4. UNIFORM COMMERCIAL CODE [Details]

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

1. General Provisions [Details]

This article was numbered as article 1 of chapter 155, C.R.S. 1963. The provisions of this article were repealed and reenacted in 2006, resulting in the addition, relocation, and elimination of sections as well as subject matter. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

Law reviews: For article, "Commercial Law", which discusses Tenth Circuit decisions dealing with commercial law, see 61 Den. L.J. 205 (1984); for article, "Commercial Law", which discusses Tenth Circuit decisions dealing with commercial law, see 62 Den. U. L. Rev. 79 (1985); for article, "Commercial and Corporate Law" which discusses Tenth Circuit decisions dealing with commercial law, see 64 Den. U. L. Rev. 165 (1987); for comment, "Bad Faith Lenders", see 60 U. Colo. L. Rev. 417 (1989); for a discussion of Tenth Circuit decisions dealing with commercial law, see 67 Den. U. L. Rev. 649 (1990).

§ 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".

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

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.

(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.

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

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 and 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 and 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 and 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.

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

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.

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

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.

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

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.

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

§ 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 that apply to particular articles or parts thereof:

(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. Conspicuous terms include the following:

(A) A heading in capital letters equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(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 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.

(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 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 currently authorized or adopted by a domestic or foreign government. 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.

(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 writing, record, or notice, means to:

(A) Deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or, if there is none, to any address reasonable under the circumstances; or

(B) In any other way cause to be received any record or notice within the time it would have arrived if properly sent.

(37) "Signed" includes any symbol executed or adopted with present intention to adopt or accept a writing.

(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.

(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.)

This section is similar to former § 4-1-201 as it existed prior to 2006.

ANNOTATION

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), cert. denied, 472 U.S. 1022, 105 S. Ct. 3489, 87 L. Ed. 2d 623 (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).

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

§ 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.

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

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.

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

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, and 5 of this title, 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.

(L. 2006: Entire article R&RE, p. 4 65, § 1, effective September 1.)

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.

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

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).

§ 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.

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

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.

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

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.

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

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. Northern Natural Gas Co., 661 P.2d 684 (Colo. App. 1982), aff'd sub nom. KN Energy, Inc. v. Great Western Sugar Co., 698 P.2d 769 (Colo. 1985), cert. denied, 472 U.S. 1022, 105 S. Ct. 3489, 87 L. Ed. 2d 623 (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. Northern Natural Gas Co., 661 P.2d 684 (Colo. App. 1982), aff'd sub nom. KN Energy, Inc. v. Great Western Sugar Co., 698 P.2d 769 (Colo. 1985), cert. denied, 472 U.S. 1022, 105 S. Ct. 3489, 87 L. Ed. 2d 623 (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.

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

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.

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

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 an authenticated record.

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

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.

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

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.

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

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.

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

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.

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

This section is similar to former § 4-1-209 as it existed prior to 2006.

2. Sales [Details]

The numbering and sequencing of C.R.S. subsections do not necessarily correspond with the numbering and sequencing of subsections in the uniform act.

§ 4-2-101. Short title

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

(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, this article applies to transactions in goods; it does not apply to:

(a) Any transaction which, although in the form of an unconditional contract to sell or present sale, is intended to operate only as a security transaction, nor does this article impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers; and

(b) The donation, whether for or without valuable consideration, acquisition, preparation, transplantation, injection, or transfusion of any human tissue, organ, or blood or component thereof for or to a human being.

(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.)

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

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 Western Sugar Co., 698 P.2d 769 (Colo. 1985), cert. denied, 472 U.S. 1022, 105 S. Ct. 3489, 87 L. Ed. 2d 623 (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).

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.

§ 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.

(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.)

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).

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

§ 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.

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

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).

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

§ 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.

(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" to contract - "termination" - "cancellation"

(1) In this article unless the context otherwise requires, "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (section 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 cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

(L. 65: p. 1301, § 1. C.R.S. 1963: § 155-2-106.)

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.

(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).

§ 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 some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants, if within a reasonable time a writing in 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 such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) 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).

(L. 65: p. 1302, § 1. C.R.S. 1963: § 155-2-201.)

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).

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 section 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).

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

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

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein, may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) By course of dealing, 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 writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

(L. 65: p. 1303, § 1. C.R.S. 1963: § 155-2-202. L. 2006: (a) amended, p. 490, § 5, effective September 1.)

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), cert. denied, 472 U.S. 1022, 105 S. Ct. 3489, 87 L. Ed. 2d 623 (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).

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

§ 4-2-203. Seals inoperative

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

(L. 65: p. 1303, § 1. C.R.S. 1963: § 155-2-203.)

§ 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.

(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 writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

(L. 65: p. 1303, § 1. C.R.S. 1963: § 155-2-205.)

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.

(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.

(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.

(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. Northern Natural Gas Co., 661 P.2d 684 (Colo. App. 1982), aff'd sub nom. KN Energy, Inc. v. Great Western Sugar Co., 698 P.2d 769 (Colo. 1985), cert. denied, 472 U.S. 1022, 105 S. Ct. 3489, 87 L. Ed. 2d 623 (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. Northern Natural Gas Co., 661 P.2d 684 (Colo. App. 1982), aff'd sub nom. KN Energy, Inc. v. Great Western Sugar Co., 698 P.2d 769 (Colo. 1985), cert. denied, 472 U.S. 1022, 105 S. Ct. 3489, 87 L. Ed. 2d 623 (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 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.

(L. 65: p. 1305, § 1. C.R.S. 1963: § 155-2-209.)

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).

(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).