Colo. 169 (1873); Chapin v. Whitsett, 3 Colo. 315 (1877); Crane v. Chandler, 5 Colo. 21 (1879); George v. Tufts, 5 Colo. 162 (1879); Horner v. Stout, 5 Colo. 166 (1879); Cook v. Mann, 6 Colo. 21 (1881); Tabor v. Sampson, 7 Colo. 426, 4 P. 45 (1884); Wilcox v. Jackson, 7 Colo. 521, 4 P. 966 (1884); Frank v. Denver & R.G. Ry., 23 F. 123 (D. Colo. 1885); Wilson v. Voight, 9 Colo. 614, 13 P. 726 (1886); Brasher v. Christophe, 10 Colo. 284, 15 P. 403 (1887); Gerow v. Castello, 11 Colo. 560, 19 P. 505 (1888); Atchison v. Graham, 14 Colo. 217, 23 P. 876 (1890); Harbison v. Tufts, 1 Colo. App. 140, 27 P. 1014 (1891); Newman v. People ex rel. McHenry, 4 Colo. App. 46, 34 P. 1006 (1893); Foster v. Cramer, 19 Colo. 405, 35 P. 747 (1894); Colo. Sav. Bank v. Metro. Theater Co., 20 Colo. 313, 36 P. 902 (1894); Jones v. Clark, 20 Colo. 353, 38 P. 371 (1894); Roberts v. Johnson, 5 Colo. App. 406, 39 P. 596 (1895); Citizens' Coal & Coke Co. v. Stanley, 6 Colo. App. 181, 40 P. 693 (1895); Bank v. Hastings, 7 Colo. App. 129, 42 P. 691 (1895); Edinger v. Grace, 8 Colo. App. 21, 44 P. 855 (1896); Mumford v. Harris, 8 Colo. App. 51, 44 P. 772 (1896); Stanley v. Citizens' Coal & Coke Co., 24 Colo. 103, 49 P. 35 (1897); Burchinell v. Gorsline, 11 Colo. App. 22, 52 P. 413 (1898); Crocker v. Burns, 13 Colo. App. 54, 56 P. 199 (1899); Nichols v. Chittenden, 14 Colo. App. 49, 59 P. 954 (1899); First Congregational Church v. Grand Rapids Sch. Furn. Co., 15 Colo. App. 46, 60 P. 948 (1900); McGovney v. Gwillin, 16 Colo. App. 284, 65 P. 346 (1901); Morse v. Morrison, 16 Colo. App. 449, 66 P. 169 (1901); Clark v. Bright, 30 Colo. 199, 69 P. 506 (1902); Richardson v. Longmont Supply Ditch Co., 19 Colo. App. 483, 76 P. 546 (1904); Fischback v. Garrison Milling & Elevator Co., 20 Colo. App. 448, 79 P. 749 (1905); Cassell v. Deisher, 39 Colo. 367, 89 P. 773 (1907); Klug v. Munce, 40 Colo. 276, 90 P. 603 (1907); Street v. Sederburg, 41 Colo. 128, 92 P. 29 (1907); Hurt v. Hubbard, 41 Colo. 505, 92 P. 908 (1907); Simonson v. McHenry, 41 Colo. 508, 92 P. 906 (1907); Sigel-Campion Live Stock Comm'n Co. v. Holly, 44 Colo. 580, 101 P. 68 (1908); Fischbach v. Garrison Milling & Elevator

Co., 46 Colo. 29, 102 P. 895 (1909); Bradford v. Roberts, 46 Colo. 330, 104 P. 391 (1909); Babbitt v. Bent County Bank, 50 Colo. 258, 108 P. 1003 (1911); Owen v. Owens, 51 Colo. 93, 117 P. 134 (1911); Stumpff v. People, 51 Colo. 202, 117 P. 134 (1911); Ferris v. Chambers, 51 Colo. 368, 117 P. 994 (1911); Meador v. Cullison, 52 Colo. 172, 120 P. 145 (1911); Puzzle Mining & Reduction Co. v. Morse Bros. Mach. & Supply Co., 24 Colo. App. 74, 131 P. 791 (1913); Ellison v. Tuckerman, 24 Colo. App. 322, 134 P. 163 (1913); Booth v. Central Sav. Bank, 58 Colo. 519, 146 P. 240 (1915); Stitt v. Spengel House Furnishing Co., 58 Colo. 559, 146 P. 770 (1915); Sorrells v. Sigel-Campion Live Stock Comm'n Co., 27 Colo. App. 154, 148 P. 279 (1915); Thompson v. Rowe, 27 Colo. App. 361, 149 P. 849 (1915); Brown v. People, 61 Colo. 27, 155 P. 332 (1916); First Nat'l Bank v. Felter, 65 Colo. 370, 176 P. 496 (1918); Beatrice Creamery Co. v. Sylvester, 65 Colo. 569, 174 P. 154 (1919); J. D. Best & Co. v. Wolf Co., 67 Colo. 42, 185 P. 371 (1919); Strauss v. Austgen, 67 Colo. 207, 184 P. 299 (1919); Cobb v. Int'l State Bank, 67 Colo. 488, 186 P. 529 (1919); Cobb v. Aiello, 67 Colo. 533, 186 P. 531 (1919); Lampman v. Lamping, 70 Colo. 167, 199 P. 418 (1921); Littell v. Brayton Motor & Accessory Co., 70 Colo. 286, 201 P. 34 (1921); Lowdermilk v. People, 70 Colo. 459, 202 P. 118 (1921); Lewin v. Telluride Iron Works Co., 272 F. 590 (8th Cir. 1921); Turnbull v. Cole, 70 Colo. 364, 201 P. 887 (1922); Downer v. Bermingham, 71 Colo. 245, 205 P. 948 (1922); Metro. State Bank v. Wright, 72 Colo. 106, 209 P. 804 (1922); Russell v. First Nat'l Bank, 72 Colo. 312, 211 P. 372 (1922); Broadhead v. Farmers' State Bank, 72 Colo. 430, 211 P. 376 (1922); Sowards v. Jones, 75 Colo. 25, 223 P. 747 (1924); Hawkes v. First Nat'l Bank, 75 Colo. 47, 224 P. 224 (1924); Bogdon v. Fort, 75 Colo. 231, 225 P. 247 (1924); Anglo-American Mill Co. v. First Nat'l Bank, 76 Colo. 57, 230 P. 118 (1924); Welty v. Burks, 76 Colo. 365 231 P. 660 (1924); Rhodes v. Harmon, 76 Colo. 565, 231 P. 222 (1925); First Nat'l Bank v. O'Connell, 77 Colo. 275, 236 P. 1002 (1925); Walker v. Mathis, 78 Colo. 384, 242 P. 68 (1925); Radetsky v. Gramm-Bernstein Motor Truck Co., 4 F.2d 965 (8th Cir. 1925); Burroughs Adding Mach. Co. v. Bogdon, 9 F.2d 54 (8th Cir. 1925); First State Bank v. Fox, 10 F.2d 116 (8th Cir. 1925); Conrad v. Nat'l Bank, 78 Colo. 485, 242 P. 676 (1926); Wilder v. Colo. Motor Fin. Co., 79 Colo. 97, 244 P. 596 (1926); Lamon v. Harada, 80 Colo. 89, 249 P. 267 (1926); Broadbent v. McFerson 80 Colo. 264, 250 P. 852 (1926); Rocky Mt. Seed Co. v. McArthur, 85 Colo. 1, 272 P. 1117 (1928); Mosko v. Matthews, 87 Colo. 55, 284 P. 1021 (1930); McCormick v. First Nat'l Bank, 88 Colo. 599, 299 P. 7 (1931); Thimmig v. Segal, 89 Colo. 385, 3 P.2d 303 (1931); Illinois Bldg. Co. v. Patterson, 91 Colo. 391, 15 P.2d 699 (1932); Blackmer Furn. Co. v. Bingham, 92 Colo. 456, 21 P.2d 711 (1933); McMinn v. Harrison, 93 Colo. 5, 23 P.2d 944 (1933); McClain v. Saranac Mach. Co., 94 Colo. 145, 28 P.2d 1009 (1934); Conway v. Headquist, 95 Colo. 187, 34 P.2d 69 (1934); Tolland Co. v. First State Bank, 95 Colo. 321, 35 P.2d 867 (1934); Int'l Harvester Co. v. McFerson, 95 Colo. 482, 37 P.2d 390 (1934); Schreiber v. Colt, 80 F.2d 511 (10th Cir. 1935); Prather v. Auto Indus. Corp., 96

Colo. 516, 45 P.2d 628 (1935); Stokes v. Kirk, 97 Colo. 96, 47 P.2d 686 (1935); Thomas v. First Nat'l Bank, 97 Colo. 474, 51 P.2d 589 (1935); Fisher v. Norman Apts., 101 Colo. 173, 72 P.2d 1092 (1937); Stokes v. Kirk, 101 Colo. 591, 75 P.2d 1041 (1938); Paoli State Bank v. Barker, 108 Colo. 153, 113 P.2d 1004 (1941); Crosswhite v. People, 110 Colo. 584, 137 P.2d 399 (1943); Hofmann v. Lamb, 113 Colo. 585, 160 P.2d 995 (1945); Smith v. Greenberg, 121 Colo. 417, 218 P.2d 514 (1950); Denver Motor Fin. Co. v. Stevens, 128 Colo. 531, 265 P.2d 224 (1953); Central Fin. Corp. v. Calvert, 130 Colo. 519, 276 P.2d 990 (1954); In re Clements, 120 F. Supp. 224 (D. Colo. 1954); Rabtoay Gen. Tire Co. v. Colo. Kenworth Corp., 135 Colo. 110, 309 P.2d 616 (1957); Exch. Nat'l Bank v. Hough, 258 F.2d 785 (10th Cir. 1958); In re Maldonado, 171 F. Supp. 340 (D. Colo. 1959); Bank of Denver v. Legler, 142 Colo. 333, 350 P.2d 1059 (1960); Roylance v. Citizens Sav. Bank, 148 Colo. 423, 366 P.2d 557 (1961); Allan v. Diamond T Motor Car Co., 291 F.2d 115 (10th Cir. 1961); Rosenthal v. Whitehead, 159 Colo. 565, 413 P.2d 909 (1966); McCoy v. People, 165 Colo. 407, 439 P.2d 347 (1968); Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970); Am. Nat'l Bank v. Magor, 28 Colo. App. 522, 476 P.2d 267 (1970); Crepeau v. Renewal Guar. Corp., 29 Colo. App. 23, 478 P.2d 698 (1970) (decided under repealed §§ 21-1-1 et seq. and 21-2-1 et seq., C.R.S. 1963, §§ 20-1-1 et seq. and 20-2-1 et seq., CRS 53, CSA, C. 32, § 1 et seq., and laws antecedent to CSA, C. 32, § 1 et seq.).

For cases which construe provisions prior to U.C.C. concerning assignment of accounts receivable, see Ware v. Barr, 126 Colo. 311, 248 P.2d 1073 (1952); Rabtoay Gen. Tire Co. v. Colo. Kenworth Corp., 135 Colo. 110, 309 P.2d 616 (1957); In re Mile Hi Restaurants, Inc., 233 F. Supp. 936 (D. Colo. 1964); Rottman v. First Nat'l Bank, 401 F.2d 484 (10th Cir. 1969); Matson & Mulhausen Constr. Co. v. Boulevard Nat'l Bank, 28 Colo. App. 427, 475 P.2d 356 (1970); Crepeau v. Renewal Guar. Corp., 29 Colo. App. 23, 478 P.2d 698 (1970); McCormick v. Diamond Shamrock Corp., 175 Colo. 406, 487 P.2d 1333 (1971) (decided under repealed § 11-2-1 et seq., C.R.S. 1963, § 11-2-1 et seq., CRS 53, and CSA, C. 12A, § 1 et seq.).

Any transaction intended to create a security interest is subject to this article. Colo. Leasing Corp. v. Borquez, 738 P.2d 377 (Colo. App. 1986); Western Group Nurseries v. Pomeranz, 867 P.2d 12 (Colo. App. 1993).

A security interest may be created in numerous types of assets, including contract rights. Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977).

Right to reclaim is not a species of interest in goods which is the result of a transaction "intended to create a security interest" and is not created by contract as contemplated within the meaning of § 4-9-102. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Characterization of transaction as "lease" or "sale" is not controlling.

Whether a transaction is characterized as a lease or sale is not controlling, but rather it is the intention of the parties to create a security interest which is controlling, that intention to be determined by the facts of each case. H.M.O. Sys. v. Choicecare Health Servs., Inc., 665 P.2d 635 (Colo. App. 1983).

"Lease" agreement being held is a contract of sale creating security interest. Colo. Leasing Corp. v. Borquez, 738 P.2d 377 (Colo. App. 1986).

Profits from motel business are personalty and not an interest in real property. In re M. Vickers, 110 B.R. 332 (Bankr. D. Colo. 1990).

Security interest in automobiles do not attach until title certificates are delivered to bank. After the purchaser of some automobiles delivered its check to the seller, but before the certificates of title were transferred to a bank as the purchaser's agent, the purchaser executed a security agreement with the bank, intending to create a security interest in the automobiles to secure repayment of the bank's financing loan, until the certificates of title were properly transferred to the purchaser's agent, no right, title, or interest was created in the purchaser which would enable it to legally convey or encumber the automobiles. Therefore, although the bank and purchaser fully intended that the security interest attach to the automobiles at the time the loan funds were deposited in the purchaser's account, the absence of any legal right, title, or interest by the purchaser in the automobiles prevented the bank's security interest from attaching prior to the time that the certificates of title were delivered. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Security interests in realty paper represent a personal property right to receive payment and are governed by the UCC. Citicorp v. Fremont Nat. Bank, 738 P.2d 29 (Colo. App. 1987).

A seller's right to receive payment by virtue of an installment land sale contract is a personal property right and is governed by this article. Citicorp v. Fremont Nat. Bank, 738 P.2d 29 (Colo. App. 1987).

This article applies to the attachment and perfection of a bank's security interest in note and deed of trust which were delivered pursuant to a loan agreement, even though the deed of trust secured an interest in real estate. Jackson Co. Fed. Savings v. Maduff Mortgage Corp., 608 F. Supp. 588 (D. Colo. 1985).

The governmental subdivision or agency exclusion of subsection (e) covers only transactions in which the government is a debtor/borrower. Bowlen v. Fed. Deposit Ins. Corp., 815 P.2d 1013 (Colo. App. 1991).

A leasehold, although enumerated in a security agreement, is not subject to the provisions of the UCC under subsection (j). Hilst v. Bennett, 175 Colo. 78, 485 P.2d 880 (1971).

This law does not apply to creation, etc., of interest in or lien on real estate. By its very terms the UCC does not apply to the creation or transfer of an interest in or lien on real estate. Fort Collins Prod. Credit

Ass'n v. Carroll Dairy, 37 Colo. App. 536, 553 P.2d 95 (1976).

The right to proceeds from an installment land sale contract constitute a security interest to be governed by this article. Citicorp v. Fremont Nat. Bank, 738 P.2d 29 (Colo. App. 1987).

A perfected interest in property cannot be displaced by subsequent attorney's lien. This section provides a first lien to attorney on property of client, but lien is subject to security interest in client's property that was perfected prior to attorney's lien. Colo. Nat. Bank v. Zerobnick & Sander, 768 P.2d 1276 (Colo. App. 1989).

Applied in Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970); Rocky Mt. Ass'n of Credit Mgt. v. Hessler Mfg. Co., 37 Colo. App. 551, 553 P.2d 840 (1976); Bd. of County Comm'rs v. Berkeley Vill., 40 Colo. App. 431, 580 P.2d 1251 (1978); James v. Ford Motor Credit Co., 638 F.2d 147 (10th Cir. 1980); Jackson v. Sec. Indus. Bank, 4 B.R. 293 (Bankr. D. Colo. 1980); Swofford v. Colo. Nat'l Bank, 628 P.2d 184 (Colo. App. 1981); Wiley v. Bank of Fountain Valley, 632 P.2d 282 (Colo. App. 1981); Young v. Golden State Bank, 632 P.2d 1053 (Colo. App. 1981); ITT Diversified Credit Corp. v. Couch, 669 P.2d 1355 (Colo. 1983).

4-9-110. Security interests arising under article 2 or 2.5.

A security interest arising under section 4-2-401, 4-2-505, 4-2-711 (3), or 4-2.5-508 (5) is subject to this article. However, until the debtor obtains possession of the goods:

(1) The security interest is enforceable, even if section 4-9-203 (b)(3) has not been satisfied;

(2) Filing is not required to perfect the security interest;

(3) The rights of the secured party after default by the debtor are governed by article 2 or 2.5 of this title; and

(4) The security interest has priority over a conflicting security interest created by the debtor.

Source: L. 2001: Entire article R&RE, p. 1333, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-113 as it existed prior to 2001.

ANNOTATION

Annotator's note. Since § 4-9-110 is similar to § 4-9-113 as it existed prior to the 2001 repeal and reenactment of this article, a relevant case construing that provision has

been included in the annotations to this section.

Lessor has no security interest in extracted gravel remaining on leased premises. The owner of a gravel pit who executes a lease allowing the extraction of gravel from his pit does not have a security interest in extracted gravel remaining on the leased premises after the right to extract gravel is terminated. The lessee acquires possession of the gravel once it is extracted. Palmer v. Corey (In re Musick Constr., Inc.), 34 B.R. 105 (Bankr. D. Colo. 1983).

PART 2

EFFECTIVENESS OF SECURITY AGREEMENT; ATTACHMENT OF SECURITY INTEREST; RIGHTS OF PARTIES TO SECURITY AGREEMENT

4-9-201. General effectiveness of security agreement.

(a) Except as otherwise provided by this title, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) A transaction subject to this article 9 is subject to any applicable rule of law that establishes a different rule for consumers and any other statute or rule of this state that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit and any consumer protection statute or rule of this state, including, but not limited to, the "Uniform Consumer Credit Code", articles 1 to 9 of title 5; the "Colorado Consumer Protection Act", article 1 of title 6; "assignment of wages", article 9 of title 8; "property and earnings exempt", article 54 of title 13; and the "Colorado Fair Debt Collection Practices Act", article 16 of title 5.

(c) In case of conflict between this article and a rule of law, statute, or regulation described in subsection (b) of this section, the rule of law, statute, or regulation controls. Failure to comply with a statute or regulation described in subsection (b) of this section has only the effect the statute or regulation specifies.

(d) This article does not:

(1) Validate any rate, charge, agreement, or practice that violates a rule of law, statute, or regulation described in subsection (b) of this section; or

(2) Extend the application of the rule of law, statute, or regulation to a transaction not otherwise subject to it.

Source: L. 2001: Entire article R&RE, p. 1334, § 1, effective July 1. **L. 2002:** (b) and (c) amended, p. 937, § 2, effective August 7. **L. 2017:** (b) amended, (HB 17-1238), ch. 260, p. 1169, § 5, effective August 9.

Editor's note: (1) The provisions of this section are similar to former §§ 4-9-201 and 4-9-203 (4) as they existed prior to 2001.

(2) **Colorado legislative change:** Colorado did not adopt the phrase "rule of law" in subsections (b) and (c) in 2001 when this article was repealed and reenacted. The phrase was subsequently adopted in 2002.

ANNOTATION

Law reviews. For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968).

Annotator's note. Since § 4-9-201 is similar to §§ 4-9-201 and 4-9-203 as they existed prior to the 2001 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

Security agreement is effective between parties except as specifically provided. It is the policy of the UCC that a security agreement shall be effective between the parties and against other parties except as specifically provided otherwise in the code. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), aff'd, 184 Colo. 166, 519 P.2d 354 (1974).

Judicial lien takes priority. A perfected security interest securing an obligation that was undertaken by debtor before creation of a judicial lien took priority over the lien even if such obligation did not become due until after the lien's creation. Alling v. Am. Tool and Grinding Co., Inc., 648 F. Supp. 1344 (D. Colo. 1986).

Extension of security agreement to include additional amounts need not adhere to any particular form where the original agreement or indenture is valid and does not prescribe any particular form for extension agreements. The extension agreement operates as a modification of the original note amount. Vance v. Casebolt, 841 P.2d 394 (Colo. App. 1992).

There is an inconsistency between this section and former § 4-9-306 on subject of proceeds. Fort Collins Prod. Credit Ass'n v. Carroll Dairy, 37 Colo. App. 536, 553 P.2d 95 (1976) (decided prior to the 1977 amendment of this section and § 4-9-306).

Applied in Young v. Golden State Bank, 632 P.2d 1053 (Colo. App. 1981); Layne v. Fort Carson Nat'l Bank, 655 P.2d 856 (Colo. App. 1982); ITT Diversified Credit Corp. v. Couch, 669 P.2d 1355 (Colo. 1983); Bank of Am. v. Denver Hotel Ass'n, 830 P.2d 1138 (Colo. App. 1992).

4-9-202. Title to collateral immaterial.

Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes, the provisions of this article with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.

Source: L. 2001: Entire article R&RE, p. 1334, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-202 as it existed prior to 2001.

ANNOTATION

Annotator's note. The following annotations include a case decided under this section as it existed prior to its 2001 repeal and reenactment.

Failure to deliver bill of sale after giving buyer possession of assets is considered a reservation. Where plaintiffs' testimony revealed that it was their intent to sell the business and its assets to the buyer, the failure to deliver the bill of sale after giving the buyer possession of the assets was, at most, a reservation of title, and as such acted as a reservation of a security interest in the property. Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977).

4-9-203. Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.

(a) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) Except as otherwise provided in subsections (c) to (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

(A) The debtor has signed a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) The collateral is not a certificated security and is in the possession of the secured party under section 4-9-313 pursuant to the debtor's security agreement;

(C) The collateral is a certificated security in registered form, and the security certificate has been delivered to the secured party under section 4-8-301 pursuant to the debtor's security agreement;

(D) The collateral is controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, electronic documents, investment property, or letter-of-credit rights, and the secured party has control under section 4-7-106, 4-9-104, 4-9-106, 4-9-107, or 4-9-107.5 pursuant to the debtor's security agreement; or

(E) The collateral is chattel paper, and the secured party has possession and control under section 4-9-314.5 pursuant to the debtor's security agreement.

(c) Subsection (b) of this section is subject to section 4-4-210 on the security interest of a collecting bank, section 4-5-117.5 on the security interest of a letter-of-credit issuer or nominated person, section 4-9-110 on a security interest arising under article 2 or 2.5 of this title, and section 4-9-206 on security interests in investment property.

(d) A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) The agreement satisfies paragraph (3) of subsection (b) of this section with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by section 4-9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

(j) No security interest in consumer goods owned by a married person and used primarily for personal, family, or household purposes, other than property referred to in section 4-9-311 and other than any purchase money security interest, shall be enforceable unless the security agreement describing the collateral in accordance with section 4-9-108 is authenticated by both husband and wife if they are residing together at the time the security interest is created.

Source: L. 2001: Entire article R&RE, p. 1334, § 1, effective July 1. **L. 2006:** (b)(3)(D) amended, p. 500, § 34, effective September 1. **L. 2023:** (b)(3)(A), (b)(3)(C), and (b)(3)(D) amended and (b)(3)(E) added, (SB 23-090), ch. 136, p. 546, § 46, effective August 7.

Editor's note: (1) The provisions of this section are similar to provisions of several former sections as they existed prior to 2001. For a detailed comparison, see the comparative tables located in the back of the index.

(2) **Colorado legislative change:** Colorado added a new subsection (j).

ANNOTATION

Law reviews. For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Commercial and Corporate Law", which discusses a Tenth Circuit decision dealing with description of crops in financing statements, see 65 Den. U. L. Rev. 469 (1988).

Annotator's note. The following annotations include cases decided under this section as it existed prior to its 2001 repeal and reenactment.

When security interest may attach to debtor's accounts receivable. A security interest cannot attach to the accounts receivable of a debtor, if the debtor does not have a "right to payment", Weld Colo. Bank

v. E & E Constr., Inc., 653 P.2d 758 (Colo. App. 1982).

Security interest may attach to accounts receivable of public contractor. A bank's security interest in the accounts receivable of a public contractor is valid only insofar as the contractor has rights to the funds retained by the public body to ensure the payment of any claims against the contractor. Where a supplier files a notice of claim with the public body, the contractor has no rights to these funds until this claim is settled. Thus, the security interest does not attach to these funds. Heinrichsdorff v. Raat, 655 P.2d 860 (Colo. App. 1982).

Right of reformation due to mutual mistake not displaced by this section in cases of security agreements. Although this section requires a security agreement to be in writing, the fact that an agreement must be in writing to satisfy a statute of frauds is not inconsistent with reformation of that written agreement if, by the reason of mutual mistake, the true agreement of the parties is not expressed in writing. Medallion Biomed., LLC v. Rosania, 298 B.R. 442 (Bankr. D. Colo. 2003).

Interest under § 38-22-127 claim takes priority over prior perfected security interest. An unsecured supplier claiming an interest under § 38-22-127, which imposes a trust fund for materialmen and laborers, takes priority over a prior perfected security interest in all present and future accounts receivable and proceeds of accounts. First Com. Corp. v. First Nat'l Bancorporation, Inc., 572 F. Supp. 1430 (D. Colo. 1983).

There is an inconsistency between this section and former § 4-9-306 on subject of proceeds. Fort Collins Prod. Credit Ass'n v. Carroll Dairy, 37 Colo. App. 536, 553 P.2d 95 (1976) (decided prior to the 1977 amendment of this section and § 4-9-306).

Lessor has no security interest in extracted gravel remaining on leased premises. The owner of a gravel pit who executes a lease allowing the extraction of gravel from his pit does not have a security interest in extracted gravel remaining on the leased premises after the right to extract gravel is terminated. The lessee acquires possession of the gravel once it is extracted. Palmer v. Corey (In re Musick Constr., Inc.), 34 B.R. 105 (Bankr. D. Colo. 1983).

Security agreement which provides that secured collateral includes debtor's tangible personal property "now or hereafter acquired" does not cover property subsequently acquired by a third party who purchased debtor's property in foreclosure. This is true even though the third party has a director, officer, and minority shareholder in common with the debtor. Vance v. Casebolt, 841 P.2d 394 (Colo. App. 1992).

Trial court did not err in holding that an unpaid seller in a cash sale did not take priority over a perfected security interest. UCC applies to determine when the title to heifers passed. Here title passed to debtor upon delivery of heifers to debtor. At the time of delivery creditor's interest in the heifers was sufficient to allow creditor's perfected security interest in after-acquired property to attach. This interest takes priority over the interests of the cash seller.

Coop. Fin. Ass'n v. B & J Cattle, 937 P.2d 915 (Colo. App. 1997).

Trial court did not err that value had been given. Agreements, including assuming the responsibility to pay long-term liabilities and entering into a security agreement, constituted sufficient consideration to support a simple contract. Compass Bank v. Kone, 134 P.3d 500 (Colo. App. 2006).

Under the circumstances, a stock redemption agreement and its various incorporated exhibits constitute an integrated and authenticated security agreement that provided a description of the collateral. Compass Bank v. Kone, 134 P.3d 500 (Colo. App. 2006).

Applied in Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970); Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), aff'd, 184 Colo. 166, 519 P.2d 354 (1974); Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977); Bank of Am. Nat'l Trust & Savings Ass'n v. Denver Hotel Ass'n Ltd. P'ship, 830 P.2d 1138 (Colo. App. 1992).

4-9-204. After-acquired property - future advances.

(a) Except as otherwise provided in subsection (b) of this section, a security agreement may create or provide for a security interest in after-acquired collateral.

(b) Subject to subsection (b.1) of this section, a security interest does not attach under a term constituting an after-acquired property clause to:

(1) Consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within ten days after the secured party gives value; or

(2) A commercial tort claim.

(b.1) Subsection (b) of this section does not prevent a security interest from attaching:

(1) To consumer goods as proceeds under section 4-9-315 (a) or commingled goods under section 4-9-336 (c);

(2) To a commercial tort claim as proceeds under section 4-9-315 (a); or

(3) Under an after-acquired property clause to property that is proceeds of consumer goods or a commercial tort claim.

(c) A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment.

Source: L. 2001: Entire article R&RE, p. 1336, § 1, effective July 1. **L. 2023:** IP(b) amended and (b.1) added, (SB 23-090), ch. 136, p. 547, § 47, effective August 7.

Editor's note: This section is similar to former § 4-9-204 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Commercial and Corporate Law", which discusses a Tenth Circuit decision dealing with a participating bank's risk under a loan participation agreement, see 65 Den. U. L. Rev. 469 (1988).

Annotator's note. The following annotations include cases decided under this section as it existed prior to its 2001 repeal and reenactment.

It is determined when security interest may attach to debtor's accounts receivable. A security interest cannot attach to the accounts receivable of a debtor, if the debtor does not have a "right to payment". Weld Colo. Bank v. E & E Constr., Inc., 653 P.2d 758 (Colo. App. 1982).

Future advance clauses on printed forms are not to secure later purchases unless it is clear the parties contemplated this at the time the agreement was made. The true intent of the parties is the sole controlling factor. In re Grizaffi, 23 B.R. 137 (Bankr. D. Colo. 1982).

"Floating liens" are limited. Even though "floating liens" are sanctioned under subsection (3), the secured party does not obtain a security interest in collateral for contingent contractual liabilities not of the same nature. In re Grizaffi, 23 B.R. 137 (Bankr. D. Colo. 1982).

"Dragnet" clauses construed against drafter. A clause in a printed form attempting to draw in as security all other and future debts and all present and future property, which is called a "dragnet" clause, is to be construed strictly against the party drafting the clause. In re Grizaffi, 23 B.R. 137 (Bankr. D. Colo. 1982).

Bank's security interest is attached at instant title certificates delivered. A bank's security interest in automobiles attached to the automobiles at the same instant that the titles were delivered to the bank. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

After the purchaser of some automobiles delivered its check to the seller, but before the certificates of title were transferred to a bank as the purchaser's agent, the purchaser executed a security agreement with the bank, intending to create a security interest in the automobiles to secure repayment of the bank's financing loan, until the

certificates of title were properly transferred to the purchaser's agent, no right, title, or interest was created in the purchaser which would enable it to legally convey or encumber the automobiles. Therefore, although the bank and purchaser fully intended that the security interest attach to the automobiles at the time the loan funds were deposited in the purchaser's account, the absence of any legal right, title, or interest by the purchaser in the automobiles prevented the bank's security interest from attaching prior to the time that the certificates of title were delivered. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Attachment was never effected where bailee at the time it gave a security interest in its inventory to a bank had no rights of its own in the property. Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

Applied in Greeley Nat. Bank v. Sloan, 677 P.2d 409 (Colo. App. 1983); Janitell v. State Bank of Wiley, 919 P.2d 921 (Colo. App. 1996); In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

4-9-205. Use or disposition of collateral permissible.

(a) A security interest is not invalid or fraudulent against creditors solely because:

(1) The debtor has the right or ability to:

(A) Use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods;

(B) Collect, compromise, enforce, or otherwise deal with collateral;

(C) Accept the return of collateral or make repossessions; or

(D) Use, commingle, or dispose of proceeds; or

(2) The secured party fails to require the debtor to account for proceeds or replace collateral.

(b) This section does not relax the requirements of possession if attachment, perfection, or enforcement of a security interest depends upon possession of the collateral by the secured party.

Source: L. 2001: Entire article R&RE, p. 1336, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-205 as it existed prior to 2001.

4-9-206. Security interest arising in purchase or delivery of financial asset.

(a) A security interest in favor of a securities intermediary attaches to a person's security entitlement if:

(1) The person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase; and

(2) The securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(b) The security interest described in subsection (a) of this section secures the person's obligation to pay for the financial asset.

(c) A security interest in favor of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if:

(1) The security or other financial asset:

(A) In the ordinary course of business is transferred by delivery with any necessary indorsement or assignment; and

(B) Is delivered under an agreement between persons in the business of dealing with such securities or financial assets; and

(2) The agreement calls for delivery against payment.

(d) The security interest described in subsection (c) of this section secures the obligation to make payment for the delivery.

Source: L. 2001: Entire article R&RE, p. 1337, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-116 as it existed prior to 2001.

4-9-207. Rights and duties of secured party having possession or control of collateral.

(a) Except as otherwise provided in subsection (d) of this section, a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) Except as otherwise provided in subsection (d) of this section, if a secured party has possession of collateral:

(1) Reasonable expenses, including the cost of 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;

(2) The risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;

(3) The secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(4) The secured party may use or operate the collateral:

(A) For the purpose of preserving the collateral or its value;

(B) As permitted by an order of a court having competent jurisdiction; or

(C) Except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) Except as otherwise provided in subsection (d) of this section, a secured party having possession of collateral or control of collateral under section 4-7-106, 4-9-104, 4-9-105, 4-9-106, 4-9-107, or 4-9-107.5:

(1) May hold as additional security any proceeds, except money or funds, received from the collateral;

(2) Shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) May create a security interest in the collateral.

(d) If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

(1) Subsection (a) of this section does not apply unless the secured party is entitled under an agreement:

(A) To charge back uncollected collateral; or

(B) Otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and

(2) Subsections (b) and (c) of this section do not apply.

Source: L. 2001: Entire article R&RE, p. 1337, § 1, effective July 1. **L. 2006:** IP(c) amended, p. 500, § 35, effective September 1. **L. 2023:** IP(c) amended, (SB 23-090), ch. 136, p. 547, § 48, effective August 7.

Editor's note: This section is similar to former § 4-9-207 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983).

Annotator's note. The following annotations include a case decided under this section as it existed prior to its 2001 repeal and reenactment.

Buyer vested with security interest upon revocation of acceptance. If a revocation of acceptance of a mobile home is justifiable under § 4-2-608, § 4-2-711(3) vests the buyer with a security interest in the home, and such an interest authorizes continued possession to preserve the collateral, pursuant to this section, subject to the seller's right to an offset for the rental value of the home. Keen v. Modern Trailer Sales, Inc., 40 Colo. App. 527, 578 P.2d 668 (1978).

4-9-208. Additional duties of secured party having control of collateral.

(a) This section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within five business days after receiving a signed demand by the debtor:

(1) A secured party having control of a deposit account under section 4-9-104 (a)(2) shall send to the bank with which the deposit account is maintained a signed record that releases the bank from any further obligation to comply with instructions originated by the secured party;

(2) A secured party having control of a deposit account under section 4-9-104 (a)(3) shall:

(A) Pay the debtor the balance on deposit in the deposit account; or

(B) At the request of the debtor, transfer the balance on deposit into a deposit account in the debtor's name, providing sufficient information so that the debtor can access the deposit account.

(2.5) The amount due the debtor shall also include all interest earned on the deposit account to the extent not already credited to the deposit account or paid to the debtor from the date the conditions in subsection (a) of this section are satisfied.

(3) A secured party, other than a buyer, having control under section 4-9-105 of an authoritative electronic copy of a record evidencing chattel paper shall transfer control of the electronic copy to the debtor or a person designated by the debtor;

(4) A secured party having control of investment property under section 4-8-106 (d)(2) or 4-9-106 (b) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained a signed record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party;

(5) A secured party having control of a letter-of-credit right under section 4-9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party a signed release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party;

(6) A secured party having control under section 4-7-106 of an authoritative electronic copy of an electronic document shall transfer control of the electronic copy to the debtor or a person designated by the debtor; and

(7) A secured party having control under section 4-12-105 of a controllable electronic record, other than a buyer of a controllable account or controllable payment intangible evidenced by the controllable electronic record, shall transfer control of the controllable electronic record to the debtor or a person designated by the debtor.

Source: L. 2001: Entire article R&RE, p. 1338, § 1, effective July 1. **L. 2006:** (b)(4) and (b)(5) amended and (b)(6) added, p. 500, § 36, effective September 1. **L. 2023:** IP(b), (b)(1), (b)(3), (b)(4), (b)(5), and (b)(6) amended and (b)(7) added, (SB 23-090), ch. 136, p. 547, § 49, effective August 7.

Editor's note - Colorado legislative change: Colorado substituted the phrase "five business" for the word "10" in the introductory portion to subsection (b), added the phrases "At the request of the debtor," and "providing sufficient information so that the debtor can access the deposit account" in subsection (b)(2)(B), and added a new subsection (b)(2.5).

4-9-209. Duties of secured party if account debtor has been notified of assignment.

(a) Except as otherwise provided in subsection (c) of this section, this section applies if:

(1) There is no outstanding secured obligation; and

(2) The secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within ten days after receiving a signed demand by the debtor, a secured party shall send to an account debtor that has received notification under section 4-9-406 (a) or 4-12-106 (b) of an assignment to the secured party as assignee a signed record that releases the account debtor from any further obligation to the secured party.

(c) This section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible.

Source: L. 2001: Entire article R&RE, p. 1340, § 1, effective July 1. **L. 2023:** (b) amended, (SB 23-090), ch. 136, p. 549, § 50, effective August 7.

4-9-210. Request for accounting - request regarding list of collateral or statement of account - definitions.

(a) In this section:

(1) "Request" means a record of a type described in paragraph (2), (3), or (4) of this subsection (a).

(2) "Request for an accounting" means a record signed by a debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request.

(3) "Request regarding a list of collateral" means a record signed by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request.

(4) "Request regarding a statement of account" means a record authenticated by a debtor requesting that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request.

(b) Subject to subsections (c), (d), (e), and (f) of this section, a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within fourteen days after receipt:

(1) In the case of a request for an accounting, by signing and sending to the debtor an accounting; and

(2) In the case of a request regarding a list of collateral or a request regarding a statement of account, by signing and sending to the debtor an approval or correction.

(c) A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor a signed record including a statement to that effect within fourteen days after receipt.

(d) A person that receives a request regarding a list of collateral, that claims no interest in the collateral when it receives the request, and that claimed an interest in the collateral at an earlier time shall comply with the request within fourteen days after receipt by sending to the debtor a signed record:

(1) Disclaiming any interest in the collateral; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the collateral.

(e) A person that receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when it receives the request, and that claimed an interest in the obligations at an earlier time shall comply with the request within fourteen days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the obligations; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

(f) A debtor is entitled without charge to a response to a request under this section during any six-month period for each (i) an accounting, (ii) regarding a list of collateral, and (iii) regarding a statement of account. The secured party may require payment of a charge, not exceeding fifteen dollars, for each additional response. Wherever the term "debtor" is used in this section, it means either the debtor or the person designated by the debtor to receive a response in a notification authenticated by the debtor and received by the secured party or other applicable person at or prior to the time of a request.

Source: L. 2001: Entire article R&RE, p. 1340, § 1, effective July 1. **L. 2023:** (a)(2), (a)(3), (b), (c), IP(d) amended, (SB 23-090), ch. 136, p. 549, § 51, effective August 7.

Editor's note: (1) This section is similar to former § 4-9-208 as it existed prior to 2001.

(2) **Colorado legislative change:** In subsection (f), Colorado changed the word "one" to "a", added the phrase "for each (i) an accounting, (ii) regarding a list of collateral, and (iii) regarding a statement of account", changed the fee from $25 to $15, and added the last sentence.

ANNOTATION

Annotator's note. Since § 4-9-210 is similar to § 4-9-208 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

If a potential creditor seeks more detailed information, he may request it from the debtor, and the burden shifts to the debtor to contact the secured party for specific details. In re Colorado Mercantile Co., 299 F. Supp. 55 (D. Colo. 1969).

Applied in Platte Valley Bank v. B & J Constr., Inc., 44 Colo. App. 21, 606 P.2d 455 (1980).

PART 3

PERFECTION AND PRIORITY

4-9-301. Law governing perfection and priority of security interests.

Except as otherwise provided in sections 4-9-303 to 4-9-306.7, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in subsection (4) of this section, while negotiable tangible documents, goods, instruments, or money is located in a jurisdiction, the local law of that jurisdiction governs:

(A) Perfection of a security interest in the goods by filing a fixture filing;

(B) Perfection of a security interest in timber to be cut; and

(C) The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.

Source: L. 2001: Entire article R&RE, p. 1341, § 1, effective July 1. **L. 2006:** IP(3) amended, p. 501, § 37, effective September 1. **L. 2023:** IP and IP(3) amended, (SB 23-090), ch. 136, p. 550, § 52, effective August 7.

Editor's note: This section is similar to former § 4-9-103 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Annotator's note. Since § 4-9-301 is similar to § 4-9-103 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

The validity of foreign security interests in personal property is governed by this section except to the extent that motor vehicle titles are governed by § 42-6-131, and the usage of the broad term "motor vehicle titles" indicates the legislative intent that whenever the question as to title to a motor vehicle arises with regard to a foreign security interest, the question is to be answered by application of § 42-6-131 and is precluded from the application of the provisions of § 4-9-103(3). Doenges-Glass, Inc. v. Gen. Motors Acceptance Corp., 175 Colo. 518, 488 P.2d 879 (1971).

Code as enacted in New York determined validity and perfection of security interest. Where seller's only office is located in New York, and assignee of seller's accounts receivable is a New York corporation, the requirements of the uniform commercial code as enacted by New York determines the validity and perfection of assignee's security interest in accounts receivable. Barocas v. Bohemia Import Co., 33 Colo. App. 263, 518 P.2d 850 (1974).

The right to collect annual campground membership dues is a right to payment for services rendered, which is an ordinary commercial account receivable. If the security interest is in accounts, the law of the jurisdiction in which the debtor is located governs the perfection and the effect

of perfection or nonperfection of the security interest. Therefore, since the debtor was located at its place of business in Florida, Florida was the proper jurisdiction in which to file in order to perfect a security interest in the collateral, making the location of the collateral in Colorado irrelevant. Capitran Inc. v. Great W. Bank, 872 P.2d 1370 (Colo. App. 1994).

Farm combine which was type used by custom crop cutting in multi-state operations is mobile equipment within the meaning of § 4-9-103 (3)(a). Golden Plains Credit Union v. Konkel, 759 P.2d 788 (Colo. App. 1988), aff'd in part, rev'd in part, 778 P.2d 660 (Colo. 1989).

The provisions of this section and § 4-9-401 (1) are not mutually exclusive and, if equipment meets the requirements of both statutory provisions, it must be considered to fall into both categories. Golden Plains Credit Union v. Konkel, 759 P.2d 788 (Colo. App. 1988), aff'd in part, rev'd in part, 778 P.2d 660 (Colo. 1989).

4-9-302. Law governing perfection and priority of agricultural liens.

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.

Source: L. 2001: Entire article R&RE, p. 1342, § 1, effective July 1.

4-9-303. Law governing perfection and priority of security interests in goods covered by a certificate of title.

(a) This section applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.

(b) Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.

(c) The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

Source: L. 2001: Entire article R&RE, p. 1342, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-103 as it existed prior to 2001.

4-9-304. Law governing perfection and priority of security interests in deposit accounts.

(a) The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank even if the transaction does not bear any relation to the bank's jurisdiction.

(b) The following rules determine a bank's jurisdiction for purposes of this part 3:

(1) If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of this part 3, this article, or this title, that jurisdiction is the bank's jurisdiction.

(2) If paragraph (1) of this subsection (b) does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) of this subsection (b) applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(4) If none of paragraphs (1), (2), and (3) of this subsection (b) applies, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located.

(5) If none of paragraphs (1), (2), (3), and (4) of this subsection (b) applies, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located.

Source: L. 2001: Entire article R&RE, p. 1343, § 1, effective July 1. **L. 2002:** (b)(1) amended, p. 938, § 3, effective August 7. **L. 2023:** (a) amended, (SB 23-090), ch. 136, p. 550, § 53, effective August 7.

4-9-305. Law governing perfection and priority of security interests in investment property.

(a) Except as otherwise provided in subsection (c) of this section, the following rules apply:

(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.

(2) The local law of the issuer's jurisdiction as specified in section 4-8-110 (d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.

(3) The local law of the securities intermediary's jurisdiction as specified in section 4-8-110 (e) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account.

(4) The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

(5) Subsections (a)(2), (a)(3), and (a)(4) of this section apply even if the transaction does not bear any relation to the jurisdiction.

(b) The following rules determine a commodity intermediary's jurisdiction for purposes of this part 3:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this part 3, this article, or this title, that jurisdiction is the commodity intermediary's jurisdiction.

(2) If paragraph (1) of this subsection (b) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) of this subsection (b) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If none of paragraphs (1), (2), and (3) of this subsection (b) applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of paragraphs (1), (2), (3), and (4) of this subsection (b) applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) The local law of the jurisdiction in which the debtor is located governs:

(1) Perfection of a security interest in investment property by filing;

(2) Automatic perfection of a security interest in investment property created by a broker or securities intermediary; and

(3) Automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.

Source: L. 2001: Entire article R&RE, p. 1343, § 1, effective July 1. **L. 2023:** (a)(5) added, (SB 23-090), ch. 136, p. 550, § 54, effective August 7.

Editor's note: This section is similar to former § 4-9-103 (6) as it existed prior to 2001.

4-9-306. Law governing perfection and priority of security interests in letter-of-credit rights.

(a) Subject to subsection (c) of this section, the local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right if the issuer's jurisdiction or nominated person's jurisdiction is a state.

(b) For purposes of this part 3, an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter-of-credit right as provided in section 4-5-116.

(c) This section does not apply to a security interest that is perfected only under section 4-9-308 (d).

Source: L. 2001: Entire article R&RE, p. 1344, § 1, effective July 1.

4-9-306.5. Law governing perfection and priority of security interests in chattel paper.

(a) Except as provided in subsection (d) of this section, if chattel paper is evidenced only by an authoritative electronic copy of the chattel paper or is evidenced by an authoritative electronic copy and an authoritative tangible copy, the local law of the chattel paper's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the chattel paper, even if the transaction does not bear any relation to the chattel paper's jurisdiction.

(b) The following rules determine the chattel paper's jurisdiction under this section:

(1) If the authoritative electronic copy of the record evidencing chattel paper, or a record attached to or logically associated with the electronic copy and readily available for review, expressly provides that a particular jurisdiction is the chattel paper's jurisdiction for purposes of this part 3, this article 9, or this title 4, that jurisdiction is the chattel paper's jurisdiction.

(2) If subsection (b)(1) of this section does not apply and the rules of the system in which the authoritative electronic copy is recorded are readily available for review and expressly provide that a particular jurisdiction is the chattel paper's jurisdiction for purposes of this part 3, this article 9, or this title 4, that jurisdiction is the chattel paper's jurisdiction.

(3) If subsections (b)(1) and (b)(2) of this section do not apply and the authoritative electronic copy, or a record attached to or logically associated with the electronic copy and readily available for review, expressly provides that the chattel paper is governed by the law of a particular jurisdiction, that jurisdiction is the chattel paper's jurisdiction.

(4) If subsections (b)(1), (b)(2), and (b)(3) of this section do not apply and the rules of the system in which the authoritative electronic copy is recorded are readily available for review and expressly provide that the chattel paper or the system is governed by the law of a particular jurisdiction, that jurisdiction is the chattel paper's jurisdiction.

(5) If subsections (b)(1) to (b)(4) of this section do not apply, the chattel paper's jurisdiction is the jurisdiction in which the debtor is located.

(c) If an authoritative tangible copy of a record evidences chattel paper and the chattel paper is not evidenced by an authoritative electronic copy, while the authoritative tangible copy of the record evidencing chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(1) Perfection of a security interest in the chattel paper by possession under section 4-9-314.5; and

(2) The effect of perfection or nonperfection and the priority of a security interest in the chattel paper.

(d) The local law of the jurisdiction in which the debtor is located governs perfection of a security interest in chattel paper by filing.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 550, § 55, effective August 7.

4-9-306.7. Law governing perfection and priority of security interests in controllable accounts, controllable electronic records, and controllable payment intangibles.

(a) Except as provided in subsection (b) of this section, the local law of the controllable electronic record's jurisdiction specified in section 4-12-107 (c) and (d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a controllable electronic record and a security interest in a controllable account or controllable payment intangible evidenced by the controllable electronic record.

(b) The local law of the jurisdiction in which the debtor is located governs:

(1) Perfection of a security interest in a controllable account, controllable electronic record, or controllable payment intangible by filing; and

(2) Automatic perfection of a security interest in a controllable payment intangible created by a sale of the controllable payment intangible.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 550, § 55, effective August 7.

4-9-307. Location of debtor.

(a) In this section, "place of business" means a place where a debtor conducts its affairs.

(b) Except as otherwise provided in this section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one place of business is located at its place of business.

(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

(c) Subsection (b) of this section applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security

interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) of this section does not apply, the debtor is located in the District of Columbia.

(d) A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified by subsections (b) and (c) of this section.

(e) A registered organization that is organized under the law of a state is located in that state.

(f) Except as otherwise provided in subsection (i) of this section, a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located:

(1) In the state that the law of the United States designates, if the law designates a state of location;

(2) In the state that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its state of location, including by designating its main office, home office, or other comparable office; or

(3) In the District of Columbia, if neither paragraph (1) nor paragraph (2) of this subsection (f) applies.

(g) A registered organization continues to be located in the jurisdiction specified by subsection (e) or (f) of this section notwithstanding:

(1) The suspension, revocation, forfeiture, or lapse of the registered organization's status as such in its jurisdiction of organization; or

(2) The dissolution, winding up, or cancellation of the existence of the registered organization.

(h) The United States is located in the District of Columbia.

(i) A branch or agency of a bank that is not organized under the law of the United States or a state is located in the state in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one state.

(j) A foreign air carrier under the "Federal Aviation Act of 1958", as amended, is located at the designated office of the agent upon which service of process may be made on behalf of the carrier.

(k) This section applies only for purposes of this part 3.

Source: L. 2001: Entire article R&RE, p. 1345, § 1, effective July 1. **L. 2012:** (f)(2) amended, (HB 12-1262), ch. 170, p. 597, § 3, effective July 1, 2013.

Editor's note: This section is similar to former § 4-9-103 (3)(d) as it existed prior to 2001.

4-9-308. When security interest or agricultural lien is perfected - continuity of perfection.

(a) Except as otherwise provided in this section and section 4-9-309, a security interest is perfected if it has attached and all of the applicable requirements for perfection in sections 4-9-310 to 4-9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.

(b) An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in section 4-9-310 have been satisfied. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective.

(c) A security interest or agricultural lien is perfected continuously if it is originally perfected by one method under this article and is later perfected by another method under this article, without an intermediate period when it was unperfected.

(d) Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

(e) Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.

(f) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(g) Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account.

Source: L. 2001: Entire article R&RE, p. 1346, § 1, effective July 1.

Editor's note: The provisions of this section are similar to former §§ 4-9-115 (2) and 4-9-303 as they existed prior to 2001.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "A Practical Checklist for Buying or Selling a Small Business in Colorado", see 15 Colo. Law. 2171 (1986).

Annotator's note. Since § 4-9-308 is similar to § 4-9-303 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

For perfection to obtain at all, a security interest must first attach. Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

Under certain circumstances, an unjust enrichment claim will prevail over a properly perfected security interest under this article. Duggan, Inc. v. Ninth Dist. Prod. Credit Ass'n, 795 P.2d 1347 (Colo. App. 1990), rev'd on other grounds, 821 P.2d 788 (Colo. 1991).

4-9-309. Security interest perfected upon attachment.

The following security interests are perfected when they attach:

(1) A purchase-money security interest in consumer goods, except as otherwise provided in section 4-9-311 (b) with respect to consumer goods that are subject to a statute or treaty described in section 4-9-311 (a);

(2) An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;

(3) A sale of a payment intangible;

(4) A sale of a promissory note;

(5) A security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services;

(6) A security interest arising under section 4-2-401, 4-2-505, 4-2-711 (3), or 4-2.5-508 (5), until the debtor obtains possession of the collateral;

(7) A security interest of a collecting bank arising under section 4-4-210;

(8) A security interest of an issuer or nominated person arising under section 4-5-117.5;

(9) A security interest arising in the delivery of a financial asset under section 4-9-206 (c);

(10) A security interest in investment property created by a broker or securities intermediary;

(11) A security interest in a commodity contract or a commodity account created by a commodity intermediary;

(12) An assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder;

(13) A security interest created by an assignment of a beneficial interest in a decedent's estate; and

(14) A sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance.

Source: L. 2001: Entire article R&RE, p. 1347, § 1, effective July 1. **L. 2002:** (14) added, p. 938, § 4, effective August 7.

Editor's note: (1) The provisions of this section are similar to provisions of several former sections as they existed prior to 2001. For a detailed comparison, see the comparative tables located in the back of the index.

(2) **Colorado legislative change:** Colorado substituted the reference to § 4-5-117.5 for the uniform act's reference to § 4-5-118 in paragraph (8).

4-9-310. When filing required to perfect security interest or agricultural lien - security interests and agricultural liens to which filing provisions do not apply.

(a) Except as otherwise provided in subsection (b) of this section and section 4-9-312 (b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) The filing of a financing statement is not necessary to perfect a security interest:

(1) That is perfected under section 4-9-308 (d), (e), (f), or (g);

(2) That is perfected under section 4-9-309 when it attaches;

(3) In property subject to a statute, regulation, or treaty described in section 4-9-311 (a);

(4) In goods in possession of a bailee which is perfected under section 4-9-312 (d)(1) or (2);

(5) In certificated securities, documents, goods, or instruments that is perfected without filing, control, or possession under section 4-9-312 (e), (f), or (g);

(6) In collateral in the secured party's possession under section 4-9-313;

(7) In a certificated security which is perfected by delivery of the security certificate to the secured party under section 4-9-313;

(8) In controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, electronic documents, investment property, or letter-of-credit rights that is perfected by control under section 4-9-314;

(8.1) In chattel paper that is perfected by possession and control under section 4-9-314.5;

(9) In proceeds which is perfected under section 4-9-315; or

(10) That is perfected under section 4-9-316.

(c) If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

Source: L. 2001: Entire article R&RE, p. 1348, § 1, effective July 1. **L. 2006:** (b)(5) and (b)(8) amended, p. 501, § 38, effective September 1. **L. 2023:** (b)(8) amended and (b)(8.1) added, (SB 23-090), ch. 136, p. 552, § 56, effective August 7.

Editor's note: This section is similar to former § 4-9-302 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968). For comment on In re Lehner appearing below, see 48 Den. L.J. 146 (1971). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

Annotator's note. Since § 4-9-310 is similar to § 4-9-302 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

A financing statement must be filed to perfect all security interests, with some exceptions. In re Lehner, 303 F. Supp. 317 (D. Colo. 1969), aff'd per curiam and reh'g denied, 427 F.2d 357 (10th Cir. 1970).

Assignment of proceeds to be paid in condemnation proceeding is not perfected lien, entitled to priority, until a financing statement is filled pursuant to this section. Bd. of County Comm'rs v. Berkeley Vill., 40 Colo. App. 431, 580 P.2d 1251 (1978).

Because priority of perfected security interest in crops depends upon date of its filing, it will normally have priority under "first in time" rule over creditor's "rents and profits" clause in a deed of trust because there priority is determined by time of application for receivership. Application of Nw. Mut. Life Ins. Co., 703 P.2d 1314 (Colo. App. 1985).

Such as logging equipment. For security interests in logging equipment to be perfected, a financing statement must be properly filed. Mtn. Credit v. Michiana Lumber & Supply, Inc., 31 Colo. App. 112, 498 P.2d 967 (1972).

A security interest in general intangibles, including the settlement of a lawsuit, is perfected by filing a financing statement as provided by law, which gives the holder of the perfected security interest a superior interest as creditor in the settlement proceeds over a judgment creditor who becomes a lien creditor only when the writ of garnishment is served on the debtor. Bowlen v. Fed. Deposit Ins. Corp., 815 P.2d 1013 (Colo. App. 1991).

Applied in Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970); Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977); Yeager Trucking v. Circle Leasing, 29 B.R. 131 (Bankr. D. Colo. 1983).

4-9-311. Perfection of security interests in property subject to certain statutes, regulations, and treaties.

(a) Except as otherwise provided in subsection (d) of this section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) A statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt section 4-9-310 (a);

(2) A statute of this state covering automobiles or other goods that provides for a security interest to be indicated on a certificate of title as a condition or result of perfection of the security interest; or

(3) A statute of another jurisdiction that provides for a security interest to be indicated on a certificate of title as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) of this section for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in subsection (d) of this section and sections 4-9-313 and 4-9-316 (d) and (e) for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty

described in subsection (a) of this section may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) Except as otherwise provided in subsection (d) of this section and section 4-9-316 (d) and (e), duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (a) of this section are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to this article.

(d) During any period in which collateral subject to a statute specified in paragraph (2) of subsection (a) of this section is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this section does not apply to a security interest in that collateral created by that person.

Source: L. 2001: Entire article R&RE, p. 1348, § 1, effective July 1. **L. 2012:** (a)(2) and (a)(3) amended, (HB 12-1262), ch. 170, p. 597, § 4, effective July 1, 2013.

Editor's note: (1) This section is similar to former § 4-9-302 as it existed prior to 2001.

(2) **Colorado legislative change:** In subsection (d), Colorado added the phrase "subject to a statute specified in paragraph (2) of subsection (a) of this section" and did not adopt the phrase "or leasing" after the word "selling" or the phrase "as debtor" at the end of the sentence.

4-9-312. Perfection of security interests in chattel paper, controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, documents, goods covered by documents, instruments, investment property, letter-of-credit rights, and money - perfection by permissive filing - temporary perfection without filing or transfer of possession.

(a) A security interest in chattel paper, controllable accounts, controllable electronic records, controllable payment intangibles, instruments, investment property, or negotiable documents may be perfected by filing.

(b) Except as otherwise provided in section 4-9-315 (c) and (d) for proceeds:

(1) A security interest in a deposit account may be perfected only by control under section 4-9-314; and

(2) Except as otherwise provided in section 4-9-308 (d), a security interest in a letter-of-credit right may be perfected only by control under section 4-9-314; and

(3) A security interest in money may be perfected only by the secured party's taking possession under section 4-9-313.

(c) While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

(1) A security interest in the goods may be perfected by perfecting a security interest in the document; and

(2) A security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:

(1) Issuance of a document in the name of the secured party;

(2) The bailee's receipt of notification of the secured party's interest; or

(3) Filing as to the goods.

(e) A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession or control for a period of twenty days from the time it attaches to the extent that it arises for new value given under a signed security agreement.

(f) A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for twenty days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:

(1) Ultimate sale or exchange; or

(2) Loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) A perfected security interest in a certificated security or instrument remains perfected for twenty days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

(1) Ultimate sale or exchange; or

(2) Presentation, collection, enforcement, renewal, or registration of transfer.

(h) After the twenty-day period specified in subsection (e), (f), or (g) of this section expires, perfection depends upon compliance with this article.

Source: L. 2001: Entire article R&RE, p. 1349, § 1, effective July 1. **L. 2006:** (e) amended, p. 501, § 39, effective September 1. **L. 2023:** (a) and (e) amended, (SB 23-090), ch. 136, p. 552, § 57, effective August 7.

Editor's note: The provisions of this section are similar to former §§ 4-9-115 (4) and 4-9-304 as they existed prior to 2001.

ANNOTATION

Law reviews. For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

Annotator's note. Since § 4-9-312 is similar to § 4-9-304 as it existed prior to the 2001 repeal and reenactment of this article, a relevant case construing that provision has been included in the annotations to this section.

Temporarily perfected security interest not rendered permanently perfected if debtor files for bankruptcy while security interest was temporarily perfected. Expeditors Int'l of Wash., Inc. v. Liquidating Trust, 313 B.R. 473 (D. Colo. 2004).

Applied in Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

4-9-313. When possession by or delivery to secured party perfects security interest without filing.

(a) Except as otherwise provided in subsection (b) of this section, a secured party may perfect a security interest in goods, instruments, negotiable tangible documents, or money by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under section 4-8-301.

(b) With respect to goods covered by a certificate of title issued by this state, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in section 4-9-316 (d).

(c) With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business when:

(1) The person in possession signs a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having signed a record acknowledging that it will hold possession of the collateral for the secured party's benefit.

(d) If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs not earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under section 4-8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) If a person acknowledges that it holds possession for the secured party's benefit:

(1) The acknowledgment is effective under subsection (c) of this section or section 4-8-301 (a), even if the acknowledgment violates the rights of a debtor; and

(2) Unless the person otherwise agrees or law other than this article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) To redeliver the collateral to the secured party.

(i) A secured party does not relinquish possession, even if a delivery under subsection (h) of this section violates the rights of a debtor. A person to which collateral is delivered under subsection (h) of this section does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this article otherwise provides.

(j) References in subsections (g) or (i) of this section regarding violation of the rights of a debtor shall not be construed as limiting the debtor's rights.

Source: L. 2001: Entire article R&RE, p. 1351, § 1, effective July 1. **L. 2006:** (a) amended, p. 502, § 40, effective September 1. **L. 2023:** (a), (c), and (d) amended, (SB 23-090), ch. 136, p. 552, § 58, effective August 7.

Editor's note: (1) The provisions of this section are similar to former §§ 4-9-115 (4)(b) and 4-9-305 as they existed prior to 2001.

(2) **Colorado legislative change:** Colorado added subsection (j).

ANNOTATION

Law reviews. For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

Annotator's note. Since § 4-9-313 is similar to § 4-9-305 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Perfected security interest in negotiable instruments. By virtue of a pledge agreement and seller's endorsement and delivery of the buyer's note and the deed of trust, the bank acquires an initial interest which is a perfected security interest in the instruments, such being personal property. Swofford v. Colo. Nat'l Bank, 628 P.2d 184 (Colo. App. 1981).

Bank was not a constructive bailee for a third party claiming rights to money deposited by defendants, therefore no security interest was perfected under this section, even though bank was given notice of third party's claims. In re Carpenter and McAleer Assoc., 815 F. Supp. 384 (D. Colo. 1993).

A security interest in equipment acquisition agreements could not have been perfected by possession because neither party possessed all of the multiple originally executed duplicates of the documents. A security interest could only have been perfected through proper filing of a financing statement with the secretary of state under § 4-9-304 (1). Denver Tec Bank v. F.D.I.C., 843 P.2d 129 (Colo. App. 1992).

Temporarily perfected security interest not rendered permanently perfected if debtor files for bankruptcy while security interest was temporarily perfected. Expeditors Int'l of Wash., Inc. v. Liquidating Trust, 313 B.R. 473 (D. Colo. 2004).

4-9-314. Perfection by control.

(a) A security interest in controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, electronic documents, investment property, or letter-of-credit rights may be perfected by control of the collateral under section 4-7-106, 4-9-104, 4-9-106, 4-9-107, or 4-9-107.5.

(b) A security interest in controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, electronic documents, or letter-of-credit rights is perfected by control under section 4-7-106, 4-9-104, 4-9-107, or 4-9-107.5 not earlier than the time the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) A security interest in investment property is perfected by control under section 4-9-106 not earlier than the time the secured party obtains control and remains perfected by control until:

(1) The secured party does not have control; and

(2) One of the following occurs:

(A) If the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(B) If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(C) If the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

Source: L. 2001: Entire article R&RE, p. 1352, § 1, effective July 1. **L. 2006:** (a) and (b) amended, p. 502, § 41, effective September 1. **L. 2023:** (a), (b), and IP(c) amended, (SB 23-090), ch. 136, p. 553, § 59, effective August 7.

Editor's note: This section is similar to former § 4-9-115 (4) as it existed prior to 2001.

4-9-314.5. Perfection by possession and control of chattel paper.

(a) A secured party may perfect a security interest in chattel paper by taking possession of each authoritative tangible copy of the record evidencing the chattel paper and obtaining control of each authoritative electronic copy of the electronic record evidencing the chattel paper.

(b) A security interest is perfected under subsection (a) of this section not earlier than the time the secured party takes possession and obtains control and remains perfected under subsection (a) of this section only while the secured party retains possession and control.

(c) Section 4-9-313 (c) and (f) to (i) applies to perfection by possession of an authoritative tangible copy of a record evidencing chattel paper.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 553, § 60, effective August 7.

4-9-315. Secured party's rights on disposition of collateral and in proceeds.

(a) Except as otherwise provided in this article and in section 4-2-403 (2):

(1) A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and

(2) A security interest attaches to any identifiable proceeds of collateral.

(b) Proceeds that are commingled with other property are identifiable proceeds:

(1) If the proceeds are goods, to the extent provided by section 4-9-336; and

(2) If the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this article with respect to commingled property of the type involved.

(c) A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.

(d) A perfected security interest in proceeds becomes unperfected on the twenty-first day after the security interest attaches to the proceeds unless:

(1) The following conditions are satisfied:

(A) A filed financing statement covers the original collateral;

(B) The proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and

(C) The proceeds are not acquired with cash proceeds;

(2) The proceeds are identifiable cash proceeds; or

(3) The security interest in the proceeds is perfected other than under subsection (c) of this section when the security interest attaches to the proceeds or within twenty days thereafter.

(e) If a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under paragraph (1) of subsection (d) of this section becomes unperfected at the later of:

(1) When the effectiveness of the filed financing statement lapses under section 4-9-515 or is terminated under section 4-9-513; or

(2) The twenty-first day after the security interest attaches to the proceeds.

Source: L. 2001: Entire article R&RE, p. 1353, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-306 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Commercial Law", see 58 Den. L.J. 279 (1981). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Commercial and Corporate Law", which discusses a Tenth Circuit decision dealing with perfection in proceeds in event of insolvency proceedings, see 65 Den. U. L. Rev. 469 (1988). For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2108 (1988).

Annotator's note. Since § 4-9-315 is similar to § 4-9-306 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

This section and § 4-9-311 must be read together. Section 4-9-311 does not invalidate the prior security interest under subsection (2). Am. Heritage Bank & Trust Co. v. O. & E., Inc., 40 Colo. App. 306, 576 P.2d 566 (1978).

For the inconsistency between § 4-9-203 and this section on subject of proceeds, see Fort Collins Prod. Credit Ass'n v. Carroll Dairy, 37 Colo. App. 536, 553 P.2d 95 (1976) (decided prior to the 1977 amendment of this section and § 4-9-203).

A secured party may bring a claim for conversion against a party who wrongfully obtained and sold property in which the secured party has a security interest if the secured party's interest has priority over the seller's interest. Former TCHR, LLC v. First Hand Mgmt., 2012 COA 129, 317 P.3d 1226.

Nothing in the language of subsection (1) requires that the disposition of collateral must be final in order to generate proceeds. In re Clancy & Co. Const., Inc., 214 B.R. 387 (Bankr. D. Colo. 1997).

Effect of failure to use word "proceeds" in security agreement. Even absent use of the specific word "proceeds" in a security agreement, the lender continues, under the uniform commercial code, to have a secured interest in money received from the sale of personalty covered specifically in the agreement. Fort Collins Prod. Credit Ass'n v. Carroll Dairy, 37 Colo. App. 536, 553 P.2d 95 (1976).

Cattle which eat feed in which there is a security interest do not constitute proceeds of the collateral by application of this section. First Nat'l Bank v. Bostron, 39 Colo. App. 107, 564 P.2d 964 (1977).

There could be no traceable "proceeds" to which a security interest in cattle feed may be said to have attached when the cattle have consumed the feed, and therefore such a security interest could not survive consumption of the feed by the cattle. First Nat'l Bank v. Bostron, 37 Colo. App. 107, 564 P.2d 964 (1977).

Wool incentive payments are "proceeds" of the wool. In re Mahleres, 53 B.R. 86 (Bankr. D. Colo. 1985).

Satisfaction of judgment constituted only "identifiable proceeds in the hands of the debtor", when the debtor paid to judgment creditor the cash proceeds of sale of equipment in which bank held security interest, and thus bank in enforcing its security interest in identifiable proceeds of sale was not entitled to recover from judgment creditor the amount paid by debtor. First Interstate Bank v. Arizona Agrochemical, 731 P.2d 746 (Colo. App. 1986).

Implied authorization for sale or other disposition of collateral must be determined based upon the circumstances of the parties, the nature of the collateral, the course of dealing of the parties, and the usage of trade. Platte Valley Bank v. B & J Constr., Inc., 44 Colo. App. 21, 606 P.2d 455 (1980); Mid-States Sales Co. v. Mtn. Empire Dairymen's Ass'n, 741 P.2d 342 (Colo. App. 1987); Morgan County Feeders, Inc. v. McCormick, 836 P.2d 1051 (Colo. App. 1992).

Existence of implied authorization is a factual determination. Morgan County Feeders, Inc. v. McCormick, 836 P.2d 1051 (Colo. App. 1992).

Bank's interest in collateral is not terminated by failure to participate in garnishment action, and its security interest follows the collateral. El Paso County Bank v. Charles R. Milisen & Co., 622 P.2d 594 (Colo. App. 1980).

Bank lost lien on corn by consenting to sale. Where lending bank, which held a security interest in the corn crop grown by a borrowing farmer, consented to the sale of the crop, the bank lost its lien on the corn. Farmers Nat'l Bank v. Ceres Land Co., 32 Colo. App. 290, 512 P.2d 1174 (1973).

Subsection (4)(d) replaces the common law rules of tracing in the context of insolvency proceedings. In re Intermountain Porta Storage, Inc., 74 B.R. 1011 (Bankr. D. Colo. 1987).

Creditor does not waive its security interest in dairy cattle by authorizing the sale of milk, but did waive its security interest to the extent it allowed distribution of the proceeds from the sale to other creditors during the customary course of dealing between the parties. Mid-States Sales v. Mt. Empire Dairymen's, 741 P.2d 342 (Colo. App. 1987).

Livestock broker engaged in conversion when it sold borrowers' cattle, which was subject to a security interest, and remitted proceeds to borrowers. Ignorance of the security interest was no defense. United States v. Winter Livestock Comm'n, 924 F.2d 986 (10th Cir. 1991).

The 10-day automatic perfection period provided by this section is not extended in the event insolvency proceedings are commenced. Following expiration of the 10-day period of automatic perfection, the mortgage financier became a general unsecured creditor of the debtor. In re Reliance Equities, Inc. 966 F.2d 1338 (10th Cir. 1992).

One cannot perfect a security interest in proceeds if the security interest in the original collateral was not perfected. Subsection (3) must be read in context of the entire section and addresses the means to perfect an interest in proceeds beyond the 10-day period, when the previously perfected interest ceases to be perfected under this section. In re Carpenter & McAleer Assocs., 815 F. Supp. 384 (D. Colo. 1993).

Since security interest in original collateral was perfected by possession, even if only for a short period of time, the security interest in the identifiable cash proceeds thereof is perfected indefinitely under this section. Expeditors Int'l of Wash., Inc. v. Liquidating Trust, 313 B.R. 473 (Bankr. D. Colo. 2004).

Pursuant to § 42-6-120, this section applies to a security interest in a motor vehicle held in inventory, notwithstanding the requirement in § 42-6-109, that the certificate of title is required to transfer an interest in a motor vehicle. Although a bank had a perfected security interest in an auto dealer's inventory, the interest was extinguished upon sale of the vehicle because the bank authorized the sale of the inventory. Under this section, the bank is left with a security interest only in the proceeds of the sale. Therefore, a credit union that financed the purchase of the vehicle from the dealer has a security interest that prevails against the bank, even though the certificate of title was not conveyed to the credit union at the time of sale. Valley Bank & Trust Co. v. Holyoke Cmty. Fed. Credit Union, 121 P.3d 358 (Colo. App. 2005).

Applied in Chambers v. Nation, 178 Colo. 124, 497 P.2d 5 (1972); Western Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979); Layne v. Fort Carson Nat'l Bank, 655 P.2d 856 (Colo. App. 1982); In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

4-9-316. Continued perfection of security interest following change in governing law.

(a) A security interest perfected pursuant to the law of the jurisdiction designated in section 4-9-301 (1), 4-9-305 (c), 4-9-306.5 (d), or 4-9-306.7 (b) remains perfected until the earliest of:

(1) The time perfection would have ceased under the law of that jurisdiction;

(2) The expiration of four months after a change of the debtor's location to another jurisdiction; or

(3) The expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

(b) If a security interest described in subsection (a) of this section becomes perfected under the law of the other jurisdiction before the earliest time or event described in said subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(c) A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if:

(1) The collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction;

(2) Thereafter the collateral is brought into another jurisdiction; and

(3) Upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

(d) Except as otherwise provided in subsection (e) of this section, a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this state remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered.

(e) A security interest described in subsection (d) of this section becomes unperfected as against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under section 4-9-311 (b) or 4-9-313 are not satisfied before the earlier of:

(1) The time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from this state; or

(2) The expiration of four months after the goods had become so covered.

(f) A security interest in chattel paper, controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, letter-of-credit rights, or investment property which is perfected under the law of the chattel paper's jurisdiction, the controllable electronic record's jurisdiction, the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:

(1) The time the security interest would have become unperfected under the law of that jurisdiction; or

(2) The expiration of four months after a change of the applicable jurisdiction to another jurisdiction.

(g) If a security interest described in subsection (f) of this section becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in said subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(h) The following rules apply to collateral to which a security interest attaches within four months after the debtor changes its location to another jurisdiction:

(1) A financing statement filed before the change pursuant to the law of the jurisdiction designated in section 4-9-301 (1) or 4-9-305 (c) is effective to perfect a security interest in the collateral if the financing statement would have been effective to perfect a security interest in the collateral had the debtor not changed its location.

(2) If a security interest perfected by a financing statement that is effective under paragraph (1) of this subsection (h) becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in section 4-9-301 (1) or 4-9-305 (c) or the expiration of the four-month period, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(i) If a financing statement naming an original debtor is filed pursuant to the law of the jurisdiction designated in section 4-9-301 (1) or 4-9-305 (c) and the new debtor is located in another jurisdiction, the following rules apply:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound under section 4-9-203 (d) if the financing statement would have been effective to perfect a security interest in the collateral had the collateral been acquired by the original debtor.

(2) A security interest that is perfected by the financing statement and that becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in section 4-9-301 (1) or 4-9-305 (c) or the expiration of the four-month period remains perfected thereafter. A security interest that is perfected by the financing statement but that does not become perfected under the law of the other jurisdiction before the earlier time or event becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

Source: L. 2001: Entire article R&RE, p. 1354, § 1, effective July 1. **L. 2012:** (h) and (i) added, (HB 12-1262), ch. 170, p. 598, § 5, effective July 1, 2013. **L. 2023:** IP(a) and IP(f) amended, (SB 23-090), ch. 136, p. 554, § 61, effective August 7.

Editor's note: This section is similar to former § 4-9-103 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Annotator's note. Since § 4-9-316 is similar to § 4-9-103 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

The validity of foreign security interests in personal property is governed by this section except to the extent that motor vehicle titles are governed by § 42-6-131, and the usage of the broad term "motor vehicle titles" indicates the legislative intent that whenever the question as to title to a motor vehicle arises with regard to a foreign security interest, the question is to be answered by application of § 42-6-131 and is precluded from the application of the provisions of § 4-9-103(3). Doenges-Glass, Inc. v. Gen. Motors Acceptance Corp., 175 Colo. 518, 488 P.2d 879 (1971).

Code as enacted in New York determined validity and perfection of security interest. Where seller's only office is located in New York, and assignee of seller's accounts receivable is a New York corporation, the requirements of the uniform commercial code as enacted by New York determines the validity and perfection of assignee's security interest in accounts receivable. Barocas v. Bohemia Import Co., 33 Colo. App. 263, 518 P.2d 850 (1974).

The right to collect annual campground membership dues is a right to payment for services rendered, which is an ordinary commercial account receivable. If the security interest is in accounts, the law of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or nonperfection of the security interest. Therefore, since the debtor was located at its place of business in Florida, Florida was the proper jurisdiction in which to file in order to perfect a security interest in the collateral, making the location of the collateral in Colorado irrelevant. Capitran Inc. v. Great W. Bank, 872 P.2d 1370 (Colo. App. 1994).

Farm combine which was type used by custom crop cutting in multi-state operations is mobile equipment within the meaning of § 4-9-103 (3)(a). Golden Plains Credit Union v. Konkel, 759 P.2d 788 (Colo. App. 1988), aff'd in part, rev'd in part, 778 P.2d 660 (Colo. 1989).

The provisions of this section and § 4-9-401 (1) are not mutually exclusive and, if equipment meets the requirements of both statutory provisions, it must be considered to fall into both categories. Golden Plains Credit Union v. Konkel, 759 P.2d 788 (Colo. App. 1988), aff'd in part, rev'd in part, 778 P.2d 660 (Colo. 1989).

4-9-317. Interests that take priority over or take free of security interest or agricultural lien.

(a) A security interest or agricultural lien is subordinate to the rights of:

(1) A person entitled to priority under section 4-9-322; and

(2) Except as otherwise provided in subsection (e) of this section, a person that becomes a lien creditor before the security interest or agricultural lien is perfected.

(b) Except as otherwise provided in subsection (e) of this section, a buyer, other than a secured party, of goods, instruments, tangible documents, or a certificated security takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) Except as otherwise provided in subsection (e) of this section, a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) Subject to subsections (f) to (i) of this section, a licensee of a general intangible or a buyer, other than a secured party, of collateral other than goods, instruments, tangible documents, or a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) Except as otherwise provided in sections 4-9-320 and 4-9-321, if a person files a financing statement with respect to a purchase-money security interest before or within twenty days after the debtor receives delivery of the collateral, or if a person perfects under article 6 of title 42, C.R.S., a purchase-money security interest in a motor vehicle, other than inventory, before or within thirty days after the debtor receives delivery of the motor vehicle, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

(f) A buyer, other than a secured party, of chattel paper takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and:

(1) Receives delivery of each authoritative tangible copy of the record evidencing the chattel paper; and

(2) If each authoritative electronic copy of the record evidencing the chattel paper can be subjected to control under section 4-9-105, obtains control of each authoritative electronic copy.

(g) A buyer of an electronic document takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and, if each authoritative electronic copy of the document can be subjected to control under section 4-7-106, obtains control of each authoritative electronic copy.

(h) A buyer of a controllable electronic record takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and obtains control of the controllable electronic record.

(i) A buyer, other than a secured party, of a controllable account or a controllable payment intangible takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and obtains control of the controllable account or controllable payment intangible.

Source: L. 2001: Entire article R&RE, p. 1355, § 1, effective July 1. **L. 2006:** (b) and (d) amended, p. 502, § 42, effective September 1. **L. 2009:** (e) amended, (SB 09-150), ch. 182, p. 801, § 1, effective April 22. **L. 2012:** (b) and (d) amended, (HB 12-1262), ch. 170, p. 598, § 6, effective July 1, 2013. **L. 2023:** (b) and (d) amended and (f), (g), (h), and (i) added, (SB 23-090), ch. 136, p. 554, § 62, effective August 7.

Editor's note: (1) The provisions of this section are similar to former §§ 4-9-301 and 4-2.5-307 (2) as they existed prior to 2001.

(2) **Colorado legislative change:** In subsection (a)(2), Colorado did not adopt the phrases "the earlier of the time" after the word "before" and "or a financing statement covering the collateral is filed" at the end of the sentence.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L.J. 685 (1980).

Annotator's note. Since § 4-9-317 is similar to § 4-9-301 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Reliance upon ownership of collateral by a debtor is not relevant to a determination of priority under the uniform commercial code, for there is no provision in the code for knowledge or reliance on ownership as a factor in determining the relative rights of secured creditors. Am. Nat'l Bank v. Magor, 28 Colo. App. 522, 476 P.2d 267 (1970).

Paramount status accorded to first to file. The drafters of the code, by their emphasis on procedural rigidity, accorded paramount status to the secured creditor first to file. Am. Nat'l Bank v. Magor, 28 Colo. App. 522, 476 P.2d 267 (1970).

An unperfected security interest becomes subordinate to the rights acquired by a lien creditor when a writ of garnishment is served on the garnishee at a time when the garnishor has no notice of the security interest. Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970).

Subsection (4) was adopted to address issues relating to advances made under a perfected security interest and federal tax liens. ITT Diversified Credit Corp. v. Couch, 669 P.2d 1355 (Colo. 1983).

Security agreement in nature of chattel mortgage creates lien for the benefit of the secured party and title reposes in the debtor or mortgagor, in the absence of a contrary contractual provision. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

Code specifies which interests take priority over an unperfected security interest, and where the seller's interest or right in the goods does not fall within any of those specified interests, its right to reclaim the goods does not take priority over a bank's unperfected security interest. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), aff'd, 184 Colo. 166, 519 P.2d 354 (1974).

Right to reclaim goods is not one of the interests so specified. The right to reclaim goods conveyed as part of a cash sale transaction is not one of the interests which is listed as having priority over an unperfected security interest. Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

Priority of judicial lien rules. A perfected security interest securing an obligation that was undertaken by debtor before creation of a judicial lien took priority over the lien even if such obligation did not become due until after the lien's creation. Alling v. Am. Tool & Grinding Co., Inc., 648 F. Supp. 1344 (D. Colo. 1986).

A creditor who holds a perfected security interest in collateral can be held liable to an unsecured creditor for benefits that enhance the value of the secured collateral on the basis of unjust enrichment, even where holding the secured creditor liable alters the priority system set forth in this section. The standard for determining whether a secured creditor is unjustly enriched as a result of benefits conferred by the unsecured creditor is the extent to which the secured creditor was involved in the transactions through which the unsecured creditor supplied goods or services that enhanced the value of the collateral. Ninth

Dist. Prod. Credit v. Ed Duggan, 821 P.2d 788 (Colo. 1991).

Creditor's unperfected security interest is not subordinate to interest of creditors who had actual knowledge of such security interest. Although creditor failed to note his security interest on the certificate of title for certain vehicles, party who assumes the obligations under an indenture and security agreement takes title to property subject to such security interest. Vance v. Casebolt, 841 P.2d 394 (Colo. App. 1992).

The Colorado Certificate of Title Act (CCTA) does not supersede subsection (e) of this section because subsection (e) does not govern the manner or timing of the perfection of liens. It governs only the priority of a lien and is not inconsistent with the CCTA. In re Roser, 613 F.3d 1240 (10th Cir. 2010).

Applied in Rocky Mt. Ass'n of Credit Mgt. v. Hessler Mfg. Co., 37 Colo. App. 551, 553 P.2d 840 (1976); Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977); Bd. of County Comm'rs v. Berkeley Vill., 40 Colo. App. 431, 580 P.2d 1251 (1978); Dept. of Natural Res. v. Benjamin, 41 Colo. App. 520, 587 P.2d 1207 (1978); Young v. Golden State Bank, 632 P.2d 1053 (Colo. App. 1981); Heinrichsdorff v. Raat, 655 P.2d 860 (Colo. App. 1982); Yeager Trucking v. Circle Leasing, 29 B.R. 131 (Bankr. D. Colo. 1983).

4-9-318. No interest retained in right to payment that is sold - rights and title of seller of account or chattel paper with respect to creditors and purchasers.

(a) A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold.

(b) For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold.

Source: L. 2001: Entire article R&RE, p. 1356, § 1, effective July 1.

4-9-319. Rights and title of consignee with respect to creditors and purchasers.

(a) Except as otherwise provided in subsection (b) of this section, for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

(b) For purposes of determining the rights of a creditor of a consignee, law other than this article determines the rights and title of a consignee while goods are in the consignee's possession if, under this part 3, a perfected security interest held by the consignor would have priority over the rights of the creditor.

Source: L. 2001: Entire article R&RE, p. 1356, § 1, effective July 1.

4-9-320. Buyer of goods.

(a) Except as otherwise provided in subsection (e) of this section, a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

(b) Except as otherwise provided in subsection (e) of this section, a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:

(1) Without knowledge of the security interest;

(2) For value;

(3) Primarily for the buyer's personal, family, or household purposes; and

(4) Before the filing of a financing statement covering the goods.

(c) To the extent that it affects the priority of a security interest over a buyer of goods under subsection (b) of this section, the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by section 4-9-316 (a) and (b).

(d) A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance.

(e) Subsections (a) and (b) of this section do not affect a security interest in goods in the possession of the secured party under section 4-9-313.

Source: L. 2001: Entire article R&RE, p. 1356, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-307 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Agricultural Lending in a Troubled Economy", see 16 Colo. Law. 1773 (1987).

Annotator's note. Since § 4-9-320 is similar to § 4-9-307 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Limits on purchasers taking free of security interest qualified by comment. Although this section limits the situations in which certain purchasers take free of security interests, the last paragraph under "Official Comment 2" to this section qualifies this limitation. Farmers Nat'l Bank v. Ceres Land Co., 32 Colo. App. 290, 512 P.2d 1174 (1973).

Applied in First Nat'l Bank v. Bostron, 39 Colo. App. 107, 564 P.2d 964 (1977); Western Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979).

4-9-321. Licensee of general intangible and lessee of goods in ordinary course of business.

(a) In this section, "licensee in ordinary course of business" means a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor's own usual or customary practices.

(b) A licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence.

(c) A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence.

Source: L. 2001: Entire article R&RE, p. 1357, § 1, effective July 1.

Editor's note: The provisions of this section are similar to former §§ 4-2.5-103 (1)(o) and 4-2.5-307 (3) as they existed prior to 2001.

4-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.

(a) Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) For the purposes of paragraph (1) of subsection (a) of this section:

(1) The time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(2) The time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) Except as otherwise provided in subsection (f) of this section, a security interest in collateral which qualifies for priority over a conflicting security interest under section 4-9-327, 4-9-328, 4-9-329, 4-9-330, or 4-9-331 also has priority over a conflicting security interest in:

(1) Any supporting obligation for the collateral; and

(2) Proceeds of the collateral if:

(A) The security interest in proceeds is perfected;

(B) The proceeds are cash proceeds or of the same type as the collateral; and

(C) In the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) Subject to subsection (e) of this section and except as otherwise provided in subsection (f) of this section, if a security interest in chattel paper, deposit accounts, negotiable documents,

instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) Subsection (d) of this section applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.

(f) Subsections (a) to (e) of this section are subject to:

(1) Subsection (g) of this section and the other provisions of this part 3;

(2) Section 4-4-210 with respect to a security interest of a collecting bank;

(3) Section 4-5-117.5 with respect to a security interest of an issuer or nominated person; and

(4) Section 4-9-110 with respect to a security interest arising under article 2 or 2.5 of this title.

(g) A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.

Source: L. 2001: Entire article R&RE, p. 1357, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-312 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

Annotator's note. Since § 4-9-322 is similar to § 4-9-312 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Where one's financing statement is incorrectly filed with a county clerk and recorder instead of the secretary of state, the interest of another who has properly filed his financing statement with the secretary of state has priority, even though the latter individual's statement is filed after the former's statement. Mtn. Credit v. Michiana Lumber & Supply, Inc., 31 Colo. App. 112, 498 P.2d 967 (1972).

Applied in Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977); Bd. of County Comm'rs v. Berkeley Vill., 40 Colo. App. 431, 580 P.2d 1251 (1978); State Dept. of Natural Res. v. Benjamin, 41 Colo. App. 520, 587 P.2d 1207 (1978); W. Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979); Denver Tec Bank v. F.D.I.C., 843 P.2d 129 (Colo. App. 1992).

4-9-323. Future advances.

(a) Except as otherwise provided in subsection (c) of this section, for purposes of determining the priority of a perfected security interest under section 4-9-322 (a)(1), perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that:

(1) Is made while the security interest is perfected only:

(A) Under section 4-9-309 when it attaches; or

(B) Temporarily under section 4-9-312 (e), (f), or (g); and

(2) Is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under section 4-9-309 or 4-9-312 (e), (f), or (g).

(b) Except as otherwise provided in subsection (c) of this section, a security interest is subordinate to the rights of a person that becomes a lien creditor while the security interest is perfected only to the extent that the security interest secures an advance made more than forty-five days after the person becomes a lien creditor unless the advance is made:

(1) Without knowledge of the lien; or

(2) Pursuant to a commitment entered into without knowledge of the lien.

(c) Subsections (a) and (b) of this section do not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor.

(d) Except as otherwise provided in subsection (e) of this section, a buyer of goods takes free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the buyer's purchase; or

(2) Forty-five days after the purchase.

(e) Subsection (d) of this section does not apply if the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the forty-five-day period.

(f) Except as otherwise provided in subsection (g) of this section, a lessee of goods takes the leasehold interest free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the lease; or

(2) Forty-five days after the lease contract becomes enforceable.

(g) Subsection (f) of this section does not apply if the advance is made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the forty-five-day period.

Source: L. 2001: Entire article R&RE, p. 1359, § 1, effective July 1. **L. 2002:** IP(b) amended, p. 938, § 5, effective August 7. **L. 2023:** IP(d) and IP(f) amended, (SB 23-090), ch. 136, p. 555, § 63, effective August 7.

Editor's note: The provisions of this section are similar to provisions of several former sections as they existed prior to 2001. For a detailed comparison, see the comparative tables located in the back of the index.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "The Rights of Landlords in Tenants' Personal Property", see 57 Den. L.J. 685 (1980). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Agricultural Lending in a Troubled Economy", see 16 Colo. Law. 1773 (1987).

Annotator's note. Since § 4-9-323 is similar to §§ 4-9-301 and 4-9-307 as they existed prior to the 2001 repeal and reenactment of this article, relevant cases construing those provisions have been included in the annotations to this section.

Limits on purchasers taking free of security interest qualified by comment. Although this section limits the situations in which certain purchasers take free of security interests, the last paragraph under "Official Comment 2" to this section qualifies this limitation. Farmers Nat'l Bank v. Ceres Land Co., 32 Colo. App. 290, 512 P.2d 1174 (1973).

Subsection (4) was adopted to address issues relating to advances made under a perfected security interest and federal tax liens. ITT Diversified Credit Corp. v. Couch, 669 P.2d 1355 (Colo. 1983).

Applied Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977).

4-9-324. Priority of purchase-money security interests.

(a) Except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and, except as otherwise provided in section 4-9-327, a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within twenty days thereafter, or, if the collateral is a motor vehicle, as defined in section 42-6-102, C.R.S., within thirty days thereafter.

(b) Subject to subsection (c) of this section and except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in section 4-9-330, and, except as otherwise provided in section 4-9-327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the inventory;

(2) The purchase-money secured party sends a signed notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

(c) Paragraphs (2) to (4) of subsection (b) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase-money security interest is temporarily perfected without filing or possession under section 4-9-312 (f), before the beginning of the twenty-day period thereunder.

(d) Subject to subsection (e) of this section and except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock, and, except as

otherwise provided in section 4-9-327, a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the livestock;

(2) The purchase-money secured party sends a signed notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within six months before the debtor receives possession of the livestock; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in livestock of the debtor and describes the livestock.

(e) Paragraphs (2) to (4) of subsection (d) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase-money security interest is temporarily perfected without filing or possession under section 4-9-312 (f), before the beginning of the twenty-day period thereunder.

(f) Except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in software has priority over a conflicting security interest in the same collateral, and, except as otherwise provided in section 4-9-327, a perfected security interest in its identifiable proceeds also has priority, to the extent that the purchase-money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under this section.

(g) If more than one security interest qualifies for priority in the same collateral under subsection (a), (b), (d), or (f) of this section:

(1) A security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in or the use of collateral; and

(2) In all other cases, section 4-9-322 (a) applies to the qualifying security interests.

Source: L. 2001: Entire article R&RE, p. 1360, § 1, effective July 1. **L. 2009:** (a) amended, (SB 09-150), ch. 182, p. 801, § 2, effective April 22. **L. 2023:** (b)(2) and (d)(2) amended, (SB 23-090), ch. 136, p. 555, § 64, effective August 7.

Editor's note: This section is similar to former § 4-9-312 as it existed prior to 2001.

4-9-325. Priority of security interests in transferred collateral.

(a) Except as otherwise provided in subsection (b) of this section, a security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if:

(1) The debtor acquired the collateral subject to the security interest created by the other person;

(2) The security interest created by the other person was perfected when the debtor acquired the collateral; and

(3) There is no period thereafter when the security interest is unperfected.

(b) Subsection (a) of this section subordinates a security interest only if the security interest:

(1) Otherwise would have priority solely under section 4-9-322 (a) or 4-9-324; or

(2) Arose solely under section 4-2-711 (3) or 4-2.5-508 (5).

Source: L. 2001: Entire article R&RE, p. 1362, § 1, effective July 1.

4-9-326. Priority of security interests created by new debtor.

(a) Subject to subsection (b) of this section, a security interest that is created by a new debtor in collateral in which the new debtor has or acquires rights and is perfected solely by a filed financing statement that would be ineffective to perfect the security interest but for the application of section 4-9-316 (i)(1) or 4-9-508 is subordinate to a security interest in the same collateral that is perfected other than by such a filed financing statement.

(b) The other provisions of this part 3 determine the priority among conflicting security interests in the same collateral perfected by filed financing statements described in subsection (a) of this section. However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound.

Source: L. 2001: Entire article R&RE, p. 1362, § 1, effective July 1. **L. 2012:** Entire section amended, (HB 12-1262), ch. 170, p. 599, § 7, effective July 1, 2013.

4-9-326.5. Priority of security interest in controllable account, controllable electronic record, and controllable payment intangible.

A security interest in a controllable account, controllable electronic record, or controllable payment intangible held by a secured party having control of the account, electronic record, or payment intangible has priority over a conflicting security interest held by a secured party that does not have control.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 556, § 65, effective August 7.

4-9-327. Priority of security interests in deposit account.

The following rules govern priority among conflicting security interests in the same deposit account:

(1) A security interest held by a secured party having control of the deposit account under section 4-9-104 has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in paragraphs (3) and (4) of this section, security interests perfected by control under section 4-9-314 rank according to priority in time of obtaining control.

(3) Except as otherwise provided in paragraph (4) of this section, a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.

(4) A security interest perfected by control under section 4-9-104 (a)(3) has priority over a security interest held by the bank with which the deposit account is maintained.

Source: L. 2001: Entire article R&RE, p. 1363, § 1, effective July 1.

4-9-328. Priority of security interests in investment property.

The following rules govern priority among conflicting security interests in the same investment property:

(1) A security interest held by a secured party having control of investment property under section 4-9-106 has priority over a security interest held by a secured party that does not have control of the investment property.

(2) Except as otherwise provided in paragraphs (3) and (4) of this section, conflicting security interests held by secured parties each of which has control under section 4-9-106 rank according to priority in time of:

(A) If the collateral is a security, obtaining control;

(B) If the collateral is a security entitlement carried in a securities account and:

(i) If the secured party obtained control under section 4-8-106 (d)(1), the secured party's becoming the person for which the securities account is maintained;

(ii) If the secured party obtained control under section 4-8-106 (d)(2), the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account; or

(iii) If the secured party obtained control through another person under section 4-8-106 (d)(3), the time on which priority would be based under this paragraph (2) if the other person were the secured party; or

(C) If the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in section 4-9-106 (b)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(3) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(4) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(5) A security interest in a certificated security in registered form which is perfected by taking delivery under section 4-9-313 (a) and not by control under section 4-9-314 has priority over a conflicting security interest perfected by a method other than control.

(6) Conflicting security interests created by a broker, securities intermediary, or commodity intermediary which are perfected without control under section 4-9-106 rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by sections 4-9-322 and 4-9-323.

Source: L. 2001: Entire article R&RE, p. 1363, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-115 (5) as it existed prior to 2001.

4-9-329. Priority of security interests in letter-of-credit right.

The following rules govern priority among conflicting security interests in the same letter-of-credit right:

(1) A security interest held by a secured party having control of the letter-of-credit right under section 4-9-107 has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control.

(2) Security interests perfected by control under section 4-9-314 rank according to priority in time of obtaining control.

Source: L. 2001: Entire article R&RE, p. 1364, § 1, effective July 1.

4-9-330. Priority of purchaser of chattel paper or instrument.

(a) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:

(1) In good faith and in the ordinary course of the purchaser's business, the purchaser gives new value, takes possession of each authoritative tangible copy of the record evidencing the chattel paper, and obtains control under section 4-9-105 of each authoritative electronic copy of the record evidencing the chattel paper; and

(2) The authoritative copies of the record evidencing the chattel paper do not indicate that the chattel paper has been assigned to an identified assignee other than the purchaser.

(b) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value, takes possession of each authoritative tangible copy of the record evidencing the chattel paper, and obtains control under section 4-9-105 of each authoritative electronic copy of the record evidencing the chattel paper in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

(c) Except as otherwise provided in section 4-9-327, a purchaser having priority in chattel paper under subsection (a) or (b) of this section also has priority in proceeds of the chattel paper to the extent that:

(1) Section 4-9-322 provides for priority in the proceeds; or

(2) The proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected.

(d) Except as otherwise provided in section 4-9-331 (a), a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.

(e) For purposes of subsections (a) and (b) of this section, the holder of a purchase-money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory.

(f) For purposes of subsections (b) and (d) of this section, if the authoritative copies of the record evidencing chattel paper or an instrument indicates that the chattel paper or instrument has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the purchase violates the rights of the secured party.

Source: L. 2001: Entire article R&RE, p. 1364, § 1, effective July 1. **L. 2023:** (a), (b), and (f) amended, (SB 23-090), ch. 136, p. 556, § 66, effective August 7.

Editor's note: This section is similar to former § 4-9-308 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

4-9-331. Priority of rights of purchasers of controllable accounts, controllable electronic records, controllable payment intangibles, documents, instruments, and securities under other articles - priority of interests in financial assets and security entitlements and protection against assertion of claim under articles 8 and 12.

(a) This article 9 does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, a

protected purchaser of a security, or a qualifying purchaser of a controllable account, controllable electronic record, or controllable payment intangible. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in articles 3, 7, 8, and 12 of this title 4.

(b) This article 9 does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under article 8 or 12 of this title 4.

(c) Filing under this article does not constitute notice of a claim or defense to the holders, or purchasers, or persons described in subsections (a) and (b) of this section.

Source: L. 2001: Entire article R&RE, p. 1365, § 1, effective July 1. **L. 2002:** (b) amended, p. 938, § 6, effective August 7. **L. 2023:** (a) and (b) amended, (SB 23-090), ch. 136, p. 557, § 67, effective August 7.

Editor's note: This section is similar to former § 4-9-309 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

4-9-332. Transfer of money - transfer of funds from deposit account.

(a) A transferee of money takes the money free of a security interest if the transferee receives possession of the money without acting in collusion with the debtor in violating the rights of the secured party.

(b) A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account if the transferee receives the funds without acting in collusion with the debtor in violating the rights of the secured party.

Source: L. 2001: Entire article R&RE, p. 1366, § 1, effective July 1. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 557, § 68, effective August 7.

ANNOTATION

A transfer from a deposit account into a COLTAF account is a transfer for purposes of this section. In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

Applied in In re 3PL4PL, 619 B.R. 441 (Bankr. D. Colo. 2020).

4-9-333. Priority of certain liens arising by operation of law.

(a) In this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:

(1) Which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;

(2) Which is created by statute or rule of law in favor of the person; and

(3) Whose effectiveness depends on the person's possession of the goods.

(b) A possessory lien on goods has priority over a security interest in the goods if the lien is created by a statute that expressly so provides.

Source: L. 2001: Entire article R&RE, p. 1366, § 1, effective July 1.

Editor's note: (1) This section is similar to former § 4-9-310 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado substituted the word "if" for "unless" and substituted the phrase "so provides" for "provides otherwise" in subsection (b).

ANNOTATION

Law reviews. For article, "Oil and Gas Financing Under the Uniform Commercial Code as Enacted in Colorado", see 43 Den. L.J. 129 (1966). For article, "Secured Transactions — Part 1: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

Annotator's note. Since § 4-9-333 is similar to § 4-9-310 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

The Colorado general assembly changed this section from the section promulgated by the national conference of commissioners on uniform state laws, so that the Colorado statute expressly provides that the repairman's lien "does not take priority over a perfected security interest

unless a statute expressly provides otherwise", which maintains prior law by giving the repairman an inferior priority status. First Sec. Bank v. Crouse, 374 F.2d 17 (10th Cir. 1967), rev'g 252 F. Supp. 230 (D. Colo. 1966).

Attorney's lien, as a statutory first lien, has priority over a bank's previously perfected security interest. N. Valley Bank v. McGloin, Davenport, 251 P.3d 1250 (Colo. App. 2010).

A court cannot, through ancillary proceedings, place a judgment creditor in a better or more favorable position than he would be in if levy were made upon the property. Hilst v. Bennett, 175 Colo. 78, 485 P.2d 880 (1971).

A court cannot require posting a bond. In ancillary proceedings in aid of execution on a judgment there is no jurisdiction in the courts to require a creditor to post a bond to secure payment of the judgment. Hilst v. Bennett, 175 Colo. 78, 485 P.2d 880 (1971).

4-9-334. Priority of security interests in fixtures and crops.

(a) A security interest under this article may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this article in ordinary building materials incorporated into an improvement on land.

(b) This article does not prevent creation of an encumbrance upon fixtures under real property law.

(c) In cases not governed by subsections (d) to (h) of this section, a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

(d) Except as otherwise provided in subsection (h) of this section, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

(1) The security interest is a purchase-money security interest;

(2) The interest of the encumbrancer or owner arises before the goods become fixtures; and

(3) The security interest is perfected by a fixture filing before the goods become fixtures or within twenty days thereafter.

(e) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The debtor has an interest of record in the real property or is in possession of the real property and the security interest:

(A) Is perfected by a fixture filing before the interest of the encumbrancer or owner is of record; and

(B) Has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

(2) Before the goods become fixtures, the security interest is perfected by any method permitted by this article and the fixtures are readily removable:

(A) Factory or office machines;

(B) Equipment that is not primarily used or leased for use in the operation of the real property; or

(C) Replacements of domestic appliances that are consumer goods;

(3) The conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article; or

(4) The security interest is:

(A) Created in a manufactured home in a manufactured-home transaction; and

(B) Perfected pursuant to a statute described in section 4-9-311 (a)(2).

(f) A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The encumbrancer or owner has, in a signed record, consented to the security interest or disclaimed an interest in the goods as fixtures; or

(2) The debtor has a right to remove the goods as against the encumbrancer or owner.

(g) The priority of the security interest under paragraph (2) of subsection (f) of this section continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates.

(h) 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 a recorded record of the mortgage so indicates. Except as otherwise provided in subsections (e) and (f) of this section, a security interest in fixtures is subordinate to a construction mortgage if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage.

(i) A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property.

Source: L. 2001: Entire article R&RE, p. 1366, § 1, effective July 1. **L. 2023:** (f)(1) amended, (SB 23-090), ch. 136, p. 557, § 69, effective August 7.

Editor's note: This section is similar to former § 4-9-313 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

Annotator's note. Since § 4-9-334 is similar to § 4-9-313 as it existed prior to the 2001 repeal and reenactment of this article, a relevant case construing that provision has been included in the annotations to this section.

Filing under this section not required in the case of manufactured ("mobile") homes if requirements of § 38-29-125 are met. Where creditor noted its lien on certificate of title pursuant to section of Colorado "Titles to Manufactured Homes Act", article 29 of title 38, C.R.S., and home was not held as inventory, creditor's interest was superior to that of holder of trust deed to real estate on which home had been affixed although creditor had not made a "fixture filing" under this section. ENT Federal Credit Union v. Chrysler First Financial Serv. Corp., 826 P.2d 430 (Colo. App. 1992).

4-9-335. Accessions.

(a) A security interest may be created in an accession and continues in collateral that becomes an accession.

(b) If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral.

(c) Except as otherwise provided in subsection (d) of this section, the other provisions of this part 3 determine the priority of a security interest in an accession.

(d) A security interest in an accession is subordinate to a security interest in the whole which is perfected by compliance with the requirements of a certificate-of-title statute under section 4-9-311 (b).

(e) After default, subject to part 6 of this article, a secured party may remove an accession from other goods if the security interest in the accession has priority over the claims of every person having an interest in the whole.

(f) A secured party that removes an accession from other goods under subsection (e) of this section shall promptly reimburse any holder of a security interest or other lien on, or owner of, the whole or of the other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

Source: L. 2001: Entire article R&RE, p. 1368, § 1, effective July 1.

4-9-336. Commingled goods.

(a) In this section, "commingled goods" means goods that are physically united with other goods in such a manner that their identity is lost in a product or mass.

(b) A security interest does not exist in commingled goods as such. However, a security interest may attach to a product or mass that results when goods become commingled goods.

(c) If collateral becomes commingled goods, a security interest attaches to the product or mass.

(d) If a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest that attaches to the product or mass under subsection (c) of this section is perfected.

(e) Except as otherwise provided in subsection (f) of this section, the other provisions of this part 3 determine the priority of a security interest that attaches to the product or mass under subsection (c) of this section.

(f) If more than one security interest attaches to the product or mass under subsection (c) of this section, the following rules determine priority:

(1) A security interest that is perfected under subsection (d) of this section has priority over a security interest that is unperfected at the time the collateral becomes commingled goods.

(2) If more than one security interest is perfected under subsection (d) of this section, the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods.

Source: L. 2001: Entire article R&RE, p. 1368, § 1, effective July 1.

4-9-337. Priority of security interests in goods covered by certificate of title.

If, while a security interest in goods is perfected by any method under the law of another jurisdiction, this state issues a certificate of title that does not show that the goods are subject to the security interest or contain a statement that they may be subject to security interests not shown on the certificate:

(1) A buyer of the goods, other than a person in the business of selling goods of that kind, takes free of the security interest if the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest; and

(2) The security interest is subordinate to a conflicting security interest in the goods that attaches, and is perfected under section 4-9-311 (b), after issuance of the certificate and without the conflicting secured party's knowledge of the security interest.

Source: L. 2001: Entire article R&RE, p. 1369, § 1, effective July 1.

4-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in section 4-9-516 (b)(5) which is incorrect at the time the financing statement is filed:

(1) The security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of tangible chattel paper, tangible documents, goods, instruments, or a security certificate, receives delivery of the collateral.

Source: L. 2001: Entire article R&RE, p. 1369, § 1, effective July 1. **L. 2006:** (2) amended, p. 502, § 43, effective September 1.

4-9-339. Priority subject to subordination.

This article does not preclude subordination by agreement by a person entitled to priority.

Source: L. 2001: Entire article R&RE, p. 1370, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-316 as it existed prior to 2001.

4-9-340. Effectiveness of right of recoupment or set-off against deposit account.

(a) Except as otherwise provided in subsection (c) of this section, a bank with which a deposit account is maintained may exercise any right of recoupment or set-off against a secured party that holds a security interest in the deposit account.

(b) Except as otherwise provided in subsection (c) of this section, the application of this article to a security interest in a deposit account does not affect a right of recoupment or set-off of the secured party as to a deposit account maintained with the secured party.

(c) The exercise by a bank of a set-off against a deposit account is ineffective against a secured party that holds a security interest in the deposit account which is perfected by control under section 4-9-104 (a)(3), if the set-off is based on a claim against the debtor.

Source: L. 2001: Entire article R&RE, p. 1370, § 1, effective July 1.

4-9-341. Bank's rights and duties with respect to deposit account.

Except as otherwise provided in section 4-9-340 (c), and unless the bank otherwise agrees in a signed record, a bank's rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended, or modified by:

(1) The creation, attachment, or perfection of a security interest in the deposit account;

(2) The bank's knowledge of the security interest; or

(3) The bank's receipt of instructions from the secured party.

Source: L. 2001: Entire article R&RE, p. 1370, § 1, effective July 1. **L. 2023:** IP amended, (SB 23-090), ch. 136, p. 557, § 70, effective August 7.

4-9-342. Bank's right to refuse to enter into or disclose existence of control agreement.

This article does not require a bank to enter into an agreement of the kind described in section 4-9-104 (a)(2), even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer.

Source: L. 2001: Entire article R&RE, p. 1370, § 1, effective July 1.

PART 4

RIGHTS OF THIRD PARTIES

4-9-401. Alienability of debtor's rights.

(a) Except as otherwise provided in subsection (b) of this section and sections 4-9-406, 4-9-407, 4-9-408, and 4-9-409, whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this article.

(b) An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect.

(c) This section shall not be construed as being inconsistent with criminal sanctions now or hereafter applicable to transactions involving collateral or as justifying any transfer that would otherwise be a violation of law.

Source: L. 2001: Entire article R&RE, p. 1371, § 1, effective July 1.

Editor's note: (1) This section is similar to former § 4-9-311 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added subsection (c).

ANNOTATION

Law reviews. For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75).

Annotator's note. Since § 4-9-401 is similar to § 4-9-311 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Section does not invalidate prior security interest. This section authorizes the physical transfer of collateral, but does not invalidate any prior security interest. Where the transfer is without the secured party's consent, and is a default under the agreement, the secured party can at that time call the note and take possession of the collateral. Layne v. Fort Carson Nat'l Bank, 655 P.2d 856 (Colo. App. 1982).

Section 4-9-306 and this section must be read together. This section does not invalidate the prior security interest under § 4-9-306 (2). Am. Heritage Bank & Trust Co. v. O. & E., Inc., 40 Colo. App. 306, 576 P.2d 566 (1978).

Bank's interest in collateral is not terminated by failure to participate in garnishment action, and its security interest follows the collateral. El Paso County Bank v. Charles R. Milisen & Co., 622 P.2d 594 (Colo. App. 1980).

4-9-402. Secured party not obligated on contract of debtor or in tort.

The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions.

Source: L. 2001: Entire article R&RE, p. 1371, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-317 as it existed prior to 2001.

ANNOTATION

Annotator's note. Since § 4-9-402 is similar to § 4-9-317 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

An assignee of contract rights is not subject to contract or tort liabilities imposed by a contract on the assignor in the absence of an assumption of such liabilities. Farmers Acceptance Corp. v. DeLozier, 178 Colo. 291, 496 P.2d 1016 (1972).

Liability of purchasers at foreclosure sale. Where there was no evidence that purchasers at a foreclosure sale affirmatively assumed the contractual liabilities of a corporation, the purchasers are not liable for

these contractual obligations. Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977).

But where a secured creditor initiates or encourages transactions between a debtor and unsecured creditor who is a supplier of goods or services and the secured creditor benefits from the goods or services supplied, equitable principles require the secured creditor to compensate the unsecured creditor to avoid unjust enrichment, especially where the goods or services supplied are necessary for preserving the secured collateral. Ninth Dist. Prod. Credit v. Ed Duggan, 821 P.2d 788 (Colo. 1991).

Applied in Ninth Dist. Prod. Credit v. Ed Duggan, 821 P.2d 788 (Colo. 1991).

4-9-403. Agreement not to assert defenses against assignee.

(a) In this section, "value" has the meaning provided in section 4-3-303 (a).

(b) Except as otherwise provided in this section, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:

(1) For value;

(2) In good faith;

(3) Without notice of a claim of a property or possessory right to the property assigned; and

(4) Without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under section 4-3-305 (a).

(c) Subsection (b) of this section does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under section 4-3-305 (b).

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this article requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement:

(1) The record has the same effect as if the record included such a statement; and

(2) The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

(e) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(f) Except as otherwise provided in subsection (d) of this section, this section does not displace law other than this article which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee.

Source: L. 2001: Entire article R&RE, p. 1371, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-206 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Exclusion and Modification of Warranty under the U.C.C. — How to Succeed in Business Without Being Liable for Not Really Trying", see 46 Den. L.J. 579 (1969).

4-9-404. Rights acquired by assignee; claims and defenses against assignee.

(a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) to (e) of this section, the rights of an assignee are subject to:

(1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment signed by the assignor or the assignee.

(b) Subject to subsection (c) of this section and except as otherwise provided in subsection (d) of this section, the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) of this section only to reduce the amount the account debtor owes.

(c) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this article requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include

such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.

(e) This section does not apply to an assignment of a health-care-insurance receivable.

Source: L. 2001: Entire article R&RE, p. 1372, § 1, effective July 1. **L. 2023:** (a)(2) amended, (SB 23-090), ch. 136, p. 558, § 71, effective August 7.

Editor's note: This section is similar to former § 4-9-318 (1) as it existed prior to 2001.

ANNOTATION

Annotator's note. Since § 4-9-404 is similar to § 4-9-318 (1) as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

This section includes set-offs and counter claims. Farmers Acceptance Corp. v. DeLozier, 179 Colo. 291, 496 P.2d 1016 (1972).

The right to receive money due or to become due under an existing contract may be assigned even though the contract itself may not be assignable. Farmers Acceptance Corp. v. DeLozier, 178 Colo. 291, 496 P.2d 1016 (1972).

Assignee is subject to defenses against assignor. An assignee of contract rights stands in the shoes of the assignor, has no greater rights against a debtor than does the assignor, and is subject to all equities and defenses which can be raised by a debtor against the assignor, with the exception of those claims and defenses which are both unrelated to the underlying contract and arise after a debtor is notified of the assignment. Farmers Acceptance Corp. v. DeLozier, 178 Colo. 291, 496 P.2d 1016 (1972).

Where an assignee obtains money which the assignor could only retain upon performance of a contract and the assignor fails to perform the contract, an assignee cannot retain mistaken, or even negligent, payments made to it by a debtor, unless there has been a subsequent change of position by assignee. Farmers Acceptance Corp. v. DeLozier, 178 Colo. 291, 496 P.2d 1016 (1972).

Where there is no evidence that an assignee relies to his detriment upon such a payment made by a debtor, the judgment of the trial court against him is proper in light of this section. Farmers Acceptance Corp. v. DeLozier, 178 Colo. 291, 496 P.2d 1016 (1972).

Agency relationship between dairyman debtor and agent responsible for marketing milk does not discharge debt to assignee.

Mid-States Sales v. Mt. Empire Dairymen's, 741 P.2d 342 (Colo. App. 1987).

4-9-405. Modification of assigned contract.

(a) A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor. This subsection (a) is subject to subsections (b) to (d) of this section.

(b) Subsection (a) of this section applies to the extent that:

(1) The right to payment or a part thereof under an assigned contract has not been fully earned by performance; or

(2) The right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under section 4-9-406 (a).

(c) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) This section does not apply to an assignment of a health-care-insurance receivable.

Source: L. 2001: Entire article R&RE, p. 1373, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-318 (2) as it existed prior to 2001.

ANNOTATION

Annotator's note. Section 4-9-405 is similar to § 4-9-318 (2) as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-318 have been included in the annotations to § 4-9-404.

4-9-406. Discharge of account debtor - notification of assignment - identification and proof of assignment - restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.

(a) Subject to subsections (b) to (i) and (m) of this section, an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, signed by the assignor or the assignee,

that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) Subject to subsections (h) and (m) of this section, notification is ineffective under subsection (a) of this section:

(1) If it does not reasonably identify the rights assigned;

(2) To the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this article; or

(3) At the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:

(A) Only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee;

(B) A portion has been assigned to another assignee; or

(C) The account debtor knows that the assignment to that assignee is limited.

(c) Subject to subsections (h) and (m) of this section, if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a) of this section.

(d) In this subsection (d), "promissory note" includes a negotiable instrument that evidences chattel paper. Except as otherwise provided in subsections (e), (k), (l), and (m) of this section and sections 4-2.5-303, 4-9-407, 8-80-103, 8-42-124, 13-64-210, and 24-4.1-114, and subject to subsection (h) of this section, a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

(e) Subsection (d) of this section does not apply to the sale of a payment intangible or promissory note, other than a sale pursuant to a disposition under section 4-9-610 or an acceptance of collateral under section 4-9-620.

(f) Except as otherwise provided in sections 4-2.5-303, 4-9-407, 8-80-103, 8-42-124, 13-64-210, and 24-4.1-114, C.R.S., and subject to subsections (h) and (i) of this section, a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:

(1) Prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

(g) Subject to subsections (h) and (m) of this section, an account debtor may not waive or vary its option under subsection (b)(3) of this section.

(h) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(i) This section does not apply to an assignment of a health-care-insurance receivable.

(j) Reserved.

(k) Subsection (d) of this section does not apply to the assignment or the transfer of, or the creation of a security interest in:

(1) A claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. sec. 104 (a)(1) or (2), as amended; or

(2) A claim or right to receive benefits under a special needs trust as described in 42 U.S.C. sec. 1396p (d)(4), as amended.

(l) As specified in section 7-90-104, C.R.S., subsections (d) to (f) of this section do not apply to the assignment or the transfer of, or the creation of a security interest in, an owner's interest as defined in section 7-90-102 (44), C.R.S.

(m) Subsections (a), (b), (c), and (g) of this section do not apply to a controllable account or controllable payment intangible.

Source: L. 2001: Entire article R&RE, p. 1373, § 1, effective July 1. **L. 2012:** (e) amended, (HB 12-1262), ch. 170, p. 599, § 8, effective July 1, 2013. **L. 2016:** IP(d) and IP(k) amended and (l) added, (HB 16-1270), ch. 119, p. 339, § 1, effective August 10. **L. 2023:** (a), IP(b), (c), IP(d), and (g) amended and (m) added, (SB 23-090), ch. 136, p. 558, § 72, effective August 7.

Editor's note: (1) This section is similar to former § 4-9-318 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado substituted the word "payment" for the word "general" in subsection (b)(3)(A), added the phrase "assignment or transfer or the" in subsection (d)(2), and added subsections (k) and (l).

ANNOTATION

Annotator's note. Section 4-9-406 is similar to § 4-9-318 as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-318 have been included in the annotations to § 4-9-404.

4-9-407. Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest.

(a) Except as otherwise provided in subsection (b) of this section, a term in a lease agreement is ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of a party to the lease to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, an interest of a party under the lease contract or in the lessor's residual interest in the goods; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease.

(b) Except as otherwise provided in section 4-2.5-303 (7), a term described in paragraph (2) of subsection (a) of this section is effective to the extent that there is:

(1) A transfer by the lessee of the lessee's right of possession or use of the goods in violation of the term; or

(2) A delegation of a material performance of either party to the lease contract in violation of the term.

(c) The creation, attachment, perfection, or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that

materially impairs the lessee's prospect of obtaining return performance or materially changes the duty of or materially increases the burden or risk imposed on the lessee within the purview of section 4-2.5-303 (4) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor.

Source: L. 2001: Entire article R&RE, p. 1375, § 1, effective July 1.

Editor's note: This section is similar to former § 4-2.5-303 as it existed prior to 2001.

4-9-408. Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective.

(a) Except as otherwise provided in subsection (b) of this section, a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(b) Subsection (a) of this section applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note, other than a sale pursuant to a disposition under section 4-9-610 or an acceptance of collateral under section 4-9-620.

(c) Except as provided in sections 8-80-103 and 8-42-124, C.R.S., a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health-care-insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(d) To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) of this section would be effective under law other than this article but is ineffective under subsection (a) or (c) of this section, the creation, attachment, or perfection of a security interest in the promissory note, health-care-insurance receivable, or general intangible:

(1) Is not enforceable against the person obligated on the promissory note or the account debtor;

(2) Does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;

(3) Does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;

(4) Does not entitle the secured party to use or assign the debtor's rights under the promissory note, health-care-insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health-care-insurance receivable, or general intangible;

(5) Does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and

(6) Does not entitle the secured party to enforce the security interest in the promissory note, health-care-insurance receivable, or general intangible.

(e) Reserved.

(f) Subsections (a) and (c) of this section do not apply to the assignment or the transfer of, or the creation of a security interest in:

(1) A claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. sec. 104 (a)(1) or (2), as amended; or

(2) A claim or right to receive benefits under a special needs trust as described in 42 U.S.C. sec. 1396p (d)(4), as amended.

(g) As specified in section 7-90-104, C.R.S., this section does not apply to the assignment or the transfer of, or the creation of a security interest in, an owner's interest as defined in section 7-90-102 (44), C.R.S.

(h) In this section, "promissory note" includes a negotiable instrument that evidences chattel paper.

Source: L. 2001: Entire article R&RE, p. 1376, § 1, effective July 1. **L. 2012:** (b) amended, (HB 12-1262), ch. 170, p. 599, § 9, effective July 1, 2013. **L. 2016:** IP(f) amended and (g) added, (HB 16-1270), ch. 119, p. 339, § 2, effective August 10. **L. 2023:** (h) added, (SB 23-090), ch. 136, p. 559, § 73, effective August 7.

Editor's note: Colorado legislative change: Colorado added the phrase "Except as provided in sections 8-80-103 and 8-42-124, C.R.S.," to subsection (c) and added subsections (f) and (g).

4-9-409. Restrictions on assignment of letter-of-credit rights ineffective.

(a) A term in a letter of credit or a rule of law, statute, regulation, custom, or practice applicable to the letter of credit which prohibits, restricts, or requires the consent of an applicant, issuer, or nominated person to a beneficiary's assignment of or creation of a security interest in a letter-of-credit right is ineffective to the extent that the term or rule of law, statute, regulation, custom, or practice:

(1) Would impair the creation, attachment, or perfection of a security interest in the letter-of-credit right; or

(2) Provides that the assignment or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter-of-credit right.

(b) To the extent that a term in a letter of credit is ineffective under subsection (a) of this section but would be effective under law other than this article or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, the creation, attachment, or perfection of a security interest in the letter-of-credit right:

(1) Is not enforceable against the applicant, issuer, nominated person, or transferee beneficiary;

(2) Imposes no duties or obligations on the applicant, issuer, nominated person, or transferee beneficiary; and

(3) Does not require the applicant, issuer, nominated person, or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party.

Source: L. 2001: Entire article R&RE, p. 1377, § 1, effective July 1.

PART 5

FILING

4-9-501. Filing office.

(a) Except as otherwise provided in subsection (b) of this section, if the local law of this state governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) The office designated for the filing or recording of a record of a mortgage on the related real property, if:

(A) The collateral is as-extracted collateral or timber to be cut; or

(B) The financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

(2) The office of the secretary of state, in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

(b) The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the secretary of state. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.

(c) The office in which to file an effective financing statement pursuant to article 9.5 of this title is the office of the secretary of state.

Source: L. 2001: Entire article R&RE, p. 1378, § 1, effective July 1.

Editor's note - Colorado legislative change: Colorado added subsection (c).

4-9-502. Contents of financing statement - record of mortgage as financing statement - time of filing financing statement.

(a) Subject to subsection (b) of this section, a financing statement is sufficient only if it:

(1) Provides the name of the debtor;

(2) Provides the name of the secured party or a representative of the secured party; and

(3) Indicates the collateral covered by the financing statement.

(b) Except as otherwise provided in section 4-9-501 (b), to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) of this section and also:

(1) Indicate that it covers this type of collateral;

(2) Indicate that it is to be filed for record in the real property records;

(3) Provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and

(4) If the debtor does not have an interest of record in the real property, provide the name of a record owner.

(c) A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

(1) The record indicates the goods or accounts that it covers;

(2) The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;

(3) The record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records; and

(4) The record is duly recorded.

(d) A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

Source: L. 2001: Entire article R&RE, p. 1379, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-402 as it existed prior to 2001.

ANNOTATION

I. General Consideration.

II. Identification of Secured Party.

III. Description of Collateral.

I. GENERAL CONSIDERATION.

Law reviews. For note, "Filing Under the Uniform Commercial Code Act 9", see 38 U. Colo. L. Rev. 598 (1966). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Commercial and Corporate Law", which discusses Tenth Circuit decisions dealing with description of collateral in financing statements, see 65 Den. U. L. Rev. 469 (1988).

Annotator's note. Since § 4-9-502 is similar to § 4-9-402 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

A financing statement does not suffice as a security agreement. John Boyle & Co. v. Colo. Patio & Awning Co., 654 P.2d 335 (Colo. App. 1982).

Financing statement was "signed by the debtor" where purchase agreement signed by purchaser allowed the vendor to sign the financing statement as an agent for the purchaser. NCR Corp. v. Robert A. McNeil Corp., 746 P.2d 1361 (Colo. App. 1987).

Applied in Heinrichsdorff v. Raat, 655 P.2d 860 (Colo. App. 1982).

II. IDENTIFICATION OF SECURED PARTY.

The amendment adopted by the general assembly dispensing with the need of manual signatures should be given effect retroactively because (a) it is procedural and (b) it is curative in nature. In re Colo. Mercantile Co., 299 F. Supp. 55 (D. Colo. 1969).

Perfect accuracy in identification of the secured party on a financing statement is not necessary as long as the statement provides sufficient additional information to enable a prudent examiner to ascertain exact state of affairs through further inquiry. In re Colo. Mercantile Co., 299 F. Supp. 55 (D. Colo. 1969).

A financing statement was not rendered invalid by fact that the financing statement erroneously identified the secured party as "O. M. Scott Credit Corporation" instead of O. M. Scott & Sons Co., since the former corporation was a wholly owned subsidiary of the latter and was so closely related and intertwined with it in business dealings as to be regarded as one with it and since no searching creditor could be seriously misled by the identification of the "O. M. Scott Credit Corporation" as the secured party. In re

Colo. Mercantile Co., 299 F. Supp. 55 (D. Colo. 1969).

Invalidating a security interest in the absence of evidence that any creditor was actually so misled would frustrate the liberal intent of the commercial code and would unnecessarily provide a trustee in bankruptcy with a windfall estate at the expense of one creditor. In re Colo. Mercantile Co., 299 F. Supp. 55 (D. Colo. 1969).

III. DESCRIPTION OF COLLATERAL.

Law reviews. For comment on In re Lehner appearing below, see 48 Den. L.J. 146 (1971).

The sufficiency of the description in a financing statement is to be determined by § 4-9-402(1). In re Lehner, 303 F. Supp. 317 (D. Colo. 1969), aff'd per curiam and reh'g denied, 427 F.2d 357 (10th Cir. 1970).

The filing of a financing statement perfects the security interest only if the statement substantially complies with the requirements of § 4-9-402(1). In re Lehner, 303 F. Supp. 317 (D. Colo. 1969), aff'd per curiam and reh'g denied, 427 F.2d 357 (10th Cir. 1970).

Collateral need not be described with utmost particularity. Mtn. Credit v. Michiana Lumber & Supply, Inc., 31 Colo. App. 112, 498 P.2d 967 (1972).

The filing need only put other creditors on notice of a possible security interest in the collateral in question, and it is sufficient if the facts of a case show that a third party, assisted by external evidence, could identify the object as being covered by the agreement. Mtn. Credit v. Michiana Lumber & Supply, Inc., 31 Colo. App. 112, 498 P.2d 967 (1972).

Since the "notice filing" system adopted by the U.C.C. requires that a secured party provide in public record enough information to alert interested parties that there may be a prior security interest. In re Colo. Mercantile Co., 299 F. Supp. 55 (D. Colo. 1969).

The use of the term "consumer goods" fails to satisfy this section, as it is too broad, general, and meaningless to fulfill the demand of § 4-9-402(1) that the financing statement at least reveal "the types". The description of collateral as simply "consumer goods" is insufficient in that it neither specifies the types nor the items, and where the collateral is used by the owner it would not seem to be an undue hardship to require the lender to designate in more meaningful terms. In re Lehner, 303 F. Supp. 317 (D. Colo. 1969), aff'd per curiam and reh'g denied, 427 F.2d 357 (10th Cir. 1970).

Log-loader sufficiently described. The use of the words "logging equipment and machinery used in logging operations" on one financing statement and the words "new and used equipment for logging and general construction" on another statement sufficiently describes the property so as to create a valid lien on a log-loader. Mtn. Credit v. Michiana Lumber & Supply, Inc., 31 Colo. App. 112, 498 P.2d 967 (1972).

Sufficient description of mobile home. Use of the words "floor plans" without other descriptive phrases is not sufficiently specific to describe mobile homes as

collateral; however, use of those words in the context "Floor plans of Modular Homes being constructed by Ft. Lupton Builders, 1500 Factory Circle, Ft. Lupton, Colorado 80621" is sufficient notice of a possible security interest in a type of collateral, mobile home units being constructed by Ft. Lupton Builders. Platte Valley Bank v. B & J Constr., Inc., 44 Colo. App. 21, 606 P.2d 455 (1980).

4-9-503. Name of debtor and secured party.

(a) A financing statement sufficiently provides the name of the debtor:

(1) Except as otherwise provided in paragraph (3) of this subsection (a), if the debtor is a registered organization or the collateral is held in a trust that is a registered organization, only if the financing statement provides the name that is stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization that purports to state, amend, or restate the registered organization's name;

(2) Subject to subsection (f) of this section, if the collateral is being administered by the personal representative of a decedent, only if the financing statement provides, as the name of the debtor, the name of the decedent and, in a separate part of the financing statement, indicates that the collateral is being administered by a personal representative;

(3) If the collateral is held in a trust that is not a registered organization, only if the financing statement:

(A) Provides, as the name of the debtor:

(i) If the organic record of the trust specifies a name for the trust, the name specified; or

(ii) If the organic record of the trust does not specify a name for the trust, the name of the settlor or testator; and

(B) In a separate part of the financing statement:

(i) If the name is provided in accordance with sub-subparagraph (i) of subparagraph (A) of this paragraph (3), indicates that the collateral is held in a trust; or

(ii) If the name is provided in accordance with sub-subparagraph (ii) of subparagraph (A) of this paragraph (3), provides additional information sufficient to distinguish the trust from other trusts having one or more of the same settlors or the same testator and indicates that the collateral is held in a trust, unless the additional information so indicates;

(4) If the debtor is an individual, only if the financing statement:

(A) Provides the individual name of the debtor;

(B) Provides the surname and first personal name of the debtor; or

(C) Subject to subsection (g) of this section, provides the name of the individual that is indicated on a driver's license that this state has issued to the individual and that has not expired or an identification card issued pursuant to part 3 of article 2 of title 42, C.R.S., that has not expired; and

(5) In other cases:

(A) If the debtor has a name, only if the financing statement provides the individual or organizational name of the debtor; and

(B) If the debtor does not have a name, only if the financing statement provides the names of the partners, members, associates, or other persons comprising the debtor, in a manner that each name provided would be sufficient if the person named were the debtor.

(b) A financing statement that provides the name of the debtor in accordance with subsection (a) of this section is not rendered ineffective by the absence of:

(1) A trade name or other name of the debtor; or

(2) Unless required under subparagraph (B) of paragraph (5) of subsection (a) of this section, names of partners, members, associates, or other persons comprising the debtor.

(c) A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

(d) Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

(e) A financing statement may provide the name of more than one debtor and the name of more than one secured party.

(f) The name of the decedent indicated on the order appointing the personal representative of the decedent issued by the court having jurisdiction over the collateral is sufficient as the "name of the decedent" under paragraph (2) of subsection (a) of this section.

(g) If this state has issued to an individual more than one driver's license of a kind described in subparagraph (C) of paragraph (4) of subsection (a) of this section, the one that was issued most recently is the one to which subparagraph (C) of paragraph (4) of subsection (a) of this section refers.

(h) In this section, the "name of the settlor or testator" means:

(1) If the settlor is a registered organization, the name that is stated to be the settlor's name on the public organic record most recently filed with or issued or enacted by the settlor's jurisdiction of organization that purports to state, amend, or restate the settlor's name; or

(2) In other cases, the name of the settlor or testator indicated in the trust's organic record.

Source: L. 2001: Entire article R&RE, p. 1380, § 1, effective July 1. **L. 2012:** (a) and (b) amended and (f), (g), and (h) added, (HB 12-1262), ch. 170, p. 600, § 10, effective July 1, 2013. **L. 2013:** (a)(4)(C) amended, (HB 13-1284), ch. 379, p. 2222, § 1, effective July 1.

4-9-504. Indication of collateral.

A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:

(1) A description of the collateral pursuant to section 4-9-108; or

(2) An indication that the financing statement covers all assets or all personal property.

Source: L. 2001: Entire article R&RE, p. 1381, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-402 (1) as it existed prior to 2001.

ANNOTATION

Law reviews. For note, "Filing Under the Uniform Commercial Code Act 9", see 38 U. Colo. L. Rev. 598 (1966). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Commercial and Corporate Law", which discusses Tenth Circuit decisions dealing with description of collateral in financing statements, see 65 Den. U. L. Rev. 469 (1988).

Annotator's note. Section 4-9-504 is similar to § 4-9-402 as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-402 have been included in the annotations to § 4-9-502.

4-9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.

(a) A consignor, lessor, or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note may file a financing statement, or may comply with a statute or treaty described in section 4-9-311 (a), using the terms "consignor", "consignee", "lessor",

"lessee", "bailor", "bailee", "licensor", "licensee", "owner", "registered owner", "buyer", "seller", or words of similar import, instead of the terms "secured party" and "debtor".

(b) This part 5 applies to the filing of a financing statement under subsection (a) of this section and, as appropriate, to compliance that is equivalent to filing a financing statement under section 4-9-311 (b), but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor, lessor, bailor, licensor, owner, or buyer which attaches to the collateral is perfected by the filing or compliance.

Source: L. 2001: Entire article R&RE, p. 1381, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-408 as it existed prior to 2001.

4-9-506. Effect of errors or omissions.

(a) A financing statement substantially satisfying the requirements of this part 5 is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) Except as otherwise provided in subsection (c) of this section, a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 4-9-503 (a) is seriously misleading.

(c) If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 4-9-503 (a), the name provided does not make the financing statement seriously misleading.

(d) For purposes of section 4-9-508 (b), the "debtor's correct name" in subsection (c) of this section means the correct name of the new debtor.

Source: L. 2001: Entire article R&RE, p. 1381, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-402 (8) as it existed prior to 2001.

ANNOTATION

Law reviews. For note, "Filing Under the Uniform Commercial Code Act 9", see 38 U. Colo. L. Rev. 598 (1966). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Commercial and Corporate Law", which discusses Tenth Circuit decisions dealing with description of collateral in financing statements, see 65 Den. U. L. Rev. 469 (1988).

Annotator's note. Section 4-9-506 is similar to § 4-9-402 as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-402 have been included in the annotations to § 4-9-502.

4-9-507. Effect of certain events on effectiveness of financing statement.

(a) A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.

(b) Except as otherwise provided in subsection (c) of this section and section 4-9-508, a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under section 4-9-506.

(c) If the name that a filed financing statement provides for a debtor becomes insufficient as the name of the debtor under section 4-9-503 (a) so that the financing statement becomes seriously misleading under section 4-9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the filed financing statement becomes seriously misleading; and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the filed financing statement becomes seriously misleading, unless an amendment to the financing statement that renders the financing statement not seriously misleading is filed within four months after the filed financing statement becomes seriously misleading.

Source: L. 2001: Entire article R&RE, p. 1382, § 1, effective July 1. **L. 2012:** (c) amended, (HB 12-1262), ch. 170, p. 602, § 11, effective July 1, 2013.

Editor's note: This section is similar to former § 4-9-402 (7) as it existed prior to 2001.

ANNOTATION

Law reviews. For note, "Filing Under the Uniform Commercial Code Act 9", see 38 U. Colo. L. Rev. 598 (1966). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Commercial and Corporate Law", which discusses Tenth Circuit decisions dealing with description of collateral in financing statements, see 65 Den. U. L. Rev. 469 (1988).

Annotator's note. Section 4-9-507 is similar to § 4-9-402 as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-402 have been included in the annotations to § 4-9-502.

4-9-508. Effectiveness of financing statement if new debtor becomes bound by security agreement.

(a) Except as otherwise provided in this section, a filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral.

(b) If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under subsection (a) of this section to be seriously misleading under section 4-9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound under section 4-9-203 (d); and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four months after the new debtor becomes bound under section 4-9-203 (d) unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time.

(c) This section does not apply to collateral as to which a filed financing statement remains effective against the new debtor under section 4-9-507 (a).

Source: L. 2001: Entire article R&RE, p. 1382, § 1, effective July 1.

4-9-509. Persons entitled to file a record.

(a) A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

(1) The debtor authorizes the filing in a signed record or pursuant to subsection (b) or (c) of this section; or

(2) The person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

(b) By signing or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:

(1) The collateral described in the security agreement; and

(2) Property that becomes collateral under section 4-9-315 (a)(2), whether or not the security agreement expressly covers proceeds.

(c) By acquiring collateral in which a security interest or agricultural lien continues under section 4-9-315 (a)(1), a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and property that becomes collateral under section 4-9-315 (a)(2).

(d) A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

(1) The secured party of record authorizes the filing; or

(2) The amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by section 4-9-513 (a) or (c), the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed.

(e) If there is more than one secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under subsection (d) of this section.

Source: L. 2001: Entire article R&RE, p. 1383, § 1, effective July 1. **L. 2023:** (a)(1) and IP(b) amended, (SB 23-090), ch. 136, p. 559, § 74, effective August 7.

Editor's note - Colorado legislative change: Colorado added the phrase "or pursuant to subsection (b) or (c) of this section" to subsection (a)(1).

4-9-510. Effectiveness of filed record.

(a) A filed record is effective only to the extent that it was filed by a person that may file it under section 4-9-509.

(b) A record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record.

(c) Subject to section 4-9-528 and subsection (d) of this section, a continuation statement that is not filed within the six-month period prescribed by section 4-9-515 (d) is ineffective.

(d) Any continuation statement filed on or after July 1, 1996, and before January 1, 1998, including one that was perfected by filing with both the offices of the secretary of state and a county clerk and recorder, continues the perfection in all of the collateral listed on the filing. With respect to continuation statements filed on or after July 1, 1996, and before January 1, 1998, the filing of a single continuation statement shall maintain the effectiveness of financing statements that name identical collateral but have been filed in multiple locations.

(e) No continuation statement filed on or after July 1, 1995, shall be ineffective solely because it failed to include a statement that the original financing statement is still effective.

Source: L. 2001: Entire article R&RE, p. 1383, § 1, effective July 1.

Editor's note - Colorado legislative change: Colorado added the phrase "Subject to section 4-9-528 and subsection (d) of this section," to subsection (c) and added subsections (d) and (e).

4-9-511. Secured party of record.

(a) A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. If an initial financing statement is filed under section 4-9-514 (a), the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.

(b) If an amendment of a financing statement which provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under section 4-9-514 (b), the assignee named in the amendment is a secured party of record.

(c) A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person.

Source: L. 2001: Entire article R&RE, p. 1384, § 1, effective July 1.

4-9-512. Amendment of financing statement.

(a) Subject to section 4-9-509, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection (e) of this section, otherwise amend the information provided in, a financing statement by filing an amendment that:

(1) Identifies, by file number, the initial financing statement to which the amendment relates; and

(2) Provides the date that the initial financing statement was filed or recorded.

(b) Except as otherwise provided in section 4-9-515, the filing of an amendment does not extend the period of effectiveness of the financing statement.

(c) A financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment.

(d) A financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment.

(e) An amendment is ineffective to the extent it:

(1) Purports to delete all debtors and fails to provide the name of a debtor to be covered by the financing statement; or

(2) Purports to delete all secured parties of record and fails to provide the name of a new secured party of record.

Source: L. 2001: Entire article R&RE, p. 1384, § 1, effective July 1.

Editor's note: (1) This section is similar to former § 4-9-402 (4) as it existed prior to 2001.

(2) **Colorado legislative change:** Subsection (a)(2) of the uniform act states: "if the amendment relates to an initial financing statement filed [or recorded] in a filing office described in Section 9-501(a)(1), provides the date and time that the initial financing statement was filed or recorded and the information specified in Section 9-502 (b)."

4-9-513. Termination statement.

(a) A secured party shall cause the secured party of record for a financing statement to file a termination statement for the financing statement if the financing statement covers consumer goods and:

(1) There is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) The debtor did not authorize the filing of the initial financing statement.

(b) To comply with subsection (a) of this section, a secured party shall cause the secured party of record to file the termination statement:

(1) Within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) If earlier, within twenty days after the secured party receives a signed demand from a debtor.

(c) In cases not governed by subsection (a) of this section, within twenty days after a secured party receives a signed demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if:

(1) Except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;

(2) The financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation;

(3) The financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession; or

(4) The debtor did not authorize the filing of the initial financing statement.

(d) Except as otherwise provided in section 4-9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective. Except as otherwise provided in section 4-9-510, for purposes of sections 4-9-519 (g), 4-9-522 (a), and 4-9-523 (c), the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse.

Source: L. 2001: Entire article R&RE, p. 1385, § 1, effective July 1. **L. 2023:** (b)(2) and IP(c) amended, (SB 23-090), ch. 136, p. 559, § 75, effective August 7.

Editor's note: (1) This section is similar to former § 4-9-404 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added the last sentence of subsection (d).

ANNOTATION

Law reviews. For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

4-9-514. Assignment of powers of secured party of record.

(a) Except as otherwise provided in subsection (c) of this section, an initial financing statement may reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party.

(b) Except as otherwise provided in subsection (c) of this section, a secured party of record may assign of record all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement that:

(1) Identifies, by its file number, the initial financing statement to which it relates;

(1.5) Provides the date that the initial financing statement was filed or recorded;

(2) Provides the name of the assignor; and

(3) Provides the name and mailing address of the assignee.

(c) An assignment of record of a security interest in a fixture covered by a record of a mortgage which is effective as a financing statement filed as a fixture filing under section 4-9-502 (c) may be made only by an assignment of record of the mortgage in the manner provided by law of this state other than this title.

(d) An assignment that was filed in accordance with this section prior to August 5, 2009, and that is on file in the filing office as of August 5, 2009, whether or not it provides the date that the initial financing statement was filed or recorded, shall be deemed to have been filed pursuant to and in accordance with this section as amended and shall have the same effect as if filed pursuant to this section as amended.

Source: L. 2001: Entire article R&RE, p. 1386, § 1, effective July 1. **L. 2009:** IP(b) and (b)(2) amended and (b)(1.5) and (d) added, (SB 09-084), ch. 141, p. 602, §§ 1, 2, effective August 5.

Editor's note: (1) This section is similar to former § 4-9-405 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added the phrase "and the name of one of the debtors" to subsection (b)(2).

4-9-515. Duration and effectiveness of financing statement - effect of lapsed financing statement.

(a) Except as otherwise provided in subsections (b), (e), (f), and (g) of this section and section 4-9-528, a filed financing statement is effective for a period of five years after the date of filing.

(b) Except as otherwise provided in subsections (e), (f), and (g) of this section, an initial financing statement filed in connection with a manufactured-home transaction is effective for a period of thirty years after the date of filing if it indicates that it is filed in connection with a manufactured-home transaction.

(c) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (d) of this section. Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(d) A continuation statement may be filed only within six months before the expiration of the five-year period specified in subsection (a) of this section, the thirty-year period specified in subsection (b) of this section, or the five-year period specified in section 4-9-528 (a)(1), whichever is applicable.

(e) Except as otherwise provided in section 4-9-510, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. Upon the expiration of the five-year period, the financing statement lapses in the same manner as provided in subsection (c) of this section, unless, before the lapse, another continuation statement is filed pursuant to subsection (d) of this section. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

(f) If a debtor is a transmitting utility and a filed initial financing statement so indicates, the financing statement is effective until a termination statement is filed.

(g) A record of a mortgage that is effective as a financing statement filed as a fixture filing under section 4-9-502 (c) remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

Source: L. 2001: Entire article R&RE, p. 1386, § 1, effective July 1. **L. 2012:** (f) amended, (HB 12-1262), ch. 170, p. 602, § 12, effective July 1, 2013.

Editor's note: (1) This section is similar to former § 4-9-403 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added the reference to section 4-9-528 in subsection (a) and the phrase "or the five-year period specified in section 4-9-528 (a)(1)" in subsection (d).

ANNOTATION

Law reviews. For article, "Commercial Law", see 56 Den. L.J. 409 (1979). For article, "Colorado Secretary of State Uniform Commercial Code Procedures", see 11 Colo. Law. 1542 (1982). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

Annotator's note. Since § 4-9-515 is similar to § 4-9-403 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

For legislative intent, see In re Vodco Volume Dev. Co., 567 F.2d 967 (10th Cir. 1977) (decided prior to 1977 amendment).

This section may not be employed to destroy prior perfected security interests in favor of a subsequent holder of a security interest. W. Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979).

For effect of filing continuation statement after properly filed financing statement had lapsed, prior to 1977 amendment, see In re Vodco Volume Dev. Co., 567 F.2d 967 (10th Cir. 1977) (decided prior to 1977 amendment).

Failure to file a continuation statement within 60 days of the termination of a debtor's bankruptcy proceeding does not cause creditor's security interest to lapse when creditor has filed a continuation statement during the bankruptcy proceedings. John Deere Co. v. Alamosa Nat. Bank, 786 P.2d 505 (Colo. App. 1989).

4-9-516. What constitutes filing - effectiveness of filing.

(a) Except as otherwise provided in subsection (b) of this section, communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) Filing does not occur with respect to a record that a filing office refuses to accept because:

(1) The record is not communicated by a method or medium of communication authorized by the filing office;

(2) An amount equal to or greater than the applicable filing fee is not tendered;

(3) The filing office is unable to index the record because:

(A) In the case of an initial financing statement, the record does not provide a name for the debtor;

(B) In the case of an amendment or information statement, the record:

(i) Does not identify the initial financing statement as required by section 4-9-512 or 4-9-518, as applicable; or

(ii) Identifies an initial financing statement whose effectiveness has lapsed under section 4-9-515;

(C) In the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual that was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's surname; or

(D) In the case of a record filed or recorded in the filing office described in section 4-9-501 (a)(1), the record does not provide a sufficient description of the real property to which it relates;

(4) In the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;

(5) In the case of an initial financing statement or an amendment that provides a name of a debtor that was not previously provided in the financing statement to which the amendment relates, the record does not:

(A) Provide a mailing address for the debtor; or

(B) Indicate whether the debtor is an individual or an organization.

(C) Repealed.

(6) In the case of an assignment reflected in an initial financing statement under section 4-9-514 (a) or an amendment filed under section 4-9-514 (b), the record does not provide a name and mailing address for the assignee; or

(7) In the case of a continuation statement, the record is not filed within the six-month period prescribed by section 4-9-515 (d).

(c) For purposes of subsection (b) of this section:

(1) A record does not provide information if the filing office is unable to read or decipher the information; and

(2) A record that does not indicate that it is an amendment or identify an initial financing statement to which it relates, as required by section 4-9-512, 4-9-514, or 4-9-518, is an initial financing statement.

(d) A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b) of this section, is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

Source: L. 2001: Entire article R&RE, p. 1387, § 1, effective July 1. **L. 2012:** IP(b)(3)(B), (b)(3)(C), IP(b)(5), (b)(5)(A), and (b)(5)(B) amended and (b)(5)(C) repealed, (HB 12-1262), ch. 170, p. 602, § 13, effective July 1, 2013.

4-9-517. Effect of indexing errors.

The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record.

Source: L. 2001: Entire article R&RE, p. 1389, § 1, effective July 1.

4-9-518. Claim concerning inaccurate or wrongfully filed record.

(a) (1) Any person named as a debtor may file in the filing office an information statement with respect to a record indexed there under the debtor's name if the person believes that the record is inaccurate or was wrongfully filed.

(2) and (3) Repealed.

(b) An information statement under subsection (a) of this section must:

(1) Identify the record to which it relates by:

(A) The file number assigned to the initial financing statement to which the record relates; and

(B) If the information statement relates to a record filed or recorded in a filing office described in section 4-9-501 (a)(1), the date that the initial financing statement was filed or recorded;

(2) Indicate that it is an information statement; and

(3) Provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

(c) A person may file in the filing office an information statement with respect to a record filed there if the person is a secured party of record with respect to the financing statement to which the record relates and believes that the person that filed the record was not entitled to do so under section 4-9-509 (d).

(d) An information statement under subsection (c) of this section must:

(1) Identify the record to which it relates by:

(A) The file number assigned to the initial financing statement to which the record relates; and

(B) If the information statement relates to a record filed or recorded in a filing office described in section 4-9-501 (a)(1), the date that the initial financing statement was filed or recorded;

(2) Indicate that it is an information statement; and

(3) Provide the basis for the person's belief that the person that filed the record was not entitled to do so under section 4-9-509 (d).

(e) The filing of an information statement does not affect the effectiveness of an initial financing statement or other filed record.

(f) Repealed.

Source: L. 2001: Entire article R&RE, p. 1389, § 1, effective July 1. **L. 2008:** (a) amended and (d) added, p. 266, § 1, effective August 5. **L. 2010:** (a)(2) amended, (HB 10-1422), ch. 419, p. 2063, § 6, effective August 11. **L. 2012:** Entire section amended, (HB 12-1262), ch. 170, p. 603, § 14, effective July 1, 2013. **L. 2013:** (a)(2), (a)(3), and (f) repealed, (HB 13-1284), ch. 379, p. 2222, § 2, effective July 1.

4-9-519. Numbering, maintaining, and indexing records - communicating information provided in records.

(a) For each record filed in a filing office, the filing office shall:

(1) Assign a unique number to the filed record;

(2) Create a record that bears the number assigned to the filed record and the date and time of filing;

(3) Maintain the filed record for public inspection; and

(4) Index the filed record in accordance with subsections (c), (d), and (e) of this section.

(b) Repealed.

(c) Except as otherwise provided in subsections (d) and (e) of this section, the filing office shall:

(1) Index an initial financing statement according to the name of the debtor and index all filed records relating to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records relating to the initial financing statement; and

(2) Index a record that provides a name of a debtor which was not previously provided in the financing statement to which the record relates also according to the name that was not previously provided.

(d) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, it must be filed for record and the filing office shall index it:

(1) Under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

(2) To the extent that the law of this state provides for indexing of records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described.

(e) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office shall index an assignment filed under section 4-9-514 (a) or an amendment filed under section 4-9-514 (b):

(1) Under the name of the assignor as grantor; and

(2) To the extent that the law of this state provides for indexing a record of the assignment of a mortgage under the name of the assignee, under the name of the assignee.

(f) The filing office shall maintain a capability:

(1) To retrieve a record by the name of the debtor and:

(A) If the filing office is described in section 4-9-501 (a)(1), by the file number assigned to the initial financing statement to which the record relates and the date that the record was filed or recorded; or

(B) If the filing office is described in section 4-9-501 (a)(2), by the file number assigned to the initial financing statement to which the record relates; and

(2) To associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement.

(g) The filing office may not remove a debtor's name from the index until one year after the effectiveness of a financing statement naming the debtor lapses under section 4-9-515 with respect to all secured parties of record.

(h) The filing office shall perform the acts required by subsections (a) to (e) of this section at the time and in the manner prescribed by filing-office rule, but not later than five business days after the filing office receives the record in question.

Source: L. 2001: Entire article R&RE, p. 1389, § 1, effective July 1. **L. 2009:** (b) repealed, (SB 09-084), ch. 141, p. 603, § 3, effective August 5.

Editor's note: (1) This section is similar to former § 4-9-403 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado did not adopt subsection (i).

4-9-520. Acceptance and refusal to accept record.

(a) A filing office shall refuse to accept a record for filing for a reason set forth in section 4-9-516 (b) and may refuse to accept a record for filing only for a reason set forth in section 4-9-516 (b).

(b) If a filing office refuses to accept a record for filing, it shall communicate to the person that presented the record the fact of and reason for the refusal and the date and time the record would have been filed had the filing office accepted it. The communication must be made at the

time and in the manner prescribed by filing-office rule but in no event more than five business days after the filing office receives the record.

(c) A filed financing statement satisfying section 4-9-502 (a) and (b) is effective, even if the filing office is required to refuse to accept it for filing under subsection (a) of this section. However, section 4-9-338 applies to a filed financing statement providing information described in section 4-9-516 (b)(5) which is incorrect at the time the financing statement is filed.

(d) If a record communicated to a filing office provides information that relates to more than one debtor, this part 5 applies as to each debtor separately.

Source: L. 2001: Entire article R&RE, p. 1391, § 1, effective July 1.

Editor's note - Colorado legislative change: In subsection (b), Colorado did not adopt the phrase "in the case of a filing office described in section 4-9-501(a)(2)," after the word "but" and changed "two" to "five".

4-9-521. Uniform form of written financing statement and amendment.

(a) A filing office that accepts written records may not refuse to accept a written initial financing statement in the form and format adopted from time to time by the secretary of state, except for a reason set forth in section 4-9-516 (b).

(b) A filing office that accepts written records may not refuse to accept a written record in the form and format adopted from time to time by the secretary of state, except for a reason set forth in section 4-9-516 (b).

Source: L. 2001: Entire article R&RE, p. 1392, § 1, effective July 1.

Editor's note - Colorado legislative change: Colorado substituted the phrase "form and format adopted from time to time by the secretary of state," for the phrase "following form and format" in subsections (a) and (b).

4-9-522. Maintenance and destruction of records.

(a) The filing office shall maintain a record of the information provided in a filed financing statement for at least one year after the effectiveness of the financing statement has lapsed under

section 4-9-515 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and the file number assigned to the initial financing statement to which the record relates and the date that the record was filed or recorded.

(b) Except to the extent that a statute governing disposition of public records provides otherwise, the filing office immediately may destroy any written record evidencing a financing statement. However, if the filing office destroys a written record, it shall maintain another record of the financing statement which complies with subsection (a) of this section.

Source: L. 2001: Entire article R&RE, p. 1392, § 1, effective July 1.

Editor's note: (1) This section is similar to former § 4-9-403 (3) as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado did not adopt the phrase "by using" after the phrase "debtor and" and added the phrase "and the date that the record was filed or recorded" in subsection (a).

4-9-523. Information from filing office - sale or license of records.

(a) If a person that files a written record requests an acknowledgment of the filing, the filing office shall send to the person an image of the record showing the number assigned to the record pursuant to section 4-9-519 (a)(1), the name of the debtor and the date and time of the filing of the record. However, if the person furnishes a copy of the record to the filing office, the filing office may instead:

(1) Note upon the copy the number assigned to the record pursuant to section 4-9-519 (a)(1) and the date and time of the filing of the record; and

(2) Send the copy to the person.

(b) If a person files a record other than a written record, the filing office shall communicate to the person an acknowledgment that provides:

(1) The information in the record;

(2) The number assigned to the record pursuant to section 4-9-519 (a)(1); and

(3) The date and time of the filing of the record.

(c) The filing office shall communicate or otherwise make available in a record the following information to any person that requests it:

(1) Whether there is on file on a date and time specified by the filing office, but not a date earlier than three business days before the filing office receives the request, any financing statement that:

(A) Designates a particular debtor;

(B) Has not lapsed under section 4-9-515 with respect to all secured parties of record; and

(C) If the request so states, has lapsed under section 4-9-515 and a record of which is maintained by the filing office under section 4-9-522 (a);

(2) The date and time of filing of each financing statement; and

(3) The information provided in each financing statement.

(d) In complying with its duty under subsection (c) of this section, the filing office may communicate information in any medium. However, if requested, the filing office shall communicate information by issuing a record that can be admitted into evidence in the courts of this state without extrinsic evidence of its authenticity.

(e) The filing office shall perform the acts required by subsections (a) to (d) of this section at the time and in the manner prescribed by filing-office rule, but not later than five business days after the filing office receives the request.

(f) At least weekly, the filing office shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under this part 5, in such digital or electronic medium as is from time to time available to the filing office.

Source: L. 2001: Entire article R&RE, p. 1392, § 1, effective July 1. **L. 2008:** (c) amended, p. 266, § 2, effective August 5. **L. 2009:** (d) amended, (SB 09-084), ch. 141, p. 603, § 4, effective August 5.

Editor's note: (1) This section is similar to former § 4-9-407 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added the phrase "the name of the debtor and" in subsection (a), added a reference to "federal tax lien notice" in subsections (c)(1), (c)(2), and (c)(3), changed "two" to "five" in subsection (e), and substituted the phrase "such digital or electronic medium as is" for the phrase "every medium" in subsection (f).

4-9-524. Delay by filing office.

Delay by the filing office beyond a time limit prescribed by this part 5 is excused if:

(1) The delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond control of the filing office; and

(2) The filing office exercises reasonable diligence under the circumstances.

Source: L. 2001: Entire article R&RE, p. 1393, § 1, effective July 1.

4-9-525. Fees.

(a) Except as otherwise provided in subsection (f) of this section and subject to section 24-75-402, C.R.S., fees for services rendered by the secretary of state under this part 5 shall be determined and collected pursuant to section 24-21-104, C.R.S.

(b) Except as otherwise provided in subsection (f) of this section, the fee for filing and indexing a record under this part 5 in a filing office described in section 4-9-501 (a)(1) shall not exceed:

(1) Ten dollars if the record is communicated in writing and consists of one or two pages;

(2) Fifteen dollars if the record is communicated in writing and consists of more than two pages; and

(3) Five dollars if the record is communicated by another medium authorized by filing-office rule.

(c) The number of names required to be indexed does not affect the amount of the fee in subsections (a) and (b) of this section.

(d) The secretary of state must set the fee for responding to a request for information from the secretary of state, including the fee for issuing a certificate showing whether there is on file any financing statement naming a particular debtor. The secretary of state need not set a fee for remote access to the secretary of state's data base.

(e) The fee for responding to a request for information from a filing office described in section 4-9-501 (a)(1), including for issuing a certificate showing whether there is on file any financing statement naming a particular debtor, shall not exceed:

(1) Five dollars if the request is communicated in writing; and

(2) Three dollars if the request is communicated by another medium authorized by filing-office rule.

(f) This section does not require a fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under section 4-9-502 (c). However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply.

Source: L. 2001: Entire article R&RE, p. 1393, § 1, effective July 1. **L. 2008:** (a) amended, p. 267, § 3, effective August 5.

Editor's note - Colorado legislative change: This section contains numerous alterations from the uniform act.

4-9-526. Filing-office rules.

(a) The secretary of state shall adopt and publish rules to implement this article. The filing-office rules must be:

(1) Consistent with this article; and

(2) Adopted and published in accordance with the "State Administrative Procedure Act", article 4 of title 24, C.R.S.

(b) To keep the filing-office rules and practices of the filing office in harmony with the rules and practices of filing offices in other jurisdictions that enact substantially this part 5, and to keep the technology used by the filing office compatible with the technology used by filing offices in other jurisdictions that enact substantially this part 5, the secretary of state, so far as is consistent with the purposes, policies, and provisions of this article, in adopting, amending, and repealing filing-office rules, shall:

(1) Consult with filing offices in other jurisdictions that enact substantially this part 5; and

(2) Consult the most recent version of the model rules promulgated by the international association of commercial administrators or any successor organization; and

(3) Take into consideration the rules and practices of, and the technology used by, filing offices in other jurisdictions that enact substantially this part 5.

Source: L. 2001: Entire article R&RE, p. 1394, § 1, effective July 1. **L. 2008:** (b)(2) amended, p. 267, § 4, effective August 5.

4-9-527. Duty to report. (Repealed)

Source: L. 2001: Entire article R&RE, p. 1395, § 1, effective July 1. **L. 2008:** (2) amended, p. 267, § 5, effective August 5. **L. 2017:** Entire section repealed, (HB 17-1133), ch. 75, p. 236, § 1, effective March 23.

4-9-528. Refiling required.

(a) (1) The effectiveness of a financing statement that was filed before July 1, 1996, and that has not otherwise lapsed by December 31, 1997, shall lapse in the manner provided in section 4-9-403 (2) of former article 9 of this title on December 31, 1997, unless a continuation statement was filed on or after July 1, 1996, but on or before December 31, 1997, that identified the original statement by filing office, file number, and date of filing and contains a statement indicating the types or describing the items of collateral indicated in the financing statement. If a continuation statement was filed in accordance with this paragraph (1), the effectiveness of the original financing statement is continued for five years after the last date to which the filing would otherwise have been effective, whereupon it lapses in the manner provided in section 4-9-515 unless another continuation statement is filed pursuant to section 4-9-515 prior to such lapse.

(2) No continuation statement filed pursuant to this subsection (a) on or after July 1, 1996, shall be ineffective solely because it:

(A) Failed to identify the original statement by county, if the filing office was the office of the secretary of state and the statement so stated, or by time of filing;

(B) Indicated the types or described the items of the collateral indicated in the financing statement instead of listing the collateral of the original filing; or

(C) Failed to include a statement that the original financing statement is still effective.

(b) For purposes of the refiling provisions of this section only, a continuation statement does not have to be filed during the period beginning July 1, 1996, to December 31, 1997, when the only collateral on a financing statement is timber to be cut; minerals or other substances of value which may be extracted from the earth; fixtures; a mortgage or deed of trust effective as a fixture filing; collateral, including fixtures, of a transmitting utility; or accounts subject to section 4-9-103 (5) of former article 9 of this title.

(c) References in this section to "former article 9 of this title" are to article 9 of this title as in effect immediately before July 1, 2001.

Source: L. 2001: Entire article R&RE, p. 1395, § 1, effective July 1.

Editor's note - Colorado legislative change: Colorado added this section.

4-9-529. Electronic and other filings.

(a) (Deleted by amendment, L. 2008, p. 268, § 6.)

(b) The secretary of state shall ensure that presentation for filing may be accomplished electronically, without the necessity for the presentation of a physical original document or the image thereof, if all required information is included and readily retrievable from the data transmitted. All electronic filings shall be retained in a form that facilitates location of the information so filed and production of a true and accurate physical printout or other representation of the information so filed.

(c) The secretary of state is hereby specifically authorized to establish prepaid accounts, an electronic debit system, a system for the acceptance of credit cards or electronic funds transfers, or any combination thereof.

(d) To facilitate the filing of documents in the office of the secretary of state electronically, the secretary of state is hereby specifically authorized to adopt, by rule, technical standards governing such filings and to reject documents that do not comply with such standards. Such standards may include, without limitation, the specification of commercially available software or the dissemination of software compatible with the secretary of state's reception, storage, and retrieval system. Where national standards are available and have been promulgated by a recognized professional organization, the secretary of state shall consider and may use such national standards as the basis for the rules.

(e) (Deleted by amendment, L. 2008, p. 268, § 6.)

Source: L. 2001: Entire article R&RE, p. 1396, § 1, effective July 1. **L. 2008:** (a), (d), and (e) amended, p. 268, § 6, effective February 29, 2012.

Editor's note - Colorado legislative change: Colorado added this section.

4-9-530. Proper office to file certain amendments. (Repealed)

Source: L. 2001: Entire article R&RE, p. 1397, § 1, effective July 1. **L. 2002:** Entire section repealed, p. 938, § 7, effective August 7.

Editor's note - Colorado legislative change: Colorado added this section.

4-9-531. Removal of social security numbers from financing statements in the custody of the secretary of state.

(a) As soon as feasible, but no later than July 1, 2003, the secretary of state shall remove social security numbers from the publicly accessible electronic records of all financing statements in the custody of the secretary that were filed with a filing office on or after April 6, 1989, and before July 1, 2001, pursuant to repealed provisions of this article that required that any such financing statement contain a social security number.

(b) A financing statement from which the secretary of state removes a social security number pursuant to subsection (a) of this section shall not be rendered insufficient or ineffective by such removal.

(c) Repealed.

Source: L. 2002: Entire section added, p. 661, § 1, effective May 28. **L. 2009:** (c) repealed, (SB 09-283), ch. 336, p. 1779, § 2, effective June 1.

Editor's note: Section 3 of chapter 336, Session Laws of Colorado 2009, provides that the act repealing subsection (c) applies to any secured transaction record in the possession of the secretary of state before, on, or after June 1, 2009.

PART 6

DEFAULT

4-9-601. Rights after default - judicial enforcement - consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.

(a) After default, a secured party has the rights provided in this part 6 and, except as otherwise provided in section 4-9-602, those provided by agreement of the parties. A secured party:

(1) May reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) If the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) A secured party in possession of collateral or control of collateral under section 4-7-106, 4-9-104, 4-9-105, 4-9-106, 4-9-107, or 4-9-107.5 has the rights and duties provided in section 4-9-207.

(c) The rights under subsections (a) and (b) of this section are cumulative and may be exercised simultaneously.

(d) Except as otherwise provided in subsection (g) of this section and section 4-9-605, after default, a debtor and an obligor have the rights provided in this part 6 and by agreement of the parties.

(e) If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of:

(1) The date of perfection of the security interest or agricultural lien in the collateral;

(2) The date of filing a financing statement covering the collateral; or

(3) Any date specified in a statute under which the agricultural lien was created.

(f) A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

(g) Except as otherwise provided in section 4-9-607 (c), this part 6 imposes no duties upon a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes.

(h) For purposes of this part 6, in taking possession of collateral by self-help, "breach of the peace" includes, but is not limited to, engaging in the following actions without the contemporaneous permission of the debtor:

(1) Entering a locked or unlocked residence or residential garage;

(2) Breaking, opening, or moving any lock, gate, or other barrier to enter enclosed real property; or

(3) Using or threatening to use violent means.

Source: L. 2001: Entire article R&RE, p. 1397, § 1, effective July 1. **L. 2006:** (b) amended, p. 503, § 44, effective September 1. **L. 2023:** (b) amended, (SB 23-090), ch. 136, p. 559, § 76, effective August 7.

Editor's note: (1) This section is similar to former § 4-9-501 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added subsection (h).

ANNOTATION

Law reviews. For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983).

Annotator's note. Since § 4-9-601 is similar to § 4-9-501 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

In an action to recover a deficiency judgment, the burden is upon the secured party to prove the amount of the deficiency. Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

A secured creditor need not "elect" his choice of remedies. He may pursue those methods of collection afforded under the code or through judicial processes otherwise available. Nor by effectuating the latter course of action does the creditor relinquish any rights obtained by virtue of his security interest. Bilar, Inc. v. Sherman, 40 Colo. App. 38, 572 P.2d 489 (1977).

Creditor is not required to make election of remedies, as rights and remedies of subsection (1) are cumulative. Wiley v. Bank of Fountain Valley, 632 P.2d 282 (Colo. App. 1981); Flexisystems, Inc. v. Am. Standards Testing Bureau, Inc., 847 P.2d 207 (Colo. App. 1992).

Creditor may proceed against real and personal property separately. Subsection (4) does not prohibit a creditor from proceeding against both real and personal property collateral simultaneously in separate proceedings. Wiley v. Bank of Fountain Valley, 632 P.2d 282 (Colo. App. 1981).

"Debtor" includes a guarantor and, as a debtor, the guarantor may not waive debtor's right to insist on a commercially reasonable disposition of collateral. May v. Women's Bank, N.A., 807 P.2d 1145 (Colo. 1991).

Section 4-9-504 is made inoperative by this section with respect to water stock foreclosed as a part of real estate security. Kinoshita v. North Denver Bank, 181 Colo. 183, 508 P.2d 1264 (1973).

Possession of chattels subject to security agreement. Secured party should have been granted immediate possession of chattels which were subject to the security agreement where the memorandum of agreement between the parties provided for foreclosure under the uniform commercial code. Alexander Dawson, Inc. v. Sage Creek Canyon Co., 37 Colo. App. 339, 546 P.2d 969 (1976).

A secured creditor who does not have possession of his security need not be granted a hearing before seizure of his security under a prior tax lien. Antonoff v. City & County of Denver, 195 Colo. 227, 577 P.2d 281 (1978).

Notice required under § 4-9-504 (3) may not be waived. United Bank v. Reed, 635 P.2d 922 (Colo. App. 1981).

Presumption that proceeds from sale without notice equal balance owing. Where there is no notice prior to sale of collateral, it is rebuttably presumed that the value of the collateral sold is equal to the balance owing on any notes. To rebut the presumption, the secured party has the burden of proving, by other evidence, the market value of the collateral and that, after application of that amount, there was a balance still owing on the notes. United Bank v. Reed, 635 P.2d 922 (Colo. App. 1981).

Applied in First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980); Hollemon v. Murray, 666 P.2d 1107 (Colo. App. 1982).

4-9-602. Waiver and variance of rights and duties.

Except as otherwise provided in section 4-9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

(1) Section 4-9-207 (b)(4)(C), which deals with use and operation of the collateral by the secured party;

(2) Section 4-9-210, which deals with requests for an accounting and requests concerning a list of collateral and statement of account;

(3) Section 4-9-607 (c), which deals with collection and enforcement of collateral;

(4) Sections 4-9-608 (a) and 4-9-615 (c) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition;

(5) Sections 4-9-608 (a) and 4-9-615 (d) to the extent that they require accounting for or payment of surplus proceeds of collateral;

(6) Section 4-9-609 to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace;

(7) Sections 4-9-610 (b), 4-9-611, 4-9-613, and 4-9-614, which deal with disposition of collateral;

(8) Section 4-9-615 (f), which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor;

(9) Section 4-9-616, which deals with explanation of the calculation of a surplus or deficiency;

(10) Section 4-9-620, 4-9-621, and 4-9-622, which deal with acceptance of collateral in satisfaction of obligation;

(11) Section 4-9-623, which deals with redemption of collateral;

(12) Section 4-9-624, which deals with permissible waivers; and

(13) Sections 4-9-625 and 4-9-626, which deal with the secured party's liability for failure to comply with this article.

Source: L. 2001: Entire article R&RE, p. 1398, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-501 (3) as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983).

Annotator's note. Section 4-9-602 is similar to § 4-9-501 as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-501 have been included in the annotations to § 4-9-601.

4-9-603. Agreement on standards concerning rights and duties.

(a) The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in section 4-9-602 if the standards are not unreasonable.

(b) Subsection (a) of this section does not empower the parties to set standards affecting the duty under section 4-9-609 to refrain from breaching the peace.

Source: L. 2001: Entire article R&RE, p. 1399, § 1, effective July 1.

Editor's note: (1) This section is similar to former § 4-9-501 (3) as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado did not adopt the word "manifestly" before the word "unreasonable" in subsection (a) and substituted the phrase "empower the parties to set standards affecting" for the phrase "apply to" in subsection (b).

4-9-604. Procedure if security agreement covers real property or fixtures.

(a) If a security agreement covers both personal and real property, a secured party may proceed:

(1) Under this part 6 as to the personal property without prejudicing any rights with respect to the real property; or

(2) As to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part 6 do not apply.

(b) Subject to subsection (c) of this section, if a security agreement covers goods that are or become fixtures, a secured party may proceed:

(1) Under this part 6; or

(2) In accordance with the rights with respect to real property, in which case the other provisions of this part 6 do not apply.

(c) Subject to the other provisions of this part 6, if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.

(d) A secured party that removes collateral shall promptly reimburse any encumbrancer or owner of the real property for the cost of repair of any physical injury caused by the removal. The secured party need not reimburse the encumbrancer or owner for any diminution in value of the real property 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 assurance for the performance of the obligation to reimburse.

Source: L. 2001: Entire article R&RE, p. 1400, § 1, effective July 1.

Editor's note: (1) The provisions of this section are similar to former §§ 4-9-313 (8) and 4-9-501 (4) as they existed prior to 2001.

(2) **Colorado legislative change:** Colorado did not adopt the phrase "other than the debtor" after the word "property" in the first sentence in subsection (d).

ANNOTATION

Law reviews. For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

4-9-605. Unknown debtor or secondary obligor.

(a) Except as provided in subsection (b) of this section, a secured party does not owe a duty based on its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:

(A) That the person is a debtor or obligor;

(B) The identity of the person; and

(C) How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

(A) That the person is a debtor; and

(B) The identity of the person.

(b) A secured party owes a duty based on its status as a secured party to a person if, at the time the secured party obtains control of collateral that is a controllable account, controllable electronic record, or controllable payment intangible or at the time the security interest attaches to the collateral, whichever is later:

(1) The person is a debtor or obligor; and

(2) The secured party knows that the information in subsection (a)(1)(A), (a)(1)(B), or (a)(1)(C) of this section relating to the person is not provided by the collateral, a record attached to or logically associated with the collateral, or the system in which the collateral is recorded.

Source: L. 2001: Entire article R&RE, p. 1400, § 1, effective July 1. **L. 2023:** IP amended and (b) added, (SB 23-090), ch. 136, p. 559, § 77, effective August 7.

4-9-606. Time of default for agricultural lien.

For purposes of this part 6, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created.

Source: L. 2001: Entire article R&RE, p. 1401, § 1, effective July 1.

4-9-607. Collection and enforcement by secured party.

(a) If so agreed, and in any event after default, a secured party:

(1) May notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;

(2) May take any proceeds to which the secured party is entitled under section 4-9-315;

(3) May enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

(4) If it holds a security interest in a deposit account perfected by control under section 4-9-104 (a)(1), may apply the balance of the deposit account to the obligation secured by the deposit account; and

(5) If it holds a security interest in a deposit account perfected by control under section 4-9-104 (a)(2) or (3), may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(b) If necessary to enable a secured party to exercise under paragraph (3) of subsection (a) of this section the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:

(1) A copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) The secured party's sworn affidavit in recordable form stating that:

(A) A default has occurred with respect to the obligation secured by the mortgage; and

(B) The secured party is entitled to enforce the mortgage nonjudicially.

(c) A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) Undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) Is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) A secured party may deduct from the collections made pursuant to subsection (c) of this section reasonable expenses of collection and enforcement, including reasonable attorney's fees and reasonable legal expenses incurred by the secured party.

(e) This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party.

Source: L. 2001: Entire article R&RE, p. 1401, § 1, effective July 1. **L. 2012:** (b)(2)(A) amended, (HB 12-1262), ch. 170, p. 604, § 15, effective July 1, 2013.

Editor's note: This section is similar to former § 4-9-502 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982).

Annotator's note. Since § 4-9-607 is similar to § 4-9-502 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Bank's security interest in taxpayer's accounts payable and contract rights was not choate under Colorado law so as to have priority over federal tax lien because bank failed to take action required under this section before the notice and filing of the federal tax lien. U.S. v. Central Bank of Denver, 843 F.2d 1300 (10th Cir. 1988).

Applied in First Nat'l Bank v. District Court, 653 P.2d 1123 (Colo. 1982).

4-9-608. Application of proceeds of collection or enforcement - liability for deficiency and right to surplus.

(a) If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under section 4-9-607 in the following order to:

(A) The reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and reasonable legal expenses incurred by the secured party;

(B) The satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(C) The satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives a signed demand for proceeds before distribution of the proceeds is completed.

(2) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand under subparagraph (C) of paragraph (1) of this subsection (a).

(3) A secured party need not apply or pay over for application noncash proceeds of collection and enforcement under section 4-9-607 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(4) A secured party shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency.

(b) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency.

Source: L. 2001: Entire article R&RE, p. 1402, § 1, effective July 1. **L. 2023:** (a)(1)(C) amended, (SB 23-090), ch. 136, p. 560, § 78, effective August 7.

Editor's note - Colorado legislative change: Colorado substituted the phrase "section 4-9-607" for the phrase "this section" in subsections (a)(1) and (a)(3) and added the word "reasonable" in subsection (a)(1)(A).

4-9-609. Secured party's right to take possession after default.

(a) After default, a secured party:

(1) May take possession of the collateral; and

(2) Without removal, may render equipment unusable and dispose of collateral on a debtor's premises under section 4-9-610.

(b) A secured party may proceed under subsection (a) of this section:

(1) Pursuant to judicial process; or

(2) Without judicial process, if it proceeds without breach of the peace.

(c) If so agreed, and in any event after default, a 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.

(d) If the collateral is a manufactured home, as defined in section 42-1-102 (48.8), or a trailer coach, as defined in section 42-1-102 (106), and is used and occupied by the debtor as a place of residence, the secured party may take possession of the collateral pursuant to this section without judicial process only if there is clear and convincing evidence that the debtor has vacated or abandoned the collateral or the debtor voluntarily surrenders the collateral to the secured party.

(e) In exercising its rights under paragraph (2) of subsection (a) of this section with respect to collateral, a secured party may not disable or render unusable any computer program or other similar device embedded in the collateral if immediate injury to any person or property is a reasonably foreseeable consequence of such action. Any secured party who disables or renders unusable such a computer program or other similar device in such circumstances shall be liable in accordance with applicable rules of law to any person who sustains an injury to person or property as a reasonably foreseeable result of the secured party's action.

Source: L. 2001: Entire article R&RE, p. 1403, § 1, effective July 1. **L. 2022:** (d) amended, (SB 22-212), ch. 421, p. 2965, § 11, effective August 10.

Editor's note: (1) This section is similar to former § 4-9-503 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added subsections (d) and (e).

ANNOTATION

Annotator's note. Since § 4-9-609 is similar to § 4-9-503 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Law reviews. For comment discussing 14th amendment "state action" ramifications and constitutionality of self-help repossessions under the U.C.C., see 44 U. Colo. L. Rev. 389 (1973). For comment discussing whether repossession by a secured creditor pursuant to statutory and contractual provisions constitutes state action, see 50 Den. L.J. 261 (1973). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983). For article, "A Review of Agricultural Law: Hard Times and Hard Choices", see 15 Colo. Law. 629 (1986). For article, "The Colorado Farm Homestead Protection Act", see 15 Colo. Law 1642 (1986). For article, "Agricultural Lending in a Troubled Economy", see 16 Colo. Law. 1773 (1987). For article, "The Agricultural Credit Act of 1987", see 17 Colo. Law. 611 (1988).

As applied to facts of case section not unconstitutional. Where the secured creditor gave the debtor every opportunity to avoid default, and only after the debtor refused to make any effort to pay and he was informed by the creditor that the creditor had no choice but to repossess, did the creditor resort to repossession, as applied to these facts, this section is not unconstitutional for violating due process. John Deere Co. v. Catalano, 186 Colo. 101, 525 P.2d 1153 (1974).

Authorization of self-help repossessions is not enough to sufficiently involve the state in the acts of repossessors for their acts to be action "under color of" state law. Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972).

Article 9 does not determine location of title after default. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

Traditional state rule allows repossession of security. In Colorado, as elsewhere, the state's traditional rule has been to allow the secured creditor to repossess the security if the contract so provides and the repossession does not "breach the peace". John Deere Co. v. Catalano, 186 Colo. 101, 525 P.2d 1153 (1974).

Right to possession is not limited by this section to the creditor whose security interest has the higher priority. Western Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979).

Section adds nothing if parties previously agree on such remedy. While the enactment of this section provides for self-help repossession in absence of contrary contract provisions, it adds nothing to the situation where the parties have previously agreed on such a remedy and the procedure is carried out without significant state help. John Deere Co. v. Catalano, 186 Colo. 101, 525 P.2d 1153 (1974).

No right to jury trial before repossession. Although C.R.C.P. 38 provides that a party is entitled to a jury trial upon demand in an action for the recovery of specific real or personal property, the rule is not intended to extend to actions involving the repossession of collateral by a secured party. Western Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979).

In event of default, voluntary delivery of collateral to creditor constitutes a repossession and does not remove the matter from the UCC. Tajalli v. Gharibi, 758 P.2d 190 (Colo. App. 1988).

Applied in First Nat'l Bank v. District Court, 653 P.2d 1123 (Colo. 1982); Layne v. Fort Carson Nat'l Bank, 655 P.2d 856 (Colo. App. 1982); Wynn v. Adams County Bank, 761 P.2d 234 (Colo. App. 1988).

4-9-610. Disposition of collateral after default.

(a) After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) A secured party may purchase collateral:

(1) At a public disposition; or

(2) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

(d) A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.

(e) A secured party may disclaim or modify warranties under subsection (d) of this section:

(1) In a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or

(2) By communicating to the purchaser, prior to completion of the transaction, a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.

(f) A record is sufficient to disclaim warranties under subsection (e) of this section if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import.

Source: L. 2001: Entire article R&RE, p. 1403, § 1, effective July 1.

Editor's note: (1) This section is similar to former § 4-9-504 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added the phrase "prior to completion of the transaction," to subsection (e)(2).

ANNOTATION

Law reviews. For comment, "Remedies for Failure to Notify Debtor of Disposition of Repossessed Collateral Under the U.C.C.", see 44 U. Colo. L. Rev. 221 (1972). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Commercial Law", see 55 Den. L.J. 425 (1978). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983). For article, "A Review of Agricultural Law: Hard Times and Hard Choices", see 15 Colo. Law. 629 (1986). For article, "The Colorado Farm Homestead Protection Act", see 15 Colo. Law. 1642 (1986). For article, "Agricultural Lending in a Troubled Economy", see 16 Colo. Law. 1773 (1987). For article, "The Agricultural Credit Act of 1987", see 17 Colo. Law. 611 (1988).

Annotator's note. Since § 4-9-610 is similar to § 4-9-504 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Issuance of title certificate to repossessor involves no deprivation of due process as contemplated by the fourteenth amendment or state constitution. It may be that repossession of automobiles or any other property sold on time payment with an express agreement permitting such repossession without notice may be resulting in great abuses, and controls are needed. If so, the regulation of this abuse is a matter for the general assembly, not the courts. Sifuentes v. Weed, 186 Colo. 109, 525 P.2d 1157 (1974).

Authorization of self-help repossessions is not enough to sufficiently involve the state in the acts of repossessors for their acts to be action "under color of" state law. Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972).

"Disposition" of collateral connotes receipt of "proceeds". Where collateral was released to the debtor, and the creditor did not receive "proceeds", no "disposition" of the collateral took place. Silverberg v. Colantuno, 991 P.2d 280 (Colo. App. 1998).

Presumption that proceeds from sale without notice equal balance owing. Where there is no notice prior to sale of collateral, it is rebuttably presumed that the value of the collateral sold is equal to the balance owing on any notes. To rebut the presumption, the secured party has the burden of proving, by other evidence, that the market value of the collateral and that, after application of that amount, there was a balance still owing on the notes. United Bank v. Reed, 635 P.2d 922 (Colo. App. 1981); Gapter v. Kocjancic, 703 P.2d 660 (Colo. App. 1985); Tajalli v. Gharibi, 758 P.2d 190 (Colo. App. 1988).

The reason for exempting from the notice requirement a transaction where there is a recognized market is that the price on the recognized market represents the fair market value from day to day, so if there is a recognized market, theoretically, the best price at any given time is the current market price. Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

Repossessed automobiles are not collateral of a type sold on a recognized market within the meaning of this section which excuses notification of sale in case of such collateral. Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

Since there is no recognized market for the sale of repossessed automobiles, debtors are entitled to notice of sale of the repossessed automobile. Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

Computer hardware is not collateral of a type sold on a recognized market within the meaning of this section which excuses notification of sale in case of such collateral. 1st Charter Lease Co. v. McAl, Inc., 679 P.2d 114 (Colo. App. 1984).

Immediate action against guarantors. Where by its terms a security document is an absolute guaranty, the obligation of the guarantors may be immediately enforced, without the necessity of an action against the principal obligor or collateral. First Com. Corp. v. Geter, 37 Colo. App. 391, 547 P.2d 1291 (1976).

The right of a secured party to a deficiency judgment is established, so that failure of secured party to give reasonable notice of sale does not result in a forfeiture of the right to recover a deficiency judgment. Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

Failure to give notice of the disposition of the collateral does not preclude the creditor from recovering a deficiency if it can prove

the amount thereof. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980); Zimmerman v. Cook, 651 P.2d 910 (Colo. App. 1982).

Director of revenue not involved in repossession and transfer of ownership. The activity of the director of revenue in the issuance of a new title to a repossessor of a motor vehicle is strictly limited to the ministerial duty of providing prima facie evidence of what has already occurred by purely private action, namely, the transfer of title from the debtor to the creditor in a manner specifically provided for by their agreement. It does not in any meaningful way involve the director in the repossession and subsequent transfer of ownership to the repossessor. Sifuentes v. Weed, 186 Colo. 109, 525 P.2d 1157 (1974).

Sufficient evidence that notice sent. The existence of a business custom is sufficient to warrant a presumption that notice was sent. It is then up to the court to decide if that presumption is overcome by other evidence. Greeley Nat. Bank v. Sloan, 677 P.2d 409 (Colo. App. 1983).

Amount received at sale as evidence of market value of collateral. If the sale of the collateral has been conducted in accordance with the requirements of the UCC, the amount received at the sale will be competent evidence of the market value. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

Amount received at sale is not evidence of market value if sale is not conducted in compliance with law. Where, because of lack of notice, the sale is not conducted in compliance with the law, the amount received is not evidence of the market value, and the secured party has to prove value by other evidence. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

Debtor entitled to market value offset against balance due. The debtors are entitled to have the market value of the collateral at the time and place of sale offset against any balance due on the indebtedness. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

Evidence of purchaser's lack of good faith. Knowledge that the holder of a subordinate security interest had not been given the notice required by this section might be evidence of a want of good faith on the part of a purchaser. Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977).

"Debtor" construed. Accommodation comakers and those others who will be called upon to pay deficiencies are "debtors" within the meaning of § 4-9-105 (1)(d) and subsection (3) of this section, and are entitled to notice of the disposition of the collateral. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

Subsection (3) deals with both the collateral and the obligation and, accordingly, the term "debtor" includes both the owner of the collateral and the obligor when they are not the same person. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

"Debtor" includes a guarantor and, as a debtor, the guarantor may not waive debtor's right to insist on a commercially reasonable

disposition of collateral. May v. Women's Bank, N.A., 807 P.2d 1145 (Colo. 1991).

A guarantor is treated as a debtor for purposes of article 9 of the Colorado Uniform Commercial Code. The protections afforded by subsection (3) that collateral be disposed of in a commercially reasonable manner are also provided to a guarantor. FBS AG Credit, Inc. v. Estate of Walker, 906 F. Supp. 1427 (D. Colo. 1995).

In proving "commercial reasonableness", the burden of proof is on the creditor. In re Wells, 51 B.R. 563 (Bankr. D. Colo. 1985).

Creditor's sale of property used as collateral to themselves is not commercially reasonable when there is expert testimony that there was no recognized market for the property and it was not subject to widely distributed standard price quotation. Cooper Investments v. Conger, 775 P.2d 76 (Colo. App. 1989).

The retention of collateral by a creditor for an excessive period of time without disposition may be commercially unreasonable in violation of this section. The question of reasonableness is one of fact for the trial court. Tajalli v. Gharibi, 758 P.2d 190 (Colo. App. 1988).

Presumption of no deficiency following repossession. There is a presumption that the value of the repossessed collateral is equal to the amount of the outstanding debt and that, therefore, there is no deficiency. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

This section provides that reasonable notification of sale must be made unless the collateral is either perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market. Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

Article 9 does not determine location of title after default. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

This section is made inoperative by § 4-9-501 with respect to water stock foreclosed as a part of real estate security. Kinoshita v. N. Denver Bank, 181 Colo. 183, 508 P.2d 1264 (1973).

The purpose of the notice requirement in subsection (3) is to give all persons having interests in the collateral or facing possible deficiency claims an opportunity to protect their interests and to utilize all practicable means of reducing to eliminating their potential liability. W. Nat'l Bank v. VFW Post 8103, 660 P.2d 919 (Colo. App. 1983).

A post-default waiver by the defendant of the notice requirement of subsection (3) can be made only when the debtor knowingly and specifically agrees to waive right to such notice. Burdick v. Tucker, 780 P.2d 34 (Colo. App. 1989).

If a secured party fails to give proper notice under subsection (3), a presumption arises that the value of the collateral at the time of sale was equal to the amount of the outstanding debt, so that no deficiency

results. Colo. Leasing Corp. v. Borquez, 738 P.2d 377 (Colo. 1986).

Notice required under subsection (3) may not be waived. United Bank v. Reed, 635 P.2d 922 (Colo. App. 1981).

Fulfillment of notice requirement for private sale. In the case of a private sale, the statutory notice requirement is fulfilled when the creditor sends reasonable notification stating the date after which the collateral will be sold. W. Nat'l Bank v. VFW Post 8103, 660 P.2d 919 (Colo. App. 1983).

Under plain language of this section, sale of wraparound promissory note transferred all debtor's rights to purchaser at foreclosure sale and discharged creditor's security interest therein; accordingly, purchaser took free of restrictions contained in security agreement. W. Group Nurseries v. Pomeranz, 867 P.2d 12 (Colo. App. 1993).

Failure of creditor to comply with the notice requirements of this section did not prevent new buyer from taking all of the debtor's rights in the repossessed car even though the certificate of title had not been transferred to the buyer prior to the automatic stay provided for by 11 U.S.C. § 362. In re Duffy, 186 B.R. 503 (Bankr. D. Colo. 1995).

Section 4-9-105 (1)(d) does not require "debtor" to be owner or have rights in the collateral. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

Applied in W. Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979); First Nat'l Bank v. District Court, 653 P.2d 1123 (Colo. 1982).

4-9-611. Notification before disposition of collateral - definition.

(a) In this section, "notification date" means the earlier of the date on which:

(1) A secured party sends to the debtor and any secondary obligor a signed notification of disposition; or

(2) The debtor and any secondary obligor waive the right to notification as provided in section 4-9-624 (a).

(b) Except as otherwise provided in subsection (d) of this section, a secured party that disposes of collateral under section 4-9-610 shall send to the persons specified in subsection (c) of this section a reasonable signed notification of disposition.

(c) To comply with subsection (b) of this section, the secured party shall send a signed notification of disposition to:

(1) The debtor;

(2) Any secondary obligor; and

(3) If the collateral is other than consumer goods:

(A) Any other person from which the secured party has received, before the notification date, a signed notification of a claim of an interest in the collateral;

(B) Any other secured party or lienholder that, ten days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(i) Identified the collateral;

(ii) Was indexed under the debtor's name as of that date; and

(iii) Was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and

(C) Any other secured party that, ten days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in section 4-9-311 (a).

(d) Subsection (b) of this section does not apply if the collateral is perishable or the creditor in good faith believes that the collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market. The specific reference to good faith in this subsection (d) does not abrogate the general obligation of the secured party to proceed in a commercially reasonable manner.

(e) A secured party complies with the requirement for notification prescribed by subsection (c)(3)(B) of this section if:

(1) Not later than twenty days or earlier than thirty days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in subparagraph (B) of paragraph (3) of subsection (c) of this section; and

(2) Before the notification date, the secured party:

(A) Did not receive a response to the request for information; or

(B) Received a response to the request for information and sent a signed notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

Source: L. 2001: Entire article R&RE, p. 1404, § 1, effective July 1. **L. 2023:** (a)(1), (b), IP(c), (c)(3)(A), IP(e), and (e)(2)(B) amended, (SB 23-090), ch. 136, p. 560, § 79, effective August 7.

Editor's note: (1) This section is similar to former § 4-9-504 (3) as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added the phrase "as provided in section 4-9-624 (a)" to subsection (a)(2) and added the references to good faith in subsection (d).

ANNOTATION

Law reviews. For comment, "Remedies for Failure to Notify Debtor of Disposition of Repossessed Collateral Under the U.C.C.", see 44 U. Colo. L. Rev. 221 (1972). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Commercial Law", see 55 Den. L.J. 425 (1978). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983). For article, "A Review of Agricultural Law: Hard Times and Hard Choices", see 15 Colo. Law. 629 (1986). For article, "The Colorado Farm Homestead Protection Act", see 15 Colo. Law. 1642 (1986). For article, "Agricultural Lending in a Troubled Economy", see 16 Colo. Law. 1773 (1987). For article, "The Agricultural Credit Act of 1987", see 17 Colo. Law. 611 (1988).

Annotator's note. Section 4-9-611 is similar to § 4-9-504 as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-504 have been included in the annotations to § 4-9-610.

4-9-612. Timeliness of notification before disposition of collateral.

(a) Except as otherwise provided in subsection (b) of this section, whether a notification is sent within a reasonable time is a question of fact.

(b) In a transaction other than a consumer transaction, a notification of disposition sent after default and ten days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition.

Source: L. 2001: Entire article R&RE, p. 1405, § 1, effective July 1.

4-9-613. Contents and form of notification before disposition of collateral: general.

(a) Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

(A) Describes the debtor and the secured party;

(B) Describes the collateral that is the subject of the intended disposition;

(C) States the method of intended disposition;

(D) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(E) States the time and place of a public disposition or the time after which any other disposition is to be made.

(2) Whether the contents of a notification that lacks any of the information specified in paragraph (1) of this subsection (a) are nevertheless sufficient is a question of fact.

(3) The contents of a notification providing substantially the information specified in paragraph (1) of this subsection (a) are sufficient, even if the notification includes:

(A) Information not specified by said paragraph (1); or

(B) Minor errors that do not cause damages to a person who relies on the information.

(4) A particular phrasing of the notification is not required.

(5) The following form of notification and the form appearing in section 4-9-614 (a)(3), when completed in accordance with the instructions in subsection (b) of this section and section 4-9-614 (b), each provides sufficient information:

NOTIFICATION OF DISPOSITION OF COLLATERAL

To: (Name of debtor, obligor, or other person to which the notification is sent)

From: (Name, address, and telephone number of secured party)

{1} Name of any debtor that is not an addressee: (Name of each debtor)

{2} We will sell (describe collateral) (to the highest qualified bidder) at public sale. A sale could include a lease or license. The sale will be held as follows:

(Date)

(Time)

(Place)

{3} We will sell (describe collateral) at private sale sometime after (date). A sale could include a lease or license.

{4} You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell or, as applicable, lease or license.

{5} If you request an accounting you must pay a charge of $ (amount).

{6} You may request an accounting by calling us at (telephone number).

(b) The following instructions apply to the form of notification in subsection (a)(5) of this section:

(1) The instructions in this subsection (b) refer to the numbers in braces before items in the form of notification in subsection (a)(5) of this section. Do not include the numbers or braces in the notification. The numbers and braces are used only for the purpose of these instructions.

(2) Include and complete item {1} only if there is a debtor that is not an addressee of the notification and list the name or names.

(3) Include and complete either item {2}, if the notification relates to a public disposition of the collateral, or item {3}, if the notification relates to a private disposition of the collateral. If item {2} is included, include the words "to the highest qualified bidder" only if applicable.

(4) Include and complete items {4} and {6}.

(5) Include and complete item {5} only if the sender will charge the recipient for an accounting.

Source: L. 2001: Entire article R&RE, p. 1406, § 1, effective July 1. **L. 2023:** (a)(5) amended and (b) added, (SB 23-090), ch. 136, p. 561, § 80, effective August 7.

Editor's note - Colorado legislative change: Colorado substituted the word "disposition" for the word "sale" in subsection (a)(1)(E) and substituted the phrase "cause damages to a person who relies on the information" for the phrase "seriously misleading" in subsection (a)(3)(B). Colorado added the phrase "or writing us at [*address*]" at the end of the notification form contained in subsection (a)(5).

4-9-614. Contents and form of notification before disposition of collateral: consumer-goods transaction.

(a) In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

(A) The information specified in section 4-9-613 (a)(1);

(B) A description of any liability for a deficiency of the person to which the notification is sent;

(C) A telephone number and mailing address from which the amount that must be paid to the secured party to redeem the collateral under section 4-9-623 is available; and

(D) A telephone number and mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed in accordance with the instructions in subsection (b) of this section, provides sufficient information:

[*Name and address of secured party*]

[*Date*]

NOTICE OF OUR PLAN TO SELL PROPERTY

(Name and address of any obligor who is also a debtor)

Subject: (Identify transaction)

We have your (describe collateral), because you broke promises in our agreement.

{1} We will sell (describe collateral) at public sale. A sale could include a lease or license. The sale will be held as follows:

(Date)

(Time)

(Place)

You may attend the sale and bring bidders if you want.

{2} We will sell (describe collateral) at private sale sometime after (date). A sale could include a lease or license.

{3} The money that we get from the sale, after paying our costs, will reduce the amount you owe. If we get less money than you owe, you (will or will not, as applicable) still owe us the

difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

{4} You can get the property back at any time before we sell it by paying us the full amount you owe, not just the past due payments, including our expenses. To learn the exact amount you must pay, call us at (telephone number).

{5} If you want us to explain to you in (writing) (writing or in (description of electronic record)) (description of electronic record) how we have figured the amount that you owe us, {6} call us at (telephone number) (or) (write us at (secured party's address)) (or contact us by (description of electronic communication method)) {7} and request (a written explanation) (a written explanation or an explanation in (description of electronic record)) (an explanation in (description of electronic record)).

{8} We will charge you $ (amount) for the explanation if we sent you another written explanation of the amount you owe us within the last six months.

{9} If you need more information about the sale (call us at (telephone number)) (or) (write us at (secured party's address)) (or contact us by (description of electronic communication method)).

{10} We are sending this notice to the following other people who have senate bill 23-090 insert copy an interest in (describe collateral) or who owe money under your agreement:

(Names of all other debtors and obligors, if any)

(4) A notification in the form of paragraph (3) of this subsection (a) is sufficient, even if additional information appears at the end of the form.

(5) A notification in the form of paragraph (3) of this subsection (a) is sufficient, even if it includes errors in information not required by paragraph (1) of this subsection (a), unless the error is misleading with respect to rights arising under this article.

(6) If a notification under this section is not in the form of paragraph (3) of this subsection (a), law other than this article determines the effect of including information not required by paragraph (1) of this section.

(b) The following instructions apply to the form of notification in subsection (a)(3) of this section:

(1) The instructions in this subsection (b) refer to the numbers in braces before items in the form of notification in subsection (a)(3) of this section. Do not include the numbers or braces in the notification. The numbers and braces are used only for the purpose of these instructions.

(2) Include and complete either item {1}, if the notification relates to a public disposition of the collateral, or item {2}, if the notification relates to a private disposition of the collateral.

(3) Include and complete items {3}, {4}, {5}, {6}, and {7}.

(4) In item {5}, include and complete any one of the three alternative methods for the explanation-writing, writing or electronic record, or electronic record.

(5) In item {6}, include the telephone number. In addition, the sender may include and complete either or both of the two additional alternative methods of communication--writing or electronic communication--for the recipient of the notification to communicate with the sender. Neither of the two additional methods of communication is required to be included.

(6) In item {7}, include and complete the method or methods for the explanation--writing, writing or electronic record, or electronic record-included in item {5}.

(7) Include and complete item {8} only if a written explanation is included in item {5} as a method for communicating the explanation and the sender will charge the recipient for another written explanation.

(8) In item {9}, include either the telephone number or the address or both the telephone number and the address. In addition, the sender may include and complete the additional method of communication--electronic communication--for the recipient of the notification to communicate with the sender. The additional method of electronic communication is not required to be included.

(9) If item {10} does not apply, insert "None" after "agreement:".

Source: L. 2001: Entire article R&RE, p. 1407, § 1, effective July 1. **L. 2023:** (a)(1)(A) and (a)(3) amended and (b) added, (SB 23-090), ch. 136, p. 563, § 81, effective August 7.

Editor's note - Colorado legislative change: Colorado added the phrase "and mailing address" in subsection (a)(1)(C) and substituted "and" for "or" in subsection (a)(1)(D). Colorado added the phrase "or write us at [*secured party's address*]" in the form regarding how to learn the exact amount the debtor must pay. The uniform act's form regarding explanations reads: "We will charge you $ _____ for the explanation if we sent you another written explanation of the amount you owe us within the last six months."

4-9-615. Application of proceeds of disposition; liability for deficiency and right to surplus.

(a) A secured party shall apply or pay over for application the cash proceeds of disposition under section 4-9-610 in the following order to:

(1) The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and reasonable legal expenses incurred by the secured party;

(2) The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) The secured party receives from the holder of the subordinate security interest or other lien a signed demand for proceeds before distribution of the proceeds is completed; and

(B) In a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) A secured party that is a consignor of the collateral if the secured party receives from the consignor a signed demand for proceeds before distribution of the proceeds is completed.

(b) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under paragraph (3) of subsection (a) of this section.

(c) A secured party need not apply or pay over for application noncash proceeds of disposition under section 4-9-610 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) of this section and permitted by subsection (c) of this section:

(1) Unless paragraph (4) of subsection (a) of this section requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) The obligor is liable for any deficiency.

(e) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes:

(1) The debtor is not entitled to any surplus; and

(2) The obligor is not liable for any deficiency.

(f) The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part 6 to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) The transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and

(2) The amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

(1) Takes the cash proceeds free of the security interest or other lien;

(2) Is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and

(3) Is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

Source: L. 2001: Entire article R&RE, p. 1409, § 1, effective July 1. **L. 2023:** (a)(3)(A) and (a)(4) amended, (SB 23-090), ch. 136, p. 566, § 82, effective August 7.

Editor's note: (1) This section is similar to former § 4-9-504 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added the phrase "under section 4-9-610" in the introductory portion to subsection (a), added the word "reasonable" before the word "legal" in subsection (a)(1), and substituted the phrase "section 4-9-610" for "this section" in subsection (c).

ANNOTATION

Law reviews. For comment, "Remedies for Failure to Notify Debtor of Disposition of Repossessed Collateral Under the U.C.C.", see 44 U. Colo. L. Rev. 221 (1972). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform

Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Commercial Law", see 55 Den. L.J. 425 (1978). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983). For article, "A Review of Agricultural Law: Hard Times and Hard Choices", see 15 Colo. Law. 629 (1986). For article, "The Colorado Farm Homestead Protection Act", see 15 Colo. Law. 1642 (1986). For article, "Agricultural Lending in a Troubled Economy", see 16 Colo. Law. 1773 (1987). For article, "The Agricultural Credit Act of 1987", see 17 Colo. Law. 611 (1988).

Annotator's note. Since § 4-9-615 is similar to § 4-9-504 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

"Disposition" of collateral connotes receipt of "proceeds". Where collateral was released to the debtor, and the creditor did not receive "proceeds", no "disposition" of the collateral took place. Silverberg v. Colantuno, 991 P.2d 280 (Colo. App. 1998).

The right of a secured party to a deficiency judgment is established, so that failure of secured party to give reasonable notice of sale does not result in a forfeiture of the right to recover a deficiency judgment. Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

Failure to give notice of the disposition of the collateral does not preclude the creditor from recovering a deficiency if it can prove the amount thereof. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980); Zimmerman v. Cook, 651 P.2d 910 (Colo. App. 1982).

Debtor entitled to market value offset against balance due. The debtors are entitled to have the market value of the collateral at the time and place of sale offset against any balance due on the indebtedness. First Nat'l Bank v. Cillessen, 622 P.2d 598 (Colo. App. 1980).

4-9-616. Explanation of calculation of surplus or deficiency - definitions.

(a) In this section:

(1) "Explanation" means a record that:

(A) States the amount of the surplus or deficiency;

(B) Provides an explanation in accordance with subsection (c) of this section of how the secured party calculated the surplus or deficiency;

(C) States, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and

(D) Provides a telephone number and mailing address from which additional information concerning the transaction is available.

(2) "Request" means a record:

(A) Signed by a debtor or consumer obligor;

(B) Requesting that the recipient provide an explanation; and

(C) Sent after disposition of the collateral under section 4-9-610.

(b) In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under section 4-9-615, the secured party shall:

(1) Send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:

(A) Before or when the secured party accounts to the debtor and pays any surplus or first makes demand in a record on the consumer obligor after the disposition for payment of the deficiency; and

(B) Within fourteen days after receipt of a request; or

(2) In the case of a consumer obligor who is liable for a deficiency, within fourteen days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

(c) To comply with subsection (a)(1)(B) of this section, an explanation must provide the following information in the following order:

(1) The aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:

(A) If the secured party takes or receives possession of the collateral after default, not more than thirty-five days before the secured party takes or receives possession; or

(B) If the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than thirty-five days before the disposition;

(2) The amount of proceeds of the disposition;

(3) The aggregate amount of the obligations after deducting the amount of proceeds;

(4) The amount, in the aggregate or by type, and types of expenses, including reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and reasonable attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition;

(5) The amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1) of this subsection (c); and

(6) The amount of the surplus or deficiency.

(d) A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of subsection (a) of this section is sufficient, even if it includes minor errors that do not cause damages to a person who relies on the information.

(e) A debtor or consumer obligor is entitled without charge to three responses to a request under this section during any six-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to paragraph (1) of subsection (b) of this section. The secured party may require payment of a charge, not exceeding fifteen dollars, for each additional response.

Source: L. 2001: Entire article R&RE, p. 1410, § 1, effective July 1. **L. 2023:** IP(a)(1), (a)(2)(A), (b)(1)(A), and IP(c) amended, (SB 23-090), ch. 136, p. 566 , § 83, effective August 7.

Editor's note - Colorado legislative change: Colorado substituted the word "and" for "or" in subsection (a)(1)(D), twice added the word "reasonable" to subsection (c)(4), substituted the phrase "do not cause damages to a person who relies on the information" for the phrase "are not seriously misleading" in subsection (d), and substituted the phrase "three responses" for "one response" and reduced the charge from $25 to $15 in subsection (e).

4-9-617. Rights of transferee of collateral.

(a) A secured party's disposition of collateral after default:

(1) Transfers to a transferee for value all of the debtor's rights in the collateral;

(2) Discharges the security interest under which the disposition is made; and

(3) Discharges any subordinate security interest or other subordinate lien.

(b) A transferee that acts in good faith takes free of the rights and interests described in subsection (a) of this section, even if the secured party fails to comply with this article or the requirements of any judicial proceeding.

(c) If a transferee does not take free of the rights and interests described in subsection (a) of this section, the transferee takes the collateral subject to:

(1) The debtor's rights in the collateral;

(2) The security interest or agricultural lien under which the disposition is made; and

(3) Any other security interest or other lien.

Source: L. 2001: Entire article R&RE, p. 1412, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-504 (4) as it existed prior to 2001.

ANNOTATION

Annotator's note. Since § 4-9-617 is similar to § 4-9-504 as it existed prior to the 2001 repeal and reenactment of this article, a relevant case construing that provision has been included in the annotations to this section.

Under plain language of this section, sale of wraparound promissory note transferred all debtor's rights to purchaser at foreclosure sale and discharged creditor's security interest therein; accordingly, purchaser took free of restrictions contained in security agreement. Western Group Nurseries v. Pomeranz, 867 P.2d 12 (Colo. App. 1993).

4-9-618. Rights and duties of certain secondary obligors.

(a) A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after the secondary obligor:

(1) Receives an assignment of a secured obligation from the secured party;

(2) Receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party; or

(3) Is subrogated to the rights of a secured party with respect to collateral.

(b) An assignment, transfer, or subrogation described in subsection (a) of this section:

(1) Is not a disposition of collateral under section 4-9-610; and

(2) Relieves the secured party of further duties under this article.

Source: L. 2001: Entire article R&RE, p. 1413, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-504 (5) as it existed prior to 2001.

4-9-619. Transfer of record or legal title.

(a) In this section, "transfer statement" means a record signed by a secured party stating:

(1) That the debtor has defaulted in connection with an obligation secured by specified collateral;

(2) That the secured party has exercised its post-default remedies with respect to the collateral;

(3) That, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral; and

(4) The name and mailing address of the secured party, debtor, and transferee.

(b) A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate-of-title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office shall:

(1) Accept the transfer statement;

(2) Promptly amend its records to reflect the transfer; and

(3) If applicable, issue a new appropriate certificate of title in the name of the transferee.

(c) A transfer of the record or legal title to collateral to a secured party under subsection (b) of this section or otherwise is not of itself a disposition of collateral under this article and does not of itself relieve the secured party of its duties under this article.

Source: L. 2001: Entire article R&RE, p. 1413, § 1, effective July 1. **L. 2023:** IP(a) amended, (SB 23-090), ch. 136, p. 567, § 84, effective August 7.

4-9-620. Acceptance of collateral in full or partial satisfaction of obligation - compulsory disposition of collateral.

(a) Except as otherwise provided in subsection (g) of this section, a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:

(1) The debtor consents to the acceptance under subsection (c) of this section;

(2) The secured party does not receive, within the time set forth in subsection (d) of this section, a notification of objection to the proposal signed by:

(A) A person to which the secured party was required to send a proposal under section 4-9-621; or

(B) Any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal;

(3) If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance; and

(4) Subsection (e) of this section does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to section 4-9-624.

(b) Reserved.

(c) For purposes of this section:

(1) A debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record signed after default; and

(2) A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record signed after default or the secured party:

(A) Sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained;

(B) In the proposal, proposes to accept collateral in full satisfaction of the obligation it secures; and

(C) Does not receive a notification of objection signed by the debtor within twenty days after the proposal is sent.

(d) To be effective under paragraph (2) of subsection (a) of this section, a notification of objection must be received by the secured party:

(1) In the case of a person to which the proposal was sent pursuant to section 4-9-621, within twenty days after notification was sent to that person; and

(2) In other cases:

(A) Within twenty days after the last notification was sent pursuant to section 4-9-621; or

(B) If a notification was not sent, before the debtor consents to the acceptance under subsection (c) of this section.

(e) A secured party that has taken possession of collateral shall dispose of the collateral pursuant to section 4-9-610 within the time specified in subsection (f) of this section if:

(1) Sixty percent of the cash price has been paid in the case of a purchase-money security interest in consumer goods; or

(2) Sixty percent of the principal amount of the obligation secured has been paid in the case of a non-purchase-money security interest in consumer goods.

(f) To comply with subsection (e) of this section, the secured party shall dispose of the collateral:

(1) Within ninety days after taking possession; or

(2) Within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and signed after default.

(g) In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures.

Source: L. 2001: Entire article R&RE, p. 1414, § 1, effective July 1. **L. 2023:** IP(a)(2), (c)(1), IP(c)(2), (c)(2)(C), and (f)(2) amended, (SB 23-090), ch. 136, p. 567, § 85, effective August 7.

Editor's note: This section is similar to former § 4-9-505 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968). For article, "Commercial Law", see 57 Den. L.J. 165 (1980). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983).

Annotator's note. Since § 4-9-620 is similar to § 4-9-505 as it existed prior to the 2001 repeal and reenactment of this article,

relevant cases construing that provision have been included in the annotations to this section.

Interest ripens upon retention of collateral following default. When a borrower defaults on its debt to the bank, on or before the filing in bankruptcy, the bank's interest ripens into an interest in real property by virtue of its election to retain the collateral and its compliance with this section, following the bankruptcy court's entry of the abandonment order. Swofford v. Colo. Nat'l Bank, 628 P.2d 184 (Colo. App. 1981).

Article 9 does not determine location of title after default. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

Timeliness of notice. For notice under subsection (2) to be effective, creditor's notification to debtor of his intent to retain collateral must be within sufficient time to allow commercially reasonable sale in event debtor objects. Vogel v. Carolina Intern., Inc., 711 P.2d 708 (Colo. App. 1985).

To constitute notice under this section, the secured party must act in good faith and must take steps a reasonable person would take to effect good faith notice. Vogel v. Carolina Intern., Inc., 711 P.2d 708 (Colo. App. 1985).

A secured party who retains repossessed property for an excessive period of time without compliance with the statutory provisions may not profit by the failure to furnish the requisite notice. Vogel v. Carolina Intern., Inc., 711 P.2d 708 (Colo. App. 1985).

Applied in Am. Heritage Bank & Trust Co. v. O. & E., Inc., 40 Colo. App. 306, 576 P.2d 566 (1978).

4-9-621. Notification of proposal to accept collateral.

(a) A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal to:

(1) Any person from which the secured party has received, before the debtor consented to the acceptance, a signed notification of a claim of an interest in the collateral;

(2) Any other secured party or lienholder that, ten days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(A) Identified the collateral;

(B) Was indexed under the debtor's name as of that date; and

(C) Was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

(3) Any other secured party that, ten days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in section 4-9-311 (a).

(b) A secured party that desires to accept collateral in partial satisfaction of the obligation it secures shall send its proposal to any secondary obligor in addition to the persons described in subsection (a) of this section.

Source: L. 2001: Entire article R&RE, p. 1415, § 1, effective July 1. **L. 2023:** (a)(1) amended, (SB 23-090), ch. 136, p. 568, § 86, effective August 7.

Editor's note: This section is similar to former § 4-9-505 as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "The Revolution in Consumer Credit Legislation", see 45 Den. L.J. 679 (1968). For article, "Commercial Law", see 57 Den. L.J. 165 (1980). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983).

Annotator's note. Section 4-9-621 is similar to § 4-9-505 as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-505 have been included in the annotations to § 4-9-620.

4-9-622. Effect of acceptance of collateral.

(a) A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures:

(1) Discharges the obligation to the extent consented to by the debtor;

(2) Transfers to the secured party all of a debtor's rights in the collateral;

(3) Discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien; and

(4) Terminates any other subordinate interest.

(b) A subordinate interest is discharged or terminated under subsection (a) of this section, even if the secured party fails to comply with this article.

Source: L. 2001: Entire article R&RE, p. 1416, § 1, effective July 1.

4-9-623. Right to redeem collateral.

(a) A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) To redeem collateral, a person shall tender:

(1) Fulfillment of all obligations secured by the collateral; and

(2) The reasonable expenses and reasonable attorney's fees described in section 4-9-615 (a)(1).

(c) A redemption may occur at any time before a secured party:

(1) Has collected collateral under section 4-9-607;

(2) Has disposed of collateral or entered into a contract for its disposition under section 4-9-610; or

(3) Has accepted collateral in full or partial satisfaction of the obligation it secures under section 4-9-622.

Source: L. 2001: Entire article R&RE, p. 1416, § 1, effective July 1.

Editor's note: (1) This section is similar to former § 4-9-506 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado added the word "reasonable" before the word "attorney's" in subsection (b)(2).

ANNOTATION

Law reviews. For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983). For article, "A Review of Agricultural Law: Hard Times and Hard Choices", see 15 Colo. Law. 629 (1986). For article, "The Colorado Farm Homestead Protection Act", see 15 Colo. Law. 1642 (1986). For article, "Agricultural Lending in a Troubled Economy", see 16 Colo. Law. 1773 (1987). For article, "The Agricultural Credit Act of 1987", see 17 Colo. Law. 611 (1988).

Annotator's note. Since § 4-9-623 is similar to § 4-9-506 as it existed prior to the 2001 repeal and reenactment of this article,

relevant cases construing that provision have been included in the annotations to this section.

Applied in H.M.O. Sys. v. Choicecare Health Servs., Inc., 665 P.2d 635 (Colo. App. 1983); Task Enters., Inc. v. Pratt Adjustment Co., 695 P.2d 762 (Colo. App. 1984).

4-9-624. Waiver.

(a) A debtor or secondary obligor may waive the right to notification of disposition of collateral under section 4-9-611 only by an agreement to that effect entered into and signed after default.

(b) A debtor may waive the right to require disposition of collateral under section 4-9-620 (e) only by an agreement to that effect entered into and signed after default.

(c) Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under section 4-9-623. Any such waiver must be by an agreement to that effect entered into and signed after default.

Source: L. 2001: Entire article R&RE, p. 1417, § 1, effective July 1. **L. 2023:** Entire section amended, (SB 23-090), ch. 136, p. 568, § 87, effective August 7.

Editor's note: (1) The provisions of this section are similar to provisions of several former sections as they existed prior to 2001. For a detailed comparison, see the comparative tables located in the back of the index.

(2) **Colorado legislative change:** Colorado added the phrase "Any such waiver must be" in subsection (c).

ANNOTATION

Law reviews. For comment, "Remedies for Failure to Notify Debtor of Disposition of Repossessed Collateral Under the U.C.C.", see 44 U. Colo. L. Rev. 221 (1972). For article, "Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code", see 46 U. Colo. L. Rev. 333 (1974-75). For article, "Commercial Law", see 55 Den. L.J. 425 (1978). For article, "Secured Transactions — Part I: Attachment, Perfection and Priorities", see 11 Colo. Law. 2939 (1982). For article, "Secured Transactions — Part II: Default, Foreclosure and Bankruptcy", see 12 Colo. Law. 13 (1983). For article, "A Review of Agricultural Law: Hard Times and Hard

Choices", see 15 Colo. Law. 629 (1986). For article, "The Colorado Farm Homestead Protection Act", see 15 Colo. Law. 1642 (1986). For article, "Agricultural Lending in a Troubled Economy", see 16 Colo. Law. 1773 (1987). For article, "The Agricultural Credit Act of 1987", see 17 Colo. Law. 611 (1988).

Annotator's note. Section 4-9-624 is similar to § 4-9-504 as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-504 have been included in the annotations to § 4-9-610.

4-9-625. Remedies for secured party's failure to comply with article.

(a) If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) Subject to subsections (c), (d), and (f) of this section, a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) Except as otherwise provided in section 4-9-628:

(1) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) of this section for its loss; and

(2) If the collateral is consumer goods, a person that was a debtor or secondary obligor at the time a secured party failed to comply with this part 6 may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

(d) A debtor whose deficiency is eliminated under section 4-9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under section 4-9-626 may not otherwise recover under subsection (b) of this section for noncompliance with the provisions of this part 6 relating to collection, enforcement, disposition, or acceptance.

(e) In addition to any damages recoverable under subsection (b) of this section, the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover five hundred dollars in each case from a person that:

(1) Fails to comply with section 4-9-208;

(2) Fails to comply with section 4-9-209;

(3) Files a record that the person is not entitled to file under section 4-9-509 (a);

(4) Fails to cause the secured party of record to file or send a termination statement as required by section 4-9-513 (a) or (c);

(5) Fails to comply with section 4-9-616 (b)(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) Fails to comply with section 4-9-616 (b)(2).

(f) A debtor or consumer obligor may recover damages under subsection (b) of this section and, in addition, five hundred dollars in each case from a person that, without reasonable cause, fails to comply with a request under section 4-9-210. A recipient of a request under section 4-9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request within the meaning of this subsection (f).

(g) If a secured party fails to comply with a request regarding a list of collateral or a statement of account under section 4-9-210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure.

(h) If a person in the course of taking possession of collateral by self-help breaches the peace as defined in paragraph (1), (2), or (3) of subsection (h) of section 4-9-601 or uses uniformed law enforcement officers without the benefit of judicial process, that person shall be liable to the debtor for one thousand dollars as a penalty.

(i) The prevailing party in any legal action, other than a class action, under this section may also recover reasonable attorney's fees and reasonable legal expenses; except that as to consumer transactions, such attorney's fees for any party shall not exceed fifteen percent of the unpaid debt or such additional fee as may be directed by the court.

(j) The number "five hundred dollars" as provided in subsections (e) and (f) of this section shall be increased on July 1, 2004, and on July 1 of each third succeeding year in accordance with any aggregate increase in the United States department of labor bureau of labor statistics consumer price index for all urban consumers for the Denver-Boulder consolidated metropolitan statistical area for the preceding three calendar years as reflected in the final consumer price index for the Denver-Boulder consolidated metropolitan statistical area for the calendar year immediately preceding the calendar year in which the adjustment is to be made; except that:

(1) Such dollar amount shall not be increased if such final consumer price index does not reflect an aggregate increase in the consumer price index for the preceding three calendar years and shall be decreased if such final consumer price index reflects an aggregate decrease in the consumer price index for the preceding three calendar years.

(2) The dollar amount as adjusted pursuant to this subsection (j) shall be rounded to the nearest ten dollars.

Source: L. 2001: Entire article R&RE, p. 1417, § 1, effective July 1. **L. 2002:** (j)(1) amended, p. 939, § 8, effective August 7.

Editor's note: (1) This section is similar to former § 4-9-507 as it existed prior to 2001.

(2) **Colorado legislative change:** Colorado did not adopt the phrase "with a request under section 4-9-210" after the word "comply" in the second sentence of subsection (b), added the phrase "list or" in subsection (g), and added subsections (h) through (j).

ANNOTATION

I. General Consideration.

II. Secured Party's Liability.

III. Market Value.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Commercial Law", see 55 Den. L.J. 425 (1978). For article, "Commercial Law", see 57 Den. L.J. 165 (1980).

Annotator's note. Since § 4-9-625 is similar to § 4-9-507 as it existed prior to the 2001 repeal and reenactment of this article, relevant cases construing that provision have been included in the annotations to this section.

Consequential damages are not recoverable under former § 4-9-507 (1); therefore, plaintiff is not entitled to damages for alleged lost profits. Proactive Techs., Inc. v. Denver Place Assocs. Ltd. P'ship, 141 P.3d 959 (Colo. App. 2006).

Applied in Young v. Golden State Bank, 39 Colo. App. 45, 560 P.2d 855 (1977); Am. Heritage Bank & Trust Co. v. O. & E., Inc., 40 Colo. App. 306, 576 P.2d 566 (1978); Young v. Golden State Bank, 41 Colo. App. 480, 589 P.2d 1381 (1978); Western Nat'l Bank v. VFW Post 8103, 660 P.2d 919 (Colo. App. 1983); Padilla v. Ghuman, 183 P.3d 653 (Colo. App. 2007).

II. SECURED PARTY'S LIABILITY.

Law reviews. For comment, "Remedies for Failure to Notify Debtor of Disposition of Repossessed Collateral Under the U.C.C.", see 44 U. Colo. L. Rev. 221 (1972).

This section establishes the right of a debtor to recover from the secured party any loss sustained where a secured party fails to give notice of sale to the debtor as required by § 4-9-504(3). Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

If the collateral is consumer goods, the minimum recovery by the debtors would be the time price differential plus ten percent of the cash price. Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

Subsection (1) penalty appropriate for violation of § 5-5-112. An appropriate penalty for the violation of § 5-5-112 is the penalty imposed by subsection (1). D.E.B. Adjustment Co. v. Cawthorne, 623 P.2d 82 (Colo. App. 1981).

III. MARKET VALUE.

Evidence of market value. Where sale is conducted in accordance with the requirements of the code, the amount received at the sale of collateral is evidence of the market value, but where sale is not conducted in compliance with the law, the amount received is not evidence of the market value of the collateral, and the secured party has the burden of proving the market value by other evidence. Cmty. Mgt. Ass'n of Colo. Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

A sale price which is less than the fair market value or the appraised value is not dispositive of commercial unreasonableness. Nor does a sale price that is less than what the debtor expected necessarily constitute commercial unreasonableness. Flexisystems, Inc. v. Am. Standards Testing Bureau, Inc., 847 P.2d 207 (Colo. App. 1992).

4-9-626. Action in which deficiency or surplus is in issue.

(a) In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply:

(1) A secured party need not prove compliance with the provisions of this part 6 relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part 6.

(3) Except as otherwise provided in section 4-9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part 6 relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, reasonable expenses, and reasonable attorney's fees exceeds the greater of:

(A) The proceeds of the collection, enforcement, disposition, or acceptance; or

(B) The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part 6 relating to collection, enforcement, disposition, or acceptance.

(4) For purposes of subparagraph (B) of paragraph (3) of this subsection (a), the amount of proceeds that would have been realized is equal to the sum of the secured obligation, reasonable expenses, and reasonable attorney's fees unless the secured party proves that the amount is less than that sum.

(5) If a deficiency or surplus is calculated under section 4-9-615 (f), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(b) Subject to section 5-5-103, C.R.S., the limitation of the rules in subsection (a) of this section to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.

Source: L. 2001: Entire article R&RE, p. 1419, § 1, effective July 1.

Editor's note - Colorado legislative change: Colorado added the word "reasonable" to subsections (a)(3) and (a)(4) and added the phrase "Subject to section 5-5-103, C.R.S.," to subsection (b).

4-9-627. Determination of whether conduct was commercially reasonable.

(a) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(b) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

(1) In the usual manner on any recognized market;

(2) At the price current in any recognized market at the time of the disposition; or

(3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(c) A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:

(1) In a judicial proceeding;

(2) By a bona fide creditors' committee;

(3) By a representative of creditors; or

(4) By an assignee for the benefit of creditors.

(d) Approval under subsection (c) of this section need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable.

Source: L. 2001: Entire article R&RE, p. 1420, § 1, effective July 1.

Editor's note: This section is similar to former § 4-9-507 (2) as it existed prior to 2001.

ANNOTATION

Law reviews. For article, "Commercial Law", see 55 Den. L.J. 425 (1978). For article, "Commercial Law", see 57 Den. L.J. 165 (1980).

Annotator's note. Section 4-9-627 is similar to § 4-9-507 as it existed prior to the 2001 repeal and reenactment of this article. Relevant cases construing § 4-9-507 have been included in the annotations to § 4-9-625.

4-9-628. Nonliability and limitation on liability of secured party - liability of secondary obligor.

(a) Subject to subsection (f) of this section, unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person:

(1) The secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with this article; and

(2) The secured party's failure to comply with this article does not affect the liability of the person for a deficiency.

(b) Subject to subsection (f) of this section, a secured party is not liable because of its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:

(A) That the person is a debtor or obligor;

(B) The identity of the person; and

(C) How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

(A) That the person is a debtor; and

(B) The identity of the person.

(c) A secured party is not liable to any person, and a person's liability for a deficiency is not affected, because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer-goods transaction or a consumer transaction or that goods are not consumer goods, if the secured party's belief is based on its reasonable reliance on:

(1) A record authenticated by the debtor concerning the purpose for which collateral was to be used, acquired, or held, or indicating that collateral is not a consumer deposit account; or

(2) A record authenticated by the obligor concerning the purpose for which a secured obligation was incurred.

(d) (1) A secured party is not liable under section 4-9-625 (c)(2) for its failure to comply with section 4-9-616.

(2) Repealed.

(e) A secured party is not liable under section 4-9-625 (c)(2) more than once with respect to any one secured obligation.

(f) Subsections (a) and (b) of this section do not apply to limit the liability of a secured party to a person if, at the time the secured party obtains control of collateral that is a controllable account, controllable electronic record, or controllable payment intangible or at the time the security interest attaches to the collateral, whichever is later:

(1) The person is a debtor or obligor; and

(2) The secured party knows that the information in subsection (b)(1)(A), (b)(1)(B), or (b)(1)(C) of this section relating to the person is not provided by the collateral, a record attached to or logically associated with the collateral, or the system in which the collateral is recorded.

Source: L. 2001: Entire article R&RE, p. 1421, § 1, effective July 1. **L. 2002:** (d)(2) repealed, p. 939, § 9, effective August 7. **L. 2023:** IP(a) and IP(b) amended and (f) added, (SB 23-090), ch. 136, p. 568, § 88, effective August 7.

Editor's note - Colorado legislative change: Colorado substituted the phrase "A record authenticated by the debtor" for the phrase "A debtor's representation" and added the phrase "or indicating that collateral is not a consumer deposit account" in subsection (c)(1), substituted the phrase "A record authenticated by the obligor" for the phrase "An obligor's representation" in subsection (c)(2), and did not adopt subsection (d) of the uniform act. The uniform act's subsection (e) states: "A secured party is not liable under section 4-9-625(c)(2) more than once with respect to any one secured obligation."

4-9-629. Secured party's liability when taking possession after default - legislative declaration - fund.

(a) The general assembly recognizes that, in the past, certain debtors may have been disadvantaged by the actions of repossessors and that such debtors were then unable to obtain just redress for their losses in the courts, especially in cases in which the creditor who initiated the action by employing or contracting with the repossessor was shielded from liability because the repossessor was categorized by the courts as an independent contractor. The general assembly wishes to ensure that the repossessor is bonded or that the secured party or assignee is held responsible at law as a principal under the general principles of agency law for the actions of a repossessor who is acting at the behest of the creditor in the event that no bond has been posted.

(b) A secured party or such party's assignee who wishes to contract with a person to recover or take possession of collateral upon default, including a motor vehicle repossessed pursuant to section 42-6-146, C.R.S., shall contract to recover or take possession of collateral only with a person who is bonded for property damage to or conversion of such collateral in the amount of at least fifty thousand dollars. Such bond shall be filed with and drawn in favor of the attorney general of the state of Colorado for use of the people of the state of Colorado, and shall be revocable only with the written consent of the attorney general pursuant to rules promulgated by the office of the attorney general. The office of the attorney general may charge a fee to be paid

by the person filing such bond in order to cover the direct and indirect costs incurred by such office in fulfilling its duties under the provisions of this section.

(c) A secured party or secured party's assignee who employs or contracts with a person who has not complied with the requirements specified in subsection (b) of this section shall be liable as principal for the actions of any person the secured party or assignee employs or contracts with to recover or take possession of the collateral after default as provided in section 4-9-609 in the same manner as if such person were the agent of the secured party or assignee, whether or not such person has been or may be deemed to be acting as an independent contractor in law.

(d) A repossessor shall not engage in repossessing, recovering, or removing collateral or personal property on behalf of a secured creditor or assignee without first disclosing to such secured creditor or assignee whether such repossessor is bonded pursuant to this article. Any person who fails to disclose or misrepresents to a secured party such person's bonded status or fails to file such bond with the attorney general shall be in violation of the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S., and shall be subject to remedies or penalties or both pursuant to said article.

(e) Any person who knowingly falsifies a repossessor bond application or misrepresents information contained therein commits a class 2 misdemeanor and shall be punished as provided in section 18-1.3-501.

(f) All moneys collected by the attorney general pursuant to this section shall be transmitted to the state treasurer, who shall credit the same to the general fund.

(g) Notwithstanding any provision by contract or common law, in exercising its rights after default, a secured party or lessor taking possession of a motor vehicle may not disable or render unusable any computer program or other similar device embedded in the motor vehicle if immediate injury to any person or property is a reasonably foreseeable consequence of such action. Any secured party or lessor who disables or renders unusable such a computer program or other similar device in such circumstances shall be liable in accordance with applicable rules of law to any person who sustains an injury to person or property as a reasonably foreseeable result of the secured party's or lessor's action.

Source: L. 2001: Entire article R&RE, p. 1422, § 1, effective July 1. **L. 2002:** (g) added, p. 939, § 10, effective August 7; (e) amended, p. 1465, § 10, effective October 1. **L. 2021:** (e) amended, (SB 21-271), ch. 462, p. 3133, § 53, effective March 1, 2022.

Editor's note - Colorado legislative change: Colorado added this section.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (e), see section 1 of chapter 318, Session Laws of Colorado 2002.

PART 7

TRANSITION

4-9-701. Effective date.

This act takes effect on July 1, 2001. References in this part 7 to "this act" refer to the repealed and reenacted article 9 of this title as contained in Senate Bill 01-240, enacted at the first regular session of the sixty-third general assembly. References in this part 7 to "former article 9" are to article 9 of this title as in effect immediately before July 1, 2001.

Source: L. 2001: Entire article R&RE, p. 1423, § 1, effective July 1.

Editor's note - Colorado legislative change: The uniform act (e) states: "This act takes effect on July 1, 2001."

4-9-702. Saving clause.

(a) Except as otherwise provided in this part 7, this act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2001.

(b) Except as otherwise provided in subsection (c) of this section and sections 4-9-703 to 4-9-710:

(1) Transactions and liens that were not governed by former article 9, were validly entered into or created before July 1, 2001, and would be subject to this act if they had been entered into or created on or after July 1, 2001, and the rights, duties, and interests flowing from those transactions and liens remain valid on or after July 1, 2001; and

(2) The transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by this act or by the law that otherwise would apply if this act had not taken effect.

(c) This act does not affect an action, case, or proceeding commenced before July 1, 2001.

Source: L. 2001: Entire article R&RE, p. 1423, § 1, effective July 1. **L. 2002:** IP(b) amended, p. 940, § 11, effective August 7.

4-9-703. Security interest perfected before effective date.

(a) A security interest that is enforceable immediately before July 1, 2001, and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this act if, on July 1, 2001, the applicable requirements for enforceability and perfection under this act are satisfied without further action.

(b) Except as otherwise provided in section 4-9-705, if, immediately before July 1, 2001, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this act are not satisfied on July 1, 2001, the security interest:

(1) Is a perfected security interest for one year after July 1, 2001;

(2) Remains enforceable after June 30, 2002, only if the security interest becomes enforceable under section 4-9-203 before July 1, 2002; and

(3) Remains perfected after June 30, 2002, only if the applicable requirements for perfection under this act are satisfied before July 1, 2002.

(c) Notwithstanding subsections (a) and (b) of this section, a lien, pledge, or security interest granted by a governmental unit prior to July 1, 2001, that is enforceable immediately before July 1, 2001, and that would have priority over the rights of a person that becomes a lien creditor at that time, shall remain enforceable and continue to have such priority on or after July 1, 2001.

Source: L. 2001: Entire article R&RE, p. 1423, § 1, effective July 1.

Editor's note - Colorado legislative change: Colorado added subsection (c).

4-9-704. Security interest unperfected before effective date.

A security interest that is enforceable immediately before July 1, 2001, but that would be subordinate to the rights of a person that becomes a lien creditor at that time:

(1) Remains an enforceable security interest for one year after July 1, 2001;

(2) Remains enforceable after June 30, 2002, only if the security interest becomes enforceable under section 4-9-203 on or before June 30, 2002; and

(3) Becomes perfected:

(A) Without further action, on July 1, 2001, if the applicable requirements for perfection under this act are satisfied on or before July 1, 2001; or

(B) When the applicable requirements for perfection are satisfied if the requirements are satisfied after July 1, 2001.

Source: L. 2001: Entire article R&RE, p. 1424, § 1, effective July 1.

4-9-705. Effectiveness of action taken before effective date.

(a) If action, other than the filing of a financing statement, is taken before July 1, 2001, and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before July 1, 2001, the action is effective to perfect a security interest that attaches under this act on or before June 30, 2002. An attached security interest becomes unperfected on July 1, 2002, unless the security interest becomes a perfected security interest under this act on or before June 30, 2002.

(b) The filing of a financing statement before July 1, 2001, is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this act.

(c) This act does not render ineffective an effective financing statement that, before July 1, 2001, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former section 4-9-103. However, except as otherwise provided in subsections (d) and (e) of this section and section 4-9-706, the financing statement ceases to be effective at the earlier of:

(1) The time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or

(2) June 30, 2006.

(d) The filing of a continuation statement after July 1, 2001, does not continue the effectiveness of the financing statement filed before said date. However, upon the timely filing of a continuation statement after July 1, 2001, and in accordance with the law of the jurisdiction governing perfection as provided in part 3 of this article, the effectiveness of a financing statement filed in the same office in that jurisdiction before said date continues for the period provided by the law of that jurisdiction.

(e) Paragraph (2) of subsection (c) of this section applies to a financing statement that, before July 1, 2001, is filed against a transmitting utility and satisfies the applicable requirements for

perfection under the law of the jurisdiction governing perfection as provided in former section 4-9-103 only to the extent that part 3 of this article provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(f) A financing statement that includes a financing statement filed before July 1, 2001, and a continuation statement filed after said date is effective only to the extent that it satisfies the requirements of part 5 of this article for an initial financing statement.

Source: L. 2001: Entire article R&RE, p. 1424, § 1, effective July 1.

4-9-706. When initial financing statement suffices to continue effectiveness of financing statement.

(a) The filing of an initial financing statement in the office specified in section 4-9-501 continues the effectiveness of a financing statement filed before July 1, 2001, if:

(1) The filing of an initial financing statement in that office would be effective to perfect a security interest under this act;

(2) The pre-effective-date financing statement was filed in an office in another state, another office in this state, or in the office of any clerk and recorder in this state; and

(3) The initial financing statement satisfies subsection (c) of this section.

(b) The filing of an initial financing statement under subsection (a) of this section continues the effectiveness of the pre-effective-date financing statement:

(1) If the initial financing statement is filed before July 1, 2001, for the period provided in former section 4-9-403 with respect to a financing statement; and

(2) If the initial financing statement is filed after July 1, 2001, for the period provided in section 4-9-515 with respect to an initial financing statement.

(c) To be effective for purposes of subsection (a) of this section, an initial financing statement must:

(1) Satisfy the requirements of part 5 of this article for an initial financing statement;

(2) Identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) Indicate that the pre-effective-date financing statement remains effective.

Source: L. 2001: Entire article R&RE, p. 1425, § 1, effective July 1. **L. 2002:** (a)(2) amended, p. 940, § 12, effective August 7.

4-9-707. Amendment of pre-effective-date financing statement.

(a) As used in this part 7, "pre-effective-date financing statement" means a financing statement filed before July 1, 2001.

(b) After July 1, 2001, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in part 3 of this article. However, the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) Except as otherwise provided in subsection (d) of this section, if the law of this state governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after July 1, 2001, only if:

(1) The pre-effective-date financing statement and an amendment are filed in the office specified in section 4-9-501;

(2) An amendment is filed in the office specified in section 4-9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies section 4-9-706 (c); or

(3) An initial financing statement that provides the information as amended and satisfies section 4-9-706 (c) is filed in the office specified in section 4-9-501.

(d) If the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under section 4-9-705 (d) and (f) or 4-9-706.

(e) Whether or not the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in this state may be terminated after July 1, 2001, by filing a termination statement in the office in which the pre-effective date financing statement is filed, unless an initial financing statement that satisfies section 4-9-706 (c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in part 3 of this article as the office in which to file a financing statement.

Source: L. 2001: Entire article R&RE, p. 1426, § 1, effective July 1.

Editor's note - Colorado legislative change: Colorado added this section; the uniform act's section 707 is codified at section 4-9-708.

4-9-708. Persons entitled to file initial financing statement or continuation statement.

A person may file an initial financing statement or a continuation statement under this part 7 if:

(1) The secured party of record authorizes the filing; and

(2) The filing is necessary under this part 7:

(A) To continue the effectiveness of a financing statement filed before July 1, 2001; or

(B) To perfect or continue the perfection of a security interest.

Source: L. 2001: Entire article R&RE, p. 1427, § 1, effective July 1.

Editor's note - Colorado legislative change: The uniform act codified this section as section 707.

4-9-709. Priority.

(a) This act determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before July 1, 2001, former article 9 determines priority.

(b) For purposes of section 4-9-322 (a), the priority of a security interest that becomes enforceable under section 4-9-203 of this act dates from July 1, 2001, if the security interest is perfected under this act by the filing of a financing statement before said date which would not have been effective to perfect the security interest under former article 9. This subsection (b) does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement.

Source: L. 2001: Entire article R&RE, p. 1427, § 1, effective July 1.

Editor's note - Colorado legislative change: The uniform act codified this section as section 708.

4-9-710. Effectiveness of filing in clerk and recorders' offices.

Except as provided in this section, a pre-effective-date financing statement filed with respect to a security interest in the office of any clerk and recorder in this state shall be treated as if it had been filed in the office of the secretary of state. The preceding sentence does not apply to a financing statement to the extent that the financing statement:

(1) Covers timber to be cut or as-extracted collateral; or

(2) Was filed as a fixture filing.

Source: L. 2002: Entire section added, p. 940, § 13, effective August 7.

PART 8

TRANSITION PROVISIONS FOR 2010 AMENDMENTS

4-9-801. Effective date.

House Bill 12-1262, enacted in 2012, takes effect on July 1, 2013.

Source: L. 2012: Entire part added, (HB 12-1262), ch. 170, p. 604, § 16, effective July 1, 2013.

4-9-802. Saving clause.

(a) Except as otherwise provided in this part 8, House Bill 12-1262, enacted in 2012, applies to a transaction or lien within its scope even if the transaction or lien was entered into or created before July 1, 2013.

(b) House Bill 12-1262, enacted in 2012, does not affect an action, case, or proceeding commenced before July 1, 2013.

Source: L. 2012: Entire part added, (HB 12-1262), ch. 170, p. 605, § 16, effective July 1, 2013.

4-9-803. Security interest perfected before effective date.

(a) A security interest that is a perfected security interest immediately before July 1, 2013, is a perfected security interest under this article, as amended, if, when House Bill 12-1262, enacted in 2012, takes effect, the applicable requirements for attachment and perfection under this article, as amended by House Bill 12-1262, enacted in 2012, are satisfied without further action.

(b) Except as otherwise provided in section 4-9-805, which controls with respect to security interests perfected by the filing of a financing statement pursuant to part 5 of this article as it existed before July 1, 2013, if, immediately before July 1, 2013, a security interest is a perfected security interest but the applicable requirements for perfection under this article, as amended by House Bill 12-1262, enacted in 2012, are not satisfied by July 1, 2013, the security interest remains perfected thereafter only if the applicable requirements for perfection under this article, as amended by House Bill 12-1262, enacted in 2012, are satisfied within one year after July 1, 2013.

Source: L. 2012: Entire part added, (HB 12-1262), ch. 170, p. 605, § 16, effective July 1, 2013.

4-9-804. Security interest unperfected before effective date.

(a) A security interest that is an unperfected security interest immediately before July 1, 2013, becomes a perfected security interest:

(1) Without further action, on July 1, 2013, if the applicable requirements for perfection under this article, as amended by House Bill 12-1262, enacted in 2012, are satisfied on or before July 1, 2013; or

(2) When the applicable requirements for perfection are satisfied if the requirements are satisfied after July 1, 2013.

Source: L. 2012: Entire part added, (HB 12-1262), ch. 170, p. 605, § 16, effective July 1, 2013.

4-9-805. Effectiveness of action taken before effective date.

(a) The filing of a financing statement before July 1, 2013, is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this article, as amended by House Bill 12-1262, enacted in 2012.

(b) House Bill 12-1262, enacted in 2012, does not render seriously misleading or otherwise ineffective an effective financing statement that, before July 1, 2013, was filed and satisfied the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in this article as it existed before July 1, 2013. However, except as otherwise provided in subsections (c) and (d) of this section and section 4-9-806, the financing statement ceases to be effective:

(1) If the financing statement was filed in this state, at the time the financing statement would have ceased to be effective had House Bill 12-1262, enacted in 2012, not taken effect; or

(2) If the financing statement was filed in another jurisdiction, at the earlier of:

(A) The time the financing statement would have ceased to be effective under the law of that jurisdiction; or

(B) June 30, 2018.

(c) The timely filing of a continuation statement on or after July 1, 2013, in accordance with the law of the jurisdiction governing perfection as provided in this article, as amended by House Bill 12-1262, enacted in 2012, continues the effectiveness of a financing statement filed in the same office in that jurisdiction before July 1, 2013, for the period provided by the law of that jurisdiction, but only to the extent the financing statement, including any amendment filed before or, if permitted by the rules of the filing office, as part of, the continuation statement, satisfies the requirements of part 5 of this article, as amended by House Bill 12-1262, enacted in 2012, for an initial financing statement. Except as provided in the preceding sentence, the filing of a continuation statement on or after July 1, 2013, does not continue the effectiveness of a financing statement filed before July 1, 2013.

(d) Subparagraph (B) of paragraph (2) of subsection (b) of this section applies to a financing statement that, before July 1, 2013, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in this article as it existed before July 1, 2013, only to the extent that this article, as amended by House Bill 12-1262, enacted in 2012, provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(e) A financing statement that includes both a financing statement filed before July 1, 2013, and a continuation statement filed on or after July 1, 2013, is effective only to the extent that, after giving effect to any amendment filed before or, if permitted by the rules of the filing office,

as part of, the continuation statement, the financing statement satisfies the requirements of part 5 of this article, as amended by House Bill 12-1262, enacted in 2012, for an initial financing statement. A financing statement filed before July 1, 2013, that indicates that the debtor is a decedent's estate indicates that the collateral is being administered by a personal representative within the meaning of section 4-9-503 (a)(2), as amended by House Bill 12-1262, enacted in 2012. A financing statement filed before July 1, 2013, that indicates that the debtor is a trust or is a trustee acting with respect to property held in trust indicates that the collateral is held in a trust within the meaning of section 4-9-503 (a)(3), as amended by House Bill 12-1262, enacted in 2012.

Source: L. 2012: Entire part added, (HB 12-1262), ch. 170, p. 605, § 16, effective July 1, 2013.

4-9-806. When initial financing statement suffices to continue effectiveness of financing statement.

(a) The filing of an initial financing statement in the office specified in section 4-9-501 continues the effectiveness of a financing statement filed before July 1, 2013, if:

(1) The filing of an initial financing statement in that office would be effective to perfect a security interest under this article, as amended by House Bill 12-1262, enacted in 2012;

(2) The pre-effective-date financing statement was filed in an office in another state; and

(3) The initial financing statement satisfies subsection (c) of this section.

(b) The filing of an initial financing statement under subsection (a) of this section continues the effectiveness of the pre-effective-date financing statement:

(1) If the initial financing statement is filed before July 1, 2013, for the period provided in section 4-9-515, as it existed before July 1, 2013, with respect to an initial financing statement; and

(2) If the initial financing statement is filed after July 1, 2013, for the period provided in section 4-9-515, as amended by House Bill 12-1262, enacted in 2012, with respect to an initial financing statement.

(c) To be effective for purposes of subsection (a) of this section, an initial financing statement must:

(1) Satisfy the requirements of part 5 of this article, as amended by House Bill 12-1262, enacted in 2012, for an initial financing statement;

(2) Identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) Indicate that the pre-effective-date financing statement remains effective.

Source: L. 2012: Entire part added, (HB 12-1262), ch. 170, p. 607, § 16, effective July 1, 2013.

4-9-807. Amendment of pre-effective-date financing statement.

(a) In this section, "pre-effective-date financing statement" means a financing statement filed before July 1, 2013.

(b) On or after July 1, 2013, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in this article, as amended by House Bill 12-1262, enacted in 2012. However, the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) Except as otherwise provided in subsection (d) of this section, if the law of this state governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended on or after July 1, 2013, only if:

(1) The pre-effective-date financing statement and an amendment are filed in the office specified in section 4-9-501;

(2) An amendment is filed in the office specified in section 4-9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies section 4-9-806 (c); or

(3) An initial financing statement that provides the information as amended and satisfies section 4-9-806 (c) is filed in the office specified in section 4-9-501.

(d) If the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under section 4-9-805 (c) and (e) or 4-9-806.

(e) Whether or not the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in this state may be terminated after July 1, 2013, by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies section 4-9-806 (c)

has been filed in the office specified by the law of the jurisdiction governing perfection as provided in this article, as amended by House Bill 12-1262, enacted in 2012, as the office in which to file a financing statement.

Source: L. 2012: Entire part added, (HB 12-1262), ch. 170, p. 607, § 16, effective July 1, 2013.

4-9-808. Person entitled to file initial financing statement or continuation statement.

(a) A person may file an initial financing statement or a continuation statement under this part 8 if:

(1) The secured party of record authorizes the filing; and

(2) The filing is necessary under this part 8:

(A) To continue the effectiveness of a financing statement filed before July 1, 2013; or

(B) To perfect or continue the perfection of a security interest.

Source: L. 2012: Entire part added, (HB 12-1262), ch. 170, p. 608, § 16, effective July 1, 2013.

4-9-809. Priority.

House Bill 12-1262, enacted in 2012, determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before July 1, 2013, this article, as it existed before July 1, 2013, determines priority.

Source: L. 2012: Entire part added, (HB 12-1262), ch. 170, p. 609, § 16, effective July 1, 2013.

ARTICLE 9.3

Central Information System

4-9.3-101 to 4-9.3-108. (Repealed)

Source: L. 2003: Entire article repealed, p. 1669, § 1, effective July 1.

Editor's note: This article was added in 1995. For amendments to this article prior to its repeal in 2003, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

ARTICLE 9.5

Central Filing of Effective Financing Statements

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4-9.5-101. Short title.

This article shall be known and may be cited as the "Central Filing of Effective Financing Statement Act".

Source: L. 88: Entire article added, p. 325, § 1, effective May 29.

4-9.5-102. Legislative declaration.

The general assembly finds, determines, and declares its intent to adopt a central filing system for security interests relating to farm products pursuant to section 1324 of the federal "Food Security Act of 1985", Pub.L. 99-198. The general assembly further finds, determines, and declares that upon the certification and operation of this central filing system, security interest holders shall use such system in lieu of any other notice provided by section 1324 of the federal "Food Security Act of 1985" for farm products used or produced in the state of Colorado which are included in the central filing system, except as otherwise allowed by this article or required by law.

Source: L. 88: Entire article added, p. 325, § 1, effective May 29.

4-9.5-103. Definitions.

As used in this article, unless the context otherwise requires:

(1) (Deleted by amendment, L. 2003, p. 1669, § 2, effective July 1, 2003.)

(2) "Buyer of farm products" or "buyer in the ordinary course of business" means a person who, in the ordinary course of business, buys farm products from a person engaged in farming operations who is in the business of selling farm products.

(2.5) "Central filing officer" means the secretary of state.

(3) "Central filing system" means a system for filing effective financing statements on a statewide basis and which has been certified by the secretary of the United States department of agriculture pursuant to section 1324 of the "Food Security Act of 1985". It is the intent of the general assembly that, effective January 1, 2000, the filing system established by section 4-9-501 shall constitute the central filing system.

(4) "Commission merchant" means any person engaged in the business of receiving any farm product for sale, on commission, or for or on behalf of another person.

(5) "Crop year" means:

(a) For a crop grown in soil, the calendar year in which it is harvested or to be harvested;

(b) For animals, the calendar year in which they are born, acquired, or owned;

(c) For poultry or eggs, the calendar year in which they are sold or to be sold.

(6) "Debtor" means a person who owns a product and subjects it to a security interest, whether or not that person owes a debt to the secured party.

(7) "Effective financing statement" means a record that:

(a) Is an original or reproduced copy thereof, a fax copy, or, if permitted by federal law, regulation, rule, or interpretation, an electronically transmitted filing;

(b) Is filed with the central filing officer by the secured party; and

(c) Is signed, authorized, or otherwise authenticated by the debtor, unless the record is filed by electronic transmission, in which case it shall be signed, authorized, or otherwise authenticated electronically pursuant to section 24-71-101, C.R.S.

(d) to (l) (Deleted by amendment, L. 2006, p. 1142, § 1.)

(8) "Farm product" means an agricultural commodity, a species of livestock used or produced in farming operations, or a product of such crop or livestock in its unmanufactured state, that is in the possession of a person engaged in farming operations. "Farm product" includes, but is not limited to, apples, artichokes, asparagus, barley, cantaloupe, carrots, cattle and calves, chickens, corn, cotton, cucumbers, dry beans, eggs, fish, flax seed, fur-bearing animals, grapes, hay, hogs, honey, honeydew melon, horses, legumes, milk, muskmelon, oats, onions, pecans, popcorn, potatoes, pumpkins, raspberries, rye, seed crops, sheep and lambs, silage, sorghum grain, soybeans, squash, strawberries, sugar beets, sunflower seeds, sweet corn, tomatoes, trees, triticale, turkeys, vetch, walnuts, watermelon, wheat, and wool. The central filing officer may add other farm products in addition to those specified in this subsection (8) if such products are covered by the general definition contained in this subsection (8).

(9) "Food Security Act of 1985" means Pub.L. 99-198, as amended: Section 1324 thereof has been codified at section 1631 of Title 7 of the United States Code.

(10) "Person" means any individual or any partnership, corporation, trust, or any other business entity.

(11) "Receipt" and other forms of the word "receive" means the earlier of actual receipt or the tenth day after deposit in the United States mails, first-class mail, postage prepaid.

(11.5) "Record", except as used in "for record", "of record", "record or legal title", and "record owner", means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Registrant" or "registered buyer" means any buyer of farm products, commission merchant, or selling agent, who has registered with the central filing officer pursuant to section 4-9.5-104.5 (3).

(13) "Secured party" means a person in whose favor there is a security interest.

(14) "Security interest" means an interest in farm products that secures payment or performance of an obligation.

(15) "Selling agent" means any person, other than a commission merchant, who is engaged in the business of negotiating the sale and purchase of any farm product on behalf of a person engaged in farming operations.

(16) "Unique identifier" means a number, combination of numbers or letters, or other identifier selected by the central filing officer using a system or method approved by the United States secretary of agriculture in accordance with the federal "Food Security Act of 1985".

Source: L. 88: Entire article added, p. 325, § 1, effective May 29. **L. 91:** (7)(i) amended, p. 323, § 1, effective May 24. **L. 94:** (7)(a) and (7)(f) amended, p. 1552, § 3, effective July 1. **L. 95:** (1), (7)(f), and (7)(j) amended, p. 1139, § 12, effective July 1, 1996. **L. 96:** (1), (7)(b), and (7)(c) amended, p. 1385, §§ 5, 6, effective July 1. **L. 97:** (7)(d)(IV) and (7)(e) amended, p. 550, § 8, effective April 24. **L. 99:** (1), (3), (7)(b), (7)(f), (7)(j), and (7)(k) amended and (2.5) added, p. 747, § 14, effective July 1. **L. 2001:** (2.5), (3), (7)(e), and (7)(j) amended, p. 1430, § 8, effective July 1. **L. 2003:** (1), (3), (7)(d)(IV), (7)(d)(VI), (8), and (12) amended, p. 1669, § 2, effective July 1. **L. 2004:** (7) amended, p. 1170, § 1, effective July 1. **L. 2006:** (7), (8), and (12) amended and (11.5) and (16) added, p. 1142, § 1, effective May 29, 2012.

4-9.5-104. Central filing system.

(1) The central filing officer shall be responsible for the design, implementation, and operation of a central filing system for effective financing statements. The system shall provide a means for filing effective financing statements with the central filing officer. The system shall include requirements:

(a) That an effective financing statement be filed in the office of the central filing officer;

(b) That the central filing officer record the date and hour of the filing of effective financing statements; and

(c) That the central filing officer assign a file number to each effective financing statement.

(2) to (6) Repealed.

(7) (Deleted by amendment, L. 99, p. 747, § 15, effective January 1, 2000.)

(8) and (9) Repealed.

Source: L. 88: Entire article added, p. 328, § 1, effective May 29. **L. 91:** (5)(a) amended, p. 323, § 2, effective May 24. **L. 94:** (1) and (5)(a) amended, p. 1552, § 4, effective July 1. **L. 95:** (5)(a) amended, p. 1139, § 13, effective July 1, 1996. **L. 99:** (1), (4), (5)(a), and (7) amended, p. 747, § 15, effective January 1, 2000. **L. 2003:** IP(1), IP(2), IP(3)(a), (4), (5), and (6) amended and (8) added, p. 1670, § 3, effective July 1. **L. 2004:** (5)(a) amended, p. 1172, § 2, effective July 1. **L. 2006:** (9) added by revision, pp. 1144, 1154, §§ 2, 12, effective May 29, 2012.

Editor's note: Subsection (9) provided for the repeal of subsections (2), (3), (4), (5), (6), (8), and (9) effective ninety days following certification in writing by the secretary of state to the revisor of statutes. The revisor of statutes received certification from the secretary of state on February 29, 2012.

4-9.5-104.5. Master list.

(1) The central filing officer shall compile all effective financing statements or notices into a master list:

(a) Containing the information referred to in section 4-9.5-105.3;

(b) Organized according to farm product; and

(c) Arranged within each such farm product:

(I) In alphabetical order according to the last name of the individual debtors or, in the case of debtors doing business other than as individuals, the first word in the name of such debtors;

(II) In numerical order according to the social security number, or other unique identifier, of the individual debtors or, in the case of debtors doing business other than as individuals, the federal internal revenue service taxpayer identification number, or other unique identifier, of such debtors;

(III) Geographically by county; and

(IV) By crop year.

(2) (a) The central filing officer shall cause the information on the master list to be produced in lists organized in the same manner as the master list.

(b) If a registered buyer or other interested person so requests, the list or lists for such buyer or person may be limited to any county or group of counties where the farm product is used or produced, or to any crop year or years, or a combination of such identifiers.

(3) All buyers of farm products, commission merchants, selling agents, and other persons may register with the central filing officer to access lists described in subsection (2) of this

section. Any buyer of farm products, commission merchant, selling agent, or other person conducting business from multiple locations may be considered as one entity, at its option. Such registration shall be on an annual basis. The central filing officer shall prescribe the process for registration, which shall include the name and address of the registrant and the list or lists described in subsection (2) of this section that such registrant desires to receive. A registration shall be complete when the registrant has provided the required information and paid the prescribed fee. A registrant is deemed to be registered only as to those products, counties, and crop years for which the registrant requests a list.

(4) The lists as produced pursuant to subsection (2) of this section shall be published and distributed by the central filing officer and shall reflect all effective financing statements that are effective as of the date of the compilation of the lists. The central filing officer shall determine the frequency with which the lists identified pursuant to subsection (2) of this section shall be compiled and distributed. Such lists may be distributed on an annual basis with three quarterly cumulative supplements or, if cost-effective, requested by registered buyers, and permitted by applicable federal law, the central filing officer may distribute more frequent supplements as determined by the central filing officer reflecting all new filings, changes, and terminations since the last list. The central filing officer may develop the form in which to distribute lists. If the name of the seller of a farm product is not on a list requested and received by a registrant, the sale of the farm product to the registrant shall be free of any security interest granted by that seller with respect to the farm product except as to any farm product for which the registrant has received direct notification of the existence of a security interest pursuant to 7 U.S.C. sec. 1631 (e)(1) and (g)(2)(A). The registrant may rely on the representation of the seller as to the seller's identity, so long as the reliance is in good faith.

(5) The central filing officer shall remove from the master list any effective financing statement that has lapsed pursuant to section 4-9.5-105.3 (2) or has been terminated pursuant to section 4-9.5-107.

(6) As soon as practicable, the central filing officer shall publish and distribute the master list electronically.

Source: L. 2006: Entire section added, p. 1146, § 3, effective May 29, 2012.

Editor's note: Section 12 of chapter 249, Session Laws of Colorado 2006, provides that the act enacting this section is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that approval of changes to the central filing system enacted by the act has been obtained from the United States department of agriculture, and the secretary of state has implemented the necessary computer system to publish and distribute the

master list electronically and is able to do so. The revisor of statutes received certification from the secretary of state on February 29, 2012.

4-9.5-105. Confirmations.

(1) (Deleted by amendment, L. 2006, p. 1148, § 4.)

(2) to (4) (Deleted by amendment, L. 96, p. 1385, § 7, effective July 1, 1996.)

(5) A buyer of farm products, whether or not registered, may rely conclusively on information obtained from the master list published and distributed electronically, regardless of any errors or omissions committed by the central filing officer in the electronic publication or distribution of the master list. If the information obtained electronically confirms that the name of the seller of a specified farm product is not on the master list, the sale of the farm product to the buyer shall be free of any security interest granted by that seller with respect to the farm product and the buyer may rely on the representation of the seller as to the seller's identity, so long as the reliance is in good faith.

Source: L. 88: Entire article added, p. 330, § 1, effective May 29. **L. 94:** (1) and (4) amended, p. 1553, § 5, effective July 1. **L. 96:** (1), (2), (3), and (4) amended, p. 1385, § 7, effective July 1. **L. 99:** (1) and (5) amended, p. 749, § 16, effective January 1, 2000. **L. 2003:** (5) amended, p. 1672, § 4, effective July 1. **L. 2006:** (1) and (5) amended, p. 1148, § 4, effective May 29, 2012.

Editor's note: Section 12 of chapter 249, Session Laws of Colorado 2006, provides that the act amending subsections (1) and (5) is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that approval of changes to the central filing system enacted by the act has been obtained from the United States department of agriculture, and the secretary of state has implemented the necessary computer system to publish and distribute the master list electronically and is able to do so. The revisor of statutes received certification from the secretary of state on February 29, 2012.

4-9.5-105.3. Effective financing statements.

(1) An effective financing statement shall state:

(a) The name and address of the secured party;

(b) The name and address of the debtor, which, in the case of an individual, shall have the surname appear first, and in the case of a corporation or other entity that is not an individual,

shall have the name appear beginning with the first word or character that is not an article or punctuation mark;

(c) The social security number, or other unique identifier, of the debtor or, in the case of a debtor doing business other than as an individual, the federal internal revenue service taxpayer identification number, or other unique identifier, of such debtor;

(d) A description of the farm products subject to the security interest created by the debtor, including:

(I) The amount of the farm products, unless all of a particular farm product is subject to the particular security interest;

(II) The name of each county in which the farm products are produced, stored, or otherwise located or to be produced, stored, or otherwise located; and

(III) The crop year, unless every crop year for the duration of the effective financing statement is subject to the particular security interest.

(e) Further details of the farm products subject to the security interest, if needed to distinguish them from other farm products owned by the same person but not subject to the particular security interest; and

(f) Such other additional information as the central filing officer may require to comply with 7 U.S.C. sec. 1631 or to more effectively carry out the purposes of this article.

(2) An effective financing statement shall remain effective for a period of five years after the date of filing, unless its effectiveness is extended by filing one or more continuation statements in accordance with section 4-9.5-106 (1).

(3) An effective financing statement may:

(a) Cover more than one farm product located in more than one county for any given debtor; and

(b) Cover more than one debtor.

(4) An effective financing statement may not be created by amending a financing statement filed under article 9 of this title.

Source: L. 2006: Entire section added, p. 1148, § 5, effective May 29, 2012.

Editor's note: Section 12 of chapter 249, Session Laws of Colorado 2006, provides that the act enacting this section is effective ninety days following certification in writing by the

secretary of state to the revisor of statutes that approval of changes to the central filing system enacted by the act has been obtained from the United States department of agriculture, and the secretary of state has implemented the necessary computer system to publish and distribute the master list electronically and is able to do so. The revisor of statutes received certification from the secretary of state on February 29, 2012.

4-9.5-105.7. Amendment of effective financing statements.

(1) An effective financing statement may be amended to add or delete collateral, or otherwise to amend the information provided in the effective financing statement, by filing an amendment with the central filing officer that identifies the effective financing statement to which the amendment relates by providing its file number, filing office where originally filed, and date filed.

(2) An effective financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment.

(3) An effective financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment.

(4) If the security interest is terminated as to one or more of the farm products shown on the filed effective financing statement and the effective financing statement is to remain effective as to one or more other farm products, the secured party shall, within thirty days after such partial termination, file an amendment reflecting such partial termination with the central filing officer. If the affected secured party fails to file an amendment reflecting such partial termination within the thirty-day period, the secured party shall be liable to the debtor for five hundred dollars and, in addition, for any loss caused to the debtor by such failure.

(5) An amendment to an effective financing statement to delete collateral does not amend or otherwise impair the perfection of any security interest perfected by the effective financing statement for purposes of article 9 of this title.

Source: L. 2006: Entire section added, p. 1148, § 5, effective May 29, 2012.

Editor's note: Section 12 of chapter 249, Session Laws of Colorado 2006, provides that the act enacting this section is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that approval of changes to the central filing system enacted by the act has been obtained from the United States department of agriculture, and the secretary of state has implemented the necessary computer system to publish and distribute the

master list electronically and is able to do so. The revisor of statutes received certification from the secretary of state on February 29, 2012.

4-9.5-106. Continuation statements.

(1) A continuation statement may be filed within six months prior to the expiration of the five-year period of effectiveness of an effective financing statement. A continuation statement shall identify the effective financing statement by file number, filing office where originally filed, and date filed. Upon timely filing of the continuation statement, the effectiveness of the effective financing statement shall be continued for five years after the last date to which the effective financing statement was effective, whereupon its effectiveness shall lapse 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 effective financing statement.

(2) The effectiveness of an effective financing statement that was filed before July 1, 1996, and that had not otherwise lapsed by December 31, 1997, shall be deemed to have lapsed in the manner provided in subsection (1) of this section on December 31, 1997, unless a continuation statement was filed on or after July 1, 1996, but on or before December 31, 1997, that complied with the requirements of subsection (1) of this section. The filing of a continuation statement pursuant to this subsection (2) shall have extended the effectiveness of the effective financing statement for five years after the last date to which the effective financing statement would otherwise have been effective, whereupon it shall have lapsed in the manner set forth in subsection (1) of this section unless further continuation statements were filed in the manner and within the time periods prescribed in subsection (1) of this section in order to prevent such lapse.

(3) (Deleted by amendment, L. 2006, p. 1150, § 6.)

(4) No continuation statement filed pursuant to this section on or after July 1, 1995, shall be ineffective solely because it failed to include a statement that the original financing statement is still effective.

Source: L. 88: Entire article added, p. 330, § 1, effective May 29. **L. 97:** Entire section amended, p. 550, § 9, effective April 24. **L. 97, 1st Ex. Sess.:** (2) amended and (4) added, p. 7, § 3, effective October 22. **L. 2006:** (1), (2), and (3) amended, p. 1150, § 6, effective May 29, 2012.

Editor's note: (1) Subsection (2) was amended and subsection (4) was added by Senate Bill 97S-005 at the first extraordinary session of the sixty-first general assembly in 1997 to correct a technical error. The amendment removes a requirement erroneously left in the law that every

continuation statement filed under the "Uniform Commercial Code - Secured Transactions" or the "Central Filing of Effective Financing Statements Act" on or after July 1, 1995, include a statement that the financing statement that is being continued by the filing remains effective. It substitutes language that validates continuation statements filed on or after July 1, 1995, in a form that does not include such statement.

(2) Section 12 of chapter 249, Session Laws of Colorado 2006, provides that the act amending subsections (1), (2), and (3) is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that approval of changes to the central filing system enacted by the act has been obtained from the United States department of agriculture, and the secretary of state has implemented the necessary computer system to publish and distribute the master list electronically and is able to do so. The revisor of statutes received certification from the secretary of state on February 29, 2012.

4-9.5-107. Termination statement.

(1) The secured party identified in an effective financing statement may at any time, and without regard to whether there is any outstanding secured obligation or commitment to make advances, incur obligations, or otherwise give value, file with the central filing officer a termination statement with respect to such effective financing statement pursuant to this section and provide notice to the debtor of such filing.

(1.3) (a) Unless the debtor otherwise requests, whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value, the secured party identified in an effective financing statement relating to such obligation or commitment shall, within thirty days, terminate such effective financing statement by filing with the central filing officer either:

(I) A termination statement pursuant to this section; or

(II) A termination statement pursuant to article 9 of this title.

(b) If a termination statement is filed pursuant to either subparagraph (I) or (II) of paragraph (a) of this subsection (1.3), the secured party shall provide notice to the debtor of such filing. If the secured party fails to file a required termination statement within the thirty-day period, the secured party shall be liable to the debtor for one thousand dollars, and, in addition, for any loss caused to the debtor by such failure.

(1.5) A termination statement filed pursuant to either subsection (1) or subparagraph (I) of paragraph (a) of subsection (1.3) of this section does not terminate or otherwise impair the perfection of any security interest perfected by the effective financing statement for purposes of article 9 of this title.

(2) (a) The termination statement shall:

(I) Be signed, authorized, or otherwise authenticated by the secured party, and if such notice is filed by electronic transmission it shall be signed electronically, pursuant to section 24-71-101, C.R.S.;

(II) Identify the effective financing statement, the effectiveness of which is to be terminated, by file number, filing office where originally filed, and date filed; and

(III) State that the effective financing statement is to be removed from the master list.

(b) The effectiveness of a terminated effective financing statement shall cease as of the date and hour of filing the termination statement by the central filing officer.

Source: L. 88: Entire article added, p. 331, § 1, effective May 29. **L. 97:** (2) amended, p. 551, § 10, effective April 24. **L. 99:** (1) and (2)(b) amended, p. 749, § 17, effective January 1, 2000. **L. 2001:** (1) and (2)(a)(I) amended, p. 1430, § 9, effective July 1. **L. 2004:** (2)(a)(I) amended, p. 1172, § 3, effective July 1. **L. 2006:** (1) and (2) amended and (1.3) and (1.5) added, p. 1150, § 7, effective (see editor's note). **L. 2008:** (1.5) amended, p. 268, § 7, effective May 29, 2012.

Editor's note: (1) Section 12 of chapter 249, Session Laws of Colorado 2006, provides that the act amending subsections (1) and (2) and enacting subsections (1.3) and (1.5) is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that approval of changes to the central filing system enacted by the act has been obtained from the United States department of agriculture, and the secretary of state has implemented the necessary computer system to publish and distribute the master list electronically and is able to do so. The revisor of statutes received certification from the secretary of state on February 29, 2012.

(2) Section 9 of chapter 84, Session Laws of Colorado 2008, provides that the act amending subsection (1.5) is effective simultaneously with Senate Bill 06-188. For further explanation, see section 12 of chapter 249, Session Laws of Colorado 2006. The revisor of statutes received certification from the secretary of state, as specified in said chapter 249, on February 29, 2012.

4-9.5-108. Filings generally.

(1) Each record filed in the central filing system shall contain all information required by the laws of this state to be contained in the record. Each such record shall:

(a) Be on or in such medium as may be acceptable to the central filing officer and from which the central filing officer may create a physical document that contains all of the

information in the record. The central filing officer may require that the record be delivered by any one or more means or on or in any one or more media as may be acceptable to the central filing officer. The central filing officer is not required to accept for filing a record that is not delivered by a means and in a medium that complies with the requirements then established by the central filing officer for the delivery and filing of records. If the central filing officer permits a record to be delivered on paper, the record shall be typewritten or machine printed, and the central filing officer may impose reasonable requirements upon the dimensions, legibility, quality and color of such paper, and typewriting or printing. If the delivery of a record subject to this article for filing is required or permitted to be accomplished electronically, then the central filing officer may prescribe the format and other attributes of the record and may refuse to permit such record to be accompanied by any physical document.

(b) Be in the English language;

(c) Include any form or cover sheet, or both, required pursuant to section 4-9.5-108.5;

(d) Be delivered to the central filing officer for filing; and

(e) Be accompanied by all required fees.

(2) A record filed pursuant to this article shall not constitute notice for purposes of section 38-35-109, C.R.S.

(3) Any continuation, termination, amendment, or assignment of an effective financing statement shall be signed, authorized, or otherwise authenticated by the secured party, and, in the case of an amendment that adds collateral or adds an additional debtor, by the affected debtor or debtors. If such filing is made by electronic transmission, it shall be signed electronically, pursuant to section 24-71-101, C.R.S.

(4) The provisions of part 5 of article 9 of this title regarding the filing of records shall apply to the filing of records under this article to the extent not inconsistent therewith.

Source: L. 88: Entire article added, p. 331, § 1, effective May 29. **L. 94:** Entire section amended, p. 1554, § 6, effective July 1. **L. 95:** Entire section amended, p. 1140, § 14, effective July 1, 1996. **L. 96:** (1) amended, p. 1386, § 8, effective July 1. **L. 97:** (3) added, p. 551, § 11, effective April 24. **L. 99:** (1) amended, p. 749, § 18, effective January 1, 2000. **L. 2001:** (1) and (3) amended, p. 1431, § 10, effective July 1. **L. 2003:** (1) amended, p. 1672, § 5, effective July 1. **L. 2004:** (3) amended, p. 1173, § 4, effective July 1. **L. 2006:** Entire section amended, p. 1152, § 8, effective May 29, 2012.

Editor's note: Section 12 of chapter 249, Session Laws of Colorado 2006, provides that the act amending this section is effective ninety days following certification in writing by the

secretary of state to the revisor of statutes that approval of changes to the central filing system enacted by the act has been obtained from the United States department of agriculture, and the secretary of state has implemented the necessary computer system to publish and distribute the master list electronically and is able to do so. The revisor of statutes received certification from the secretary of state on February 29, 2012.

4-9.5-108.5. Forms.

The central filing officer may prepare and furnish a form for any record that is subject to this article and may require the use of any such form.

Source: L. 2006: Entire section added, p. 1153, § 9, effective May 29, 2012.

Editor's note: Section 12 of chapter 249, Session Laws of Colorado 2006, provides that the act enacting this section is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that approval of changes to the central filing system enacted by the act has been obtained from the United States department of agriculture, and the secretary of state has implemented the necessary computer system to publish and distribute the master list electronically and is able to do so. The revisor of statutes received certification from the secretary of state on February 29, 2012.

4-9.5-109. "Food Security Act of 1985".

Whether a buyer of farm products takes subject to a security interest shall be determined by section 1324 of the federal "Food Security Act of 1985" and applicable provisions of Colorado law.

Source: L. 88: Entire article added, p. 331, § 1, effective May 29.

4-9.5-110. Fees - rules - federal certification.

(1) Repealed.

(1.5) The central filing officer shall charge and collect fees and other charges, which shall be determined and collected pursuant to section 24-21-104 (3), C.R.S., for:

(a) Distributing the master list;

(b) Furnishing any information;

(c) Furnishing a copy of any filed record;

(d) Filing any record required or permitted to be filed under this article.

(2) The central filing officer is hereby authorized to adopt such rules as are necessary to carry out the provisions of this article and to conform the central filing system to the requirements of the federal "Food Security Act of 1985".

(3) The central filing officer may contract with one or more public or private parties to perform some or all of its duties under this article; except that the central filing officer may not delegate the power to make rules or regulations, conduct public hearings, prescribe forms, and establish services and fees therefor.

(4) (Deleted by amendment, L. 2003, p. 1672, § 6, effective July 1, 2003.)

(5) Revenues collected by the central filing officer pursuant to this article shall be transmitted to the state treasurer, who shall credit the same to the department of state cash fund created in section 24-21-104 (3), C.R.S.

(6) Repealed.

Source: L. 88: Entire article added, p. 331, § 1, effective May 29. **L. 95:** (1) and (3) amended, p. 1140, § 15, effective July 1, 1996. **L. 96:** (1) repealed, p. 1386, § 9, effective July 1. **L. 99:** (4) added, p. 750, § 19, effective July 1. **L. 2003:** (2), (3), and (4) amended and (5) and (6) added, p. 1672, § 6, effective July 1. **L. 2006:** Entire section amended, p. 1153, § 10, effective May 29, 2012.

Editor's note: (1) Subsection (6)(b) provided for the repeal of subsection (6), effective July 1, 2004. (See L. 2003, p. 1672.)

(2) Section 12 of chapter 249, Session Laws of Colorado 2006, provides that the act amending this section is effective ninety days following certification in writing by the secretary of state to the revisor of statutes that approval of changes to the central filing system enacted by the act has been obtained from the United States department of agriculture, and the secretary of state has implemented the necessary computer system to publish and distribute the master list electronically and is able to do so. The revisor of statutes received certification from the secretary of state on February 29, 2012.

4-9.5-111. Penalties.

Any debtor or third party who provides any false or misleading information concerning the name of the owner of any farm products or the existence of any security interest affecting farm products with the intent to deprive the secured party of any of his or her security under the security interest or to defraud or mislead the buyer of any farm product as to the existence of the security interest or fails to pay to the secured party any moneys realized out of the sale of collateral in violation of any security agreement and with the intent to deprive the secured party of such party's rights thereto, or makes a filing subject to section 4-9.5-108 (3) that is not signed, authorized, or otherwise authenticated by the secured party as required by section 4-9.5-108 (3), shall be deemed to have violated section 18-5-206, C.R.S., and shall be subject to the penalties described in said section. Any penalty so collected shall be transmitted to the state treasurer, who shall credit the same to the department of state cash fund created in section 24-21-104 (3), C.R.S.

Source: L. 88: Entire article added, p. 332, § 1, effective May 29. **L. 97:** Entire section amended, p. 552, § 12, effective April 24. **L. 2003:** Entire section amended, p. 1673, § 7, effective July 1. **L. 2004:** Entire section amended, p. 1173, § 5, effective July 1.

4-9.5-112. Severability of provisions. (Repealed)

Source: L. 88: Entire article added, p. 332, § 1, effective May 29. **L. 2003:** Entire section repealed, p. 1669, § 1, effective July 1.

4-9.5-112.5. Immunity.

(1) Except in cases of willful misconduct or bad faith, the contractors retained by the central filing officer, as well as the employees of such contractors, shall be exempt from personal liability as a result of an error or omission in receiving, entering, storing, or providing information or performing their duties as required by this title.

(2) Any error or omission described in subsection (1) of this section shall constitute a tort and not a breach of any express or implied contract.

Source: L. 2003: Entire section added, p. 1673, § 8, effective July 1.

4-9.5-113. Repeal of article. (Repealed)

Source: L. 94: Entire section added, p. 1554, § 7, effective July 1. **L. 95:** Entire section repealed, p. 1140, § 16, effective July 1.

ARTICLE 9.7

Colorado Statutory Lien Registration Act

4-9.7-101. Short title.
4-9.7-102. Scope.
4-9.7-103. Definitions.
4-9.7-104. Contents of a notice of lien or notice of amendment.
4-9.7-105. Acceptance and refusal to accept for filing.
4-9.7-106. Duties of filing officer.
4-9.7-107. Fees.
4-9.7-108. Effect of filing.
4-9.7-109. Filing office - rules.

4-9.7-101. Short title.

This article shall be known and may be cited as the "Colorado Statutory Lien Registration Act".

Source: L. 2008: Entire article added, p. 268, § 8, effective May 29, 2012.

4-9.7-102. Scope.

(a) This article shall apply to the filing of a record relating to a designated statutory lien.

(b) This article shall not apply to the filing of:

(1) Notices, certificates, or other records pertaining to any lien created pursuant to the laws of the United States; or

(2) A financing statement or other record filed pursuant to article 9 or 9.5 of this title or any successor statutes.

(c) This article shall not be construed to create a filing requirement for any lien where the applicable substantive statute does not require filing.

Source: L. 2008: Entire article added, p. 268, § 8, effective May 29, 2012.

4-9.7-103. Definitions.

(a) As used in this article, unless the context otherwise requires:

(1) "Claimant" means a person identified as a beneficiary or owner of a designated statutory lien in a notice of lien or notice of amendment filed in the office of the secretary of state pursuant to this article.

(2) "Continue" means to renew or otherwise extend the effectiveness of a notice of lien.

(3) "Designated statutory lien" means:

(A) A harvester's lien pursuant to article 24.5 of title 38, C.R.S.;

(B) An agistor's lien pursuant to part 2 of article 20 of title 38, C.R.S.;

(C) A hospital lien pursuant to article 27 of title 38, C.R.S.;

(D) A restitution lien pursuant to section 16-18.5-104, C.R.S.;

(E) A child support lien pursuant to section 14-10-122, C.R.S.;

(F) A security interest held by a housing authority pursuant to section 29-4-712, C.R.S.; or

(G) Any other lien provided for by a statute of this state that requires or expressly permits a notice or other record creating, evidencing, or perfecting the lien to be filed in the office of the secretary of state, except as provided in section 4-9.7-102 (b) and (c).

(4) "Notice of amendment" means a record filed in the office of the secretary of state pursuant to this article that changes, corrects, continues, terminates, subordinates, or otherwise modifies a notice of lien.

(5) "Notice of lien" means a record filed in the office of the secretary of state pursuant to this article that identifies one or more claimants with respect to a designated statutory lien; identifies, to the extent required by the applicable substantive statute, the property asserted to be subject to the lien; identifies the owner or owners of the property; and otherwise complies with the requirements of this article.

(6) "Owner" means a person identified in a notice of lien or notice of amendment in the office of the secretary of state pursuant to this article as an owner of property subject to a designated statutory lien.

(7) "Record", except as used in the phrases "for record", "of record", "record or legal title", and "record owner", means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(8) "Substantive statute" means the statute creating, providing for, or giving rise to a designated statutory lien.

(9) "Taxpayer identification number" means a social security number, an employer identification number, or an individual taxpayer identification number.

(10) "Terminate" means to release or otherwise extinguish the effectiveness of a notice of lien.

Source: L. 2008: Entire article added, p. 269, § 8, effective May 29, 2012.

4-9.7-104. Contents of a notice of lien or notice of amendment.

(a) (1) A notice of lien shall state:

(A) The name of one or more owners;

(B) The name of one or more claimants;

(C) A citation to the section of the substantive statute pursuant to which the notice of lien is filed;

(D) To the extent required by the applicable substantive statute, an identification of the property asserted to be subject to a designated statutory lien and any other information that the applicable substantive statute requires to be contained in or included with the notice of lien;

(E) That any other information or record required to be filed with the office of the secretary of state pursuant to the applicable substantive statute has been included with or attached to the notice of lien; and

(F) Such additional information as the secretary of state may require.

(2) A notice of lien may state:

(A) The mailing address of one or more owners; and

(B) The mailing address of one or more claimants.

(b) (1) A notice of amendment shall state:

(A) The original filing number of the notice of lien to which the notice of amendment relates;

(B) That any other information or record required to be filed with the office of the secretary of state pursuant to the applicable substantive statute has been included with or attached to the notice of amendment; and

(C) Any additional information that the secretary of state requires.

(2) A notice of amendment may contain any information necessary to indicate the manner and extent to which the notice of amendment affects the notice of lien.

(c) A notice of lien shall remain effective for the period provided for by the applicable substantive statute or until a notice of amendment that terminates the notice of lien is filed in the office of the secretary of state.

Source: L. 2008: Entire article added, p. 270, § 8, effective May 29, 2012.

4-9.7-105. Acceptance and refusal to accept for filing.

(a) The secretary of state shall refuse to accept a notice of lien or notice of amendment for filing if:

(1) The applicable filing fee is not tendered;

(2) The notice is not communicated by a method of communication authorized by the secretary of state;

(3) The notice of lien does not state the name of an owner;

(4) The notice of lien does not state the name of a claimant;

(5) The notice of amendment does not indicate the original file number of the notice of lien to which the notice of amendment relates; or

(6) The notice of lien or notice of amendment fails to state any additional information that the secretary of state requires.

(b) The secretary of state may refuse to accept a notice of lien or notice of amendment for filing if the notice of lien or notice of amendment does not include the address of one or more claimants.

(c) Filing does not occur with respect to a notice of lien or notice of amendment that the secretary of state refuses to accept for a reason set forth in subsection (a) or (b) of this section.

Source: L. 2008: Entire article added, p. 271, § 8, effective May 29, 2012.

4-9.7-106. Duties of filing officer.

(a) If a notice of lien is communicated to and accepted by the secretary of state for filing, the secretary of state shall cause the notice to be marked, maintained, and indexed in accordance with the provisions of section 4-9-519 as if the notice were a financing statement and each owner identified in the notice were a debtor within the meaning of section 4-9-519.

(b) If a notice of amendment is communicated to and accepted by the secretary of state for filing, the secretary of state shall:

(1) Cause the notice of amendment to be marked, maintained, and indexed as if the notice were an amendment of a financing statement within the meaning of section 4-9-512;

(2) If the notice of amendment terminates a notice of lien, cause the notice of amendment to be marked, maintained, and indexed as if the notice were a termination statement within the meaning of section 4-9-513; or

(3) If the notice of amendment continues a notice of lien, cause the notice of amendment to be marked, maintained, and indexed as if the notice were a continuation statement as defined in section 4-9-102 (27) and extend the effectiveness of the notice of lien by the appropriate period pursuant to the applicable substantive statute.

(c) If the secretary of state refuses to accept a notice of lien or notice of amendment for filing, the secretary of state shall communicate to the person that presented the record the fact of and reason for the refusal. The communication shall be made at the time and in the manner prescribed by the rules adopted by the secretary of state pursuant to section 4-9.7-109.

(d) The secretary of state may remove a notice of lien from the records of the secretary of state one year after the notice expires in accordance with section 4-9.7-104 (c).

(e) The secretary of state shall communicate or otherwise make available in a record the following information to any person that requests the information:

(1) Whether there is on file on a date and time specified by the secretary of state any notice of lien or notice of amendment that:

(A) Designates a particular owner; and

(B) Has not expired under section 4-9.7-104 (c); and

(C) If the request so states, has expired under section 4-9.7-104 (c) and a record of which is maintained by the secretary of state under subsection (d) of this section;

(2) The date and time of filing of each notice of lien and notice of amendment described in paragraph (1) of this subsection (e); and

(3) The information provided in each notice of lien and notice of amendment described in paragraph (1) of this subsection (e).

Source: L. 2008: Entire article added, p. 271, § 8, effective May 29, 2012. **L. 2013:** (d), (e)(1)(B), and (e)(1)(C) amended, (HB 13-1300), ch. 316, p. 1662, § 6, effective August 7.

4-9.7-107. Fees.

Subject to section 24-75-402, C.R.S., fees for services rendered by the secretary of state under this article shall be determined and collected pursuant to section 24-21-104, C.R.S.

Source: L. 2008: Entire article added, p. 273, § 8, effective May 29, 2012.

4-9.7-108. Effect of filing.

A notice of lien or notice of amendment that is communicated to the office of the secretary of state with tender of the filing fee, but which the secretary of state wrongfully refuses to accept, is effective as a filed record in the records of the secretary of state except as against a purchaser of the property described in the notice who gives value in reasonable reliance upon the absence of the record in the records of the secretary of state.

Source: L. 2008: Entire article added, p. 273, § 8, effective May 29, 2012.

4-9.7-109. Filing office - rules.

(a) The secretary of state shall adopt and publish any rules necessary to implement this article. The rules shall be:

(1) Consistent with this article; and

(2) Adopted and published in accordance with the "State Administrative Procedure Act", article 4 of title 24, C.R.S.

Source: L. 2008: Entire article added, p. 273, § 8, effective May 29, 2012.

ARTICLE 10

Effective Date

4-10-101 to 4-10-208. (Repealed)

Source: L. 2001: Entire article repealed, p. 1448, § 48, effective July 1.

Editor's note: This article was numbered as article 10 of chapter 155, C.R.S. 1963. For amendments to this article prior to its repeal in 2001, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

ARTICLE 11

Fees

4-11-101 and 4-11-102. (Repealed)

Source: L. 2001: Entire article repealed, p. 1448, § 48, effective July 1.

Editor's note: This article was numbered as article 11 of chapter 155, C.R.S. 1963. For amendments to this article prior to its repeal in 2001, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume.

ARTICLE 12

Controllable Electronic Records

4-12-101. Title. 4-12-102. Definitions.

4-12-103. Relation to article 9 and consumer laws.

4-12-104. Rights in controllable account, controllable electronic record, and controllable payment intangible.

4-12-105. Control of controllable electronic record.

4-12-106. Discharge of account debtor on controllable account or controllable payment intangible.

4-12-107. Governing law.

4-12-101. Title.

This article 12 may be cited as the "Uniform Commercial Code-Controllable Electronic Records".

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-12-102. Definitions.

(a) In this article 12:

(1) "Controllable electronic record" means a record stored in an electronic medium that can be subjected to control under section 4-12-105. The term does not include a controllable account, a controllable payment intangible, a deposit account, an electronic copy of a record evidencing chattel paper, an electronic document of title, investment property, a transferable record, or an electronic record that is currently authorized or adopted by a domestic or foreign government and is not a medium of exchange that was recorded and transferable in a system that existed and operated for the medium of exchange before the medium of exchange was authorized or adopted by a government.

(2) "Qualifying purchaser" means a purchaser of a controllable electronic record or an interest in a controllable electronic record that obtains control of the controllable electronic record for value, in good faith, and without notice of a claim of a property right in the controllable electronic record.

(3) "Transferable record" has the meaning provided for that term in section 201 (a)(1) of the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7021 (a)(1), as amended.

(4) "Value" has the meaning provided in section 4-3-303 (a), as if references in that subsection (a) to an "instrument" were references to a controllable account, controllable electronic record, or controllable payment intangible.

(b) The definitions in article 9 of this title 4 of "account debtor", "controllable account", "controllable payment intangible", "chattel paper", "deposit account", and "investment property" apply to this article 12.

(c) Article 1 of this title 4 contains general definitions and principles of construction and interpretation applicable throughout this article 12.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-12-103. Relation to article 9 and consumer laws.

(a) If there is conflict between this article 12 and article 9 of this title 4, article 9 of this title 4 governs.

(b) A transaction subject to this article 12 is subject to any applicable rule of law that establishes a different rule for consumers and any other state law.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-12-104. Rights in controllable account, controllable electronic record, and controllable payment intangible.

(a) This section applies to the acquisition and purchase of rights in a controllable account or controllable payment intangible, including the rights and benefits under subsections (c), (d), (e), (g), and (h) of this section of a purchaser and qualifying purchaser, in the same manner this section applies to a controllable electronic record.

(b) To determine whether a purchaser of a controllable account or a controllable payment intangible is a qualifying purchaser, the purchaser obtains control of the account or payment intangible if it obtains control of the controllable electronic record that evidences the account or payment intangible.

(c) Except as provided in this section, law other than this article 12 determines whether a person acquires a right in a controllable electronic record and the right the person acquires.

(d) A purchaser of a controllable electronic record acquires all rights in the controllable electronic record that the transferor had or had power to transfer; except that a purchaser of a limited interest in a controllable electronic record acquires rights only to the extent of the interest purchased.

(e) A qualifying purchaser acquires its rights in the controllable electronic record free of a claim of a property right in the controllable electronic record.

(f) Except as provided in subsections (a) and (e) of this section for a controllable account and a controllable payment intangible or law other than this article 12, a qualifying purchaser takes a right to payment, right to performance, or other interest in property evidenced by the controllable electronic record subject to a claim of a property right in the right to payment, right to performance, or other interest in property.

(g) An action may not be asserted against a qualifying purchaser based on both a purchase by the qualifying purchaser of a controllable electronic record and a claim of a property right in another controllable electronic record, whether the action is framed in conversion, replevin, constructive trust, equitable lien, or other theory.

(h) Filing of a financing statement under article 9 of this title 4 is not notice of a claim of a property right in a controllable electronic record.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-12-105. Control of controllable electronic record.

(a) A person has control of a controllable electronic record if the electronic record, a record attached to or logically associated with the electronic record, or a system in which the electronic record is recorded:

(1) Gives the person:

(A) Power to avail itself of substantially all the benefit from the electronic record; and

(B) Exclusive power, subject to subsection (b) of this section, to:

(i) Prevent others from availing themselves of substantially all the benefit from the electronic record; and

(ii) Transfer control of the electronic record to another person or cause another person to obtain control of another controllable electronic record as a result of the transfer of the electronic record; and

(2) Enables the person readily to identify itself in any way, including by name, identifying number, cryptographic key, office, or account number, as having the powers specified in subsection (a)(1) of this section.

(b) Subject to subsection (c) of this section, a power is exclusive under subsections (a)(1)(B)(i) and (a)(1)(B)(ii) of this section even if:

(1) The controllable electronic record, a record attached to or logically associated with the electronic record, or a system in which the electronic record is recorded limits the use of the electronic record or has a protocol programmed to cause a change, including a transfer or loss of control or a modification of benefits afforded by the electronic record; or

(2) The power is shared with another person.

(c) A power of a person is not shared with another person under subsection (b)(2) of this section and the person's power is not exclusive if:

(1) The person can exercise the power only if the power also is exercised by the other person; and

(2) The other person:

(A) Can exercise the power without exercise of the power by the person; or

(B) Is the transferor to the person of an interest in the controllable electronic record or a controllable account or controllable payment intangible evidenced by the controllable electronic record.

(d) If a person has the powers specified in subsections (a)(1)(B)(i) and (a)(1)(B)(ii) of this section, the powers are presumed to be exclusive.

(e) A person has control of a controllable electronic record if another person, other than the transferor to the person of an interest in the controllable electronic record or a controllable account or controllable payment intangible evidenced by the controllable electronic record:

(1) Has control of the electronic record and acknowledges that it has control on behalf of the person; or

(2) Obtains control of the electronic record after having acknowledged that it will obtain control of the electronic record on behalf of the person.

(f) A person that has control under this section is not required to acknowledge that it has control on behalf of another person.

(g) If a person acknowledges that it has or will obtain control on behalf of another person, unless the person otherwise agrees or law other than this article 12 or article 9 of this title 4

otherwise provides, the person does not owe any duty to the other person and is not required to confirm the acknowledgment to any other person.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-12-106. Discharge of account debtor on controllable account or controllable payment intangible.

(a) An account debtor on a controllable account or controllable payment intangible may discharge its obligation by paying:

(1) The person having control of the controllable electronic record that evidences the controllable account or controllable payment intangible; or

(2) Except as provided in subsection (b) of this section, a person that formerly had control of the controllable electronic record.

(b) Subject to subsection (d) of this section, the account debtor may not discharge its obligation by paying a person that formerly had control of the controllable electronic record if the account debtor receives a notification that:

(1) Is signed by a person that formerly had control or the person to which control was transferred;

(2) Reasonably identifies the controllable account or controllable payment intangible;

(3) Notifies the account debtor that control of the controllable electronic record that evidences the controllable account or controllable payment intangible was transferred;

(4) Identifies the transferee, in any reasonable way, including by name, identifying number, cryptographic key, office, or account number; and

(5) Provides a commercially reasonable method by which the account debtor is to pay the transferee.

(c) After receipt of a notification that complies with subsection (b) of this section, the account debtor may discharge its obligation by paying in accordance with the notification and may not discharge the obligation by paying a person that formerly had control.

(d) Subject to subsection (h) of this section, notification is ineffective under subsection (b) of this section:

(1) Unless, before the notification is sent, the account debtor and the person that, at that time, had control of the controllable electronic record that evidences the controllable account or

controllable payment intangible agree in a signed record to a commercially reasonable method by which a person may furnish reasonable proof that control has been transferred;

(2) To the extent an agreement between the account debtor and seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this article 12; or

(3) At the option of the account debtor, if the notification notifies the account debtor to:

(A) Divide a payment;

(B) Make less than the full amount of an installment or other periodic payment; or

(C) Pay any part of a payment by more than one method or to more than one person.

(e) Subject to subsection (h) of this section, if requested by the account debtor, the person giving the notification under subsection (b) of this section seasonably shall furnish reasonable proof, using the method in the agreement referred to in subsection (d)(1) of this section, that control of the controllable electronic record has been transferred. Unless the person complies with the request, the account debtor may discharge its obligation by paying a person that formerly had control, even if the account debtor has received a notification under subsection (b) of this section.

(f) A person furnishes reasonable proof under subsection (e) of this section that control has been transferred if the person demonstrates, using the method in the agreement referred to in subsection (d)(1) of this section, that the transferee has the power to:

(1) Avail itself of substantially all the benefit from the controllable electronic record;

(2) Prevent others from availing themselves of substantially all the benefit from the controllable electronic record; and

(3) Transfer the powers specified in subsections (f)(1) and (f)(2) of this section to another person.

(g) Subject to subsection (h) of this section, an account debtor may not waive or vary its rights under subsections (d)(1) and (e) of this section or its option under subsection (d)(3) of this section.

(h) This section is subject to law other than this article 12 which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-12-107. Governing law.

(a) Except as provided in subsection (b) of this section, the local law of a controllable electronic record's jurisdiction governs a matter covered by this article 12.

(b) For a controllable electronic record that evidences a controllable account or controllable payment intangible, the local law of the controllable electronic record's jurisdiction governs a matter covered by section 4-12-106 unless an effective agreement determines that the local law of another jurisdiction governs.

(c) The following rules determine a controllable electronic record's jurisdiction under this section:

(1) If the controllable electronic record, or a record attached to or logically associated with the controllable electronic record and readily available for review, expressly provides that a particular jurisdiction is the controllable electronic record's jurisdiction for purposes of this article 12 or this title 4, that jurisdiction is the controllable electronic record's jurisdiction.

(2) If subsection (c)(1) of this section does not apply and the rules of the system in which the controllable electronic record is recorded are readily available for review and expressly provide that a particular jurisdiction is the controllable electronic record's jurisdiction for purposes of this article 12 or this title 4, that jurisdiction is the controllable electronic record's jurisdiction.

(3) If subsections (c)(1) and (c)(2) of this section do not apply and the controllable electronic record, or a record attached to or logically associated with the controllable electronic record and readily available for review, expressly provides that the controllable electronic record is governed by the law of a particular jurisdiction, that jurisdiction is the controllable electronic record's jurisdiction.

(4) If subsections (c)(1), (c)(2), and (c)(3) of this section do not apply and the rules of the system in which the controllable electronic record is recorded are readily available for review and expressly provide that the controllable electronic record or the system is governed by the law of a particular jurisdiction, that jurisdiction is the controllable electronic record's jurisdiction.

(5) If subsections (c)(1) to (c)(4) of this section do not apply, the controllable electronic record's jurisdiction is the District of Columbia.

(d) If subsection (c)(5) of this section applies and this article 12 is not in effect in the District of Columbia without material modification, the governing law for a matter covered by this article 12 is the law of the District of Columbia as though this article 12 were in effect in the District of Columbia without material modification. In this subsection (d), "article 12" means article 12 of the "Uniform Commercial Code".

(e) To the extent subsections (a) and (b) of this section provide that the local law of the controllable electronic record's jurisdiction governs a matter covered by this article 12, that law

governs even if the matter or a transaction to which the matter relates does not bear any relation to the controllable electronic record's jurisdiction.

(f) The rights acquired under section 4-12-104 by a purchaser or qualifying purchaser are governed by the law applicable under this section at the time of purchase.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

ARTICLE 13

Transitional Provisions for Uniform Commercial Code Amendments (2022)

PART 1
GENERAL PROVISIONS AND DEFINITIONS

4-13-101. Short title.

4-13-102. Definitions.

PART 2
GENERAL TRANSITIONAL PROVISION

4-13-201. Saving clause.

PART 3
TRANSITIONAL PROVISIONS FOR ARTICLES 9 AND 12 OF THIS TITLE 4

4-13-301. Saving clause.

4-13-302. Security interest perfected before effective date.

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4-13-304. Effectiveness of actions taken before effective date.

4-13-305. Priority.

4-13-306. Priority of claims when priority rules of article 9 do not apply.

PART 1

GENERAL PROVISIONS AND DEFINITIONS

4-13-101. Short title.

This article 13 may be cited as "Transitional Provisions for Uniform Commercial Code Amendments (2022)".

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-13-102. Definitions.

(a) In this article 13:

(1) "Adjustment date" means July 1, 2025, or the date that is one year after the effective date of this article 13, whichever is later.

(2) "Article 12" means article 12 of this title 4.

(3) "Article 12 property" means a controllable account, controllable electronic record, or controllable payment intangible.

(b) The following definitions in other articles of this title 4 apply to this article 13.

"Controllable account"	Section 4-9-102.
"Controllable electronic record"	Section 4-12-102.
"Controllable payment intangible"	Section 4-9-102.
"Financing statement"	Section 4-9-102.

(c) Article 1 of this title 4 contains general definitions and principles of construction and interpretation applicable throughout this article 13.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

PART 2

GENERAL TRANSITIONAL PROVISION

4-13-201. Saving clause.

Except as provided in part 3 of this article 13, a transaction validly entered into before the effective date of this article 13 and the rights, duties, and interests flowing from the transaction remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by law other than this title 4 or, if applicable, this title 4, as though this article 13 had not taken effect.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

PART 3

TRANSITIONAL PROVISIONS FOR ARTICLES 9 AND 12 OF THIS TITLE 4

4-13-301. Saving clause.

(a) Except as provided in this part 3, article 9, as amended by Senate Bill 23-090, enacted in 2023, and article 12 of this title 4, as enacted by Senate Bill 23-090, enacted in 2023, apply to a transaction, lien, or other interest in property, even if the transaction, lien, or interest was entered into, created, or acquired before the effective date of this article 13.

(b) Except as provided in subsection (c) of this section and sections 4-13-302 to 4-13-306:

(1) A transaction, lien, or interest in property that was validly entered into, created, or transferred before the effective date of this article 13 and that was not governed by this title 4, but would be subject to article 9 of this title 4, as amended by Senate Bill 23-090, enacted in 2023, or article 12 of this title 4, as enacted by Senate Bill 23-090, enacted in 2023, if it had been entered into, created, or transferred on or after the effective date of this article 13, including the rights, duties, and interests flowing from the transaction, lien, or interest, remains valid on and after the effective date of this article 13; and

(2) The transaction, lien, or interest may be terminated, completed, consummated, and enforced as required or permitted by this title 4, as amended by Senate Bill 23-090, enacted in 2023, or by the law that would apply if this title 4, as amended by Senate Bill 23-090, enacted in 2023, had not taken effect.

(c) This article 13 does not affect an action, case, or proceeding commenced before the effective date of this article 13.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-13-302. Security interest perfected before effective date.

(a) A security interest that is enforceable and perfected immediately before the effective date of this article 13 is a perfected security interest under this title 4 if, on the effective date of this article 13, the requirements for enforceability and perfection under this title 4 are satisfied without further action.

(b) If a security interest is enforceable and perfected immediately before the effective date of this article 13, but the requirements for enforceability or perfection under this title 4 are not satisfied on the effective date of this article 13, the security interest:

(1) Is a perfected security interest until the earlier of the time perfection would have ceased under the law in effect immediately before the effective date of this article 13 or the adjustment date;

(2) Remains enforceable thereafter only if the security interest satisfies the requirements for enforceability under section 4-9-203, as amended by Senate Bill 23-090, enacted in 2023, before the adjustment date; and

(3) Remains perfected thereafter only if the requirements for perfection under this title 4 are satisfied before the time specified in subsection (b)(1) of this section.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-13-303. Security interest unperfected before effective date.

A security interest that is enforceable immediately before the effective date of this article 13 but is unperfected at that time:

(1) Remains an enforceable security interest until the adjustment date;

(2) Remains enforceable thereafter if the security interest becomes enforceable under section 4-9-203, as amended by Senate Bill 23-090, enacted in 2023, on the effective date of this article 13 or before the adjustment date; and

(3) Becomes perfected:

(A) Without further action, on the effective date of this article 13, if the requirements for perfection under this title 4 are satisfied before or at that time; or

(B) When the requirements for perfection are satisfied if the requirements are satisfied after that time.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-13-304. Effectiveness of actions taken before effective date.

(a) If action, other than the filing of a financing statement, is taken before the effective date of this article 13 and the action would have resulted in perfection of the security interest had the security interest become enforceable before the effective date of this article 13, the action is effective to perfect a security interest that attaches under this title 4 before the adjustment date.

An attached security interest becomes unperfected on the adjustment date unless the security interest becomes a perfected security interest under this title 4 before the adjustment date.

(b) The filing of a financing statement before the effective date of this article 13 is effective to perfect a security interest on the effective date of this article 13 to the extent the filing would satisfy the requirements for perfection under this title 4.

(c) The taking of an action before the effective date of this article 13 is sufficient for the enforceability of a security interest on the effective date of this article 13 if the action would satisfy the requirements for enforceability under this title 4.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-13-305. Priority.

(a) Subject to subsections (b) and (c) of this section, this title 4 determines the priority of conflicting claims to collateral.

(b) Subject to subsection (c) of this section, if the priorities of claims to collateral were established before the effective date of this article 13, article 9 of this title 4 as in effect before the effective date of this article 13 determines priority.

(c) On the adjustment date, to the extent the priorities determined by article 9 of this title 4, as amended by Senate Bill 23-090, enacted in 2023, modify the priorities established before the effective date of this article 13, the priorities of claims to article 12 property established before the effective date of this article 13 cease to apply.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.

4-13-306. Priority of claims when priority rules of article 9 do not apply.

(a) Subject to subsections (b) and (c) of this section, article 12 of this title 4, as enacted by Senate Bill 23-090, enacted in 2023, determines the priority of conflicting claims to article 12 property when the priority rules of article 9 of this title 4, as amended by Senate Bill 23-090, enacted in 2023, do not apply.

(b) Subject to subsection (c) of this section, when the priority rules of article 9 of this title 4, as amended by Senate Bill 23-090, enacted in 2023, do not apply and the priorities of claims to article 12 property were established before the effective date of this act, law other than this article 12 determines priority.

(c) When the priority rules of article 9 of this title 4, as amended by Senate Bill 23-090, enacted in 2023, do not apply, to the extent the priorities determined by this title 4 modify the priorities established before the effective date of this article 13, the priorities of claims to article 12 property established before the effective date of this article 13 cease to apply on the adjustment date.

Source: L. 2023: Entire section added, (SB 23-090), ch. 136, p. 569, § 89, effective August 7.