

1993

Life Insurance Company of Virginia v. West One Bank, Utah : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH

DOCKET NO.

930476

IN THE UTAH COURT OF APPEALS

LIFE INSURANCE COMPANY OF
VIRGINIA

Defendant and Appellant,

vs.

WEST ONE BANK, UTAH

Plaintiff and Appellee.

Case No. 930476-CA

Priority No. 15

BRIEF OF APPELLANT

Appeal From Summary Judgment Entered
in the Third District Court Salt Lake County, State of Utah
The Honorable Glenn K. Iwasaki

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Utah Court of Appeals

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Mary T. Noonan
Clerk of the Court

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JURISDICTION

The Court of Appeals has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2)(j) (1992), and the Order of the Supreme Court of Utah, dated July 26, 1993, pouring-over this case.

STATEMENT OF THE ISSUES

1. Whether the claims of West One Bank ("West One") as an assignee are defective under Utah Code Ann. 70A-9-318(1) because the right of Appellant Life Insurance Company of Virginia ("LOV") to retain commissions in payment of funds advanced to United Underwriters, Inc. ("UUI") accrued before LOV received the required statutory notice of West One's assignment interest.

2. Whether lack of an effective notice of assignment bars West One from receiving a double payment benefit, pursuant to Utah Code Ann. 70A-9-318(3).

3. Whether West One waived its claims based on Utah Code Ann. 70A-9-306(2), or is estopped from asserting them under principles of common law.

4. Whether, because West One's claimed rights were exercisable only on default of UUI, the failure by West One to establish the date of default by UUI created an issue of fact which made summary judgment inappropriate.

Standard of Review: This appeal contests the granting of summary judgment. Since summary judgment is granted as a

matter of law, the Court may review the District Court's conclusions of law without according them any deference, viewing the facts in the light most favorable to Appellants. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989). Summary judgment is not appropriate where there is an issue of material fact, and a genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ. Jackson v. Dabney, 645 P.2d 613 (Utah 1982).

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 70A-1-103 (1990)

Utah Code Ann. § 70A-1-106 (1990)

Utah Code Ann. § 70A-1-205 (1990)

Utah Code Ann. § 70A-9-306(2) (1990)

Utah Code Ann. § 70A-9-311 (1990)

Utah Code Ann. § 70A-9-318(1), (3) (1990)

Rule 56, U. R. Civ. P.

STATEMENT OF THE CASE

I. Nature of Case.

Appellant LOV entered into an insurance brokerage contract with United Underwriters, Inc. ("UUI") in 1984 (the "Brokerage Contract"). Under the brokerage Contract, LOV agreed to pay UUI commissions on any LOV insurance policies sold by UUI.

In late 1987, West One's predecessor, Continental Bank, loaned UUI \$1,500,000 evidenced by a promissory note ("Note"). To secure payment of the Note, UUI executed and delivered to West One a Collateral Pledge Agreement ("Pledge Agreement") giving West One a security interest in commissions payable to UUI from various insurance companies, including the commissions due from LOV under the Brokerage Contract.

As required by the Pledge Agreement, in late 1987, UUI executed and delivered to West One an Assignment and a related Assignment of Contracts as Collateral dated December 22, 1987 in which UUI assigned to West One all sums of money due or to become due to UUI from LOV under the Brokerage Contract. Also in December 1987, West One sent LOV a written Notice of Assignment (the "Notice") informing LOV of the assignment, but without directing LOV to make all future commissions under the Brokerage Contract to it, West One.

LOV acknowledged that it had received the Notice, but since it had not been directed otherwise, LOV continued to pay the commissions to UUI without any objection from West One. On March 2, 1988, West One perfected its security interest in the Brokerage Contract by filing a UCC-1 Financing Statement with the Utah Department of Commerce and Commercial Code.

On or about March 1, 1989, LOV advanced \$100,000 to UUI evidenced by a promissory note and an assignment of all of UUI's right, title and interest in and to any and all commissions to which UUI was entitled under the Brokerage Contract. The assignment agreement specified that LOV would pay UUI the commissions by credits to repay the loan balance, as was their custom, and as is widely practiced in the industry. In 1989 and 1990, LOV applied part of the commissions as they were earned by UUI to satisfy UUI's debt on the \$100,000 loan.

In 1992, West One filed a complaint alleging that UUI defaulted on the Note and Pledge Agreement while owing West One in excess of \$668,000, but without identifying the date of default, and alleging that LOV had wrongfully retained the commissions payable to UUI.

Until shortly before the filing of this action by West One in 1992, LOV was unaware of UUI's alleged default on its obligations to West One; and West One never directed LOV to pay West One the commissions owed under the Brokerage Contract.

The trial court granted West One's Motion for Summary Judgment, ordering LOV to pay to West One all of the commissions retained by LOV as payment on UUI's Promissory Note to LOV. LOV brings this appeal because the trial court's entry of Summary

Judgment is contrary to theories of common law and provisions of the UCC as adopted by Utah.

II. Course of Proceedings and Disposition At Trial Court.

This is an appeal from a summary judgment in the Third District Court, Salt Lake County, Judge Glenn K. Iwasaki presiding. The "Findings of Fact and Conclusions of Law, and Judgment" which is the subject of this appeal was signed by the Trial Court on May 11, 1993 and entered on May 28, 1993.

STATEMENT OF FACTS

1. Pursuant to a Brokerage contract dated October 22, 1986 and effectively dated January 1, 1984 ("Brokerage contract") between UUI and LOV, LOV agreed to pay UUI certain insurance commissions. (Record, Page 121.) (All Record page numbers referred to hereafter are attached as the Addendum.)

2. On or about December 22, 1987, West One loaned UUI \$1,500,000, which obligation was evidenced by a promissory note ("Note") of even amount. (Record, Page 121.)

3. To secure payment of the Note, UUI executed and delivered to West One a Collateral Pledge Agreement ("Pledge Agreement") whereby West One obtained a security interest in, among other things, the right to receive certain commissions payable to UUI from various insurance companies, including the

commissions due from defendant LOV under the Brokerage contract.
(Record, Page 121.)

4. As part of the Pledge Agreement, UUI executed and delivered to West One an Assignment dated December 22, 1987 in which UUI assigned to West One all sums of money due or to become due to UUI from LOV under the Brokerage contract. (Record, Pages 84, 121.)

5. The Assignment is part of an Assignment of Contracts as Collateral dated December 22, 1987 and executed by UUI and West One.

6. Paragraph 7. of the Assignment of Contracts describes Remedies available to West One "upon or at any time after default." (Record, Page 88.) Therefore, West One had no remedies as an assignee until UUI was in default to West One.

7. In December 1987, West One sent LOV a written Notice of Assignment. The Notice of Assignment provides that "upon written notice from [West One], all monies due or to become due under the [Brokerage contract] are to be paid to [West One] pursuant to this Assignment." The Notice of Assignment does not direct LOV to make payments directly to West One. (Emphasis added.) (Record, Pages 42, 122.)

8. On December 30, 1987, LOV acknowledged receipt of the Notice of Assignment. (Record, Page 122.)

9. West One perfected its security interest in the above-described collateral by filing a UCC-1 Financing statement with the Utah Department of commerce and commercial code on March 2, 1988. (Record, Page 122.)

10. On or about March 1, 1989, UUI borrowed \$100,000 from LOV evidenced by a promissory note in favor of LOV. To secure its obligation, UUI assigned to LOV all of its right, title and interest in and to any and all commissions to which UUI was entitled under the Brokerage Agreement. (Record, Page 122, Assignment, Record, Page 93.)

11. In conformance with their prior dealings, UUI authorized LOV to credit the commissions against the amount of the balance of UUI's obligation to LOV with no reference to any default. The entire balance of the loan was to be paid in this manner. Record, Page 93.)

12. West One never gave LOV "written notice" to pay West One pursuant to the Assignment at any time in the more than four years after giving LOV the Notice of Assignment. Response to Request For Production of Document No. 5, Record, p. 96.

13. On June 19, 1992, West One filed a complaint alleged that UUI was in default under the terms of the Note and Pledge Agreement without identifying when the default occurred.

14. Until shortly before the filing of this action by West One, LOV was unaware of UUI's default on its obligations to West One. (Record, Pages 73, 123.)

15. LOV asserted theories of waiver, estoppel and ineffective notice in its answer. (Record, Pages 14-15.)

SUMMARY OF ARGUMENT

POINT I

**BECAUSE WEST ONE'S DID NOT GIVE LOV THE REQUIRED
NOTICE OF ASSIGNMENT, ITS SECURITY INTEREST IS
SUBJECT TO LOV'S RIGHT TO RETAIN COMMISSIONS
PURSUANT TO 70A-9-318(1).**

Utah Code Ann. 70A-9-318(1), subject's West One's security interest to any defense or claim of an account debtor which accrues before the account debtor receives notification of the assignment. Because West One did not meet the contractual or statutory requirements for a notification of assignment as set forth in Utah Code Ann. § 70A-9-318(3), West One's security interests are subject to LOV's right to retain commissions as regular payments to recoup \$100,000 advanced to UUI.

POINT II

BECAUSE WEST ONE DID NOT GIVE LOV AN EFFECTIVE NOTICE OF ASSIGNMENT, WEST ONE IS NOT ENTITLED TO A "DOUBLE PAYMENT" FOR AMOUNTS ADVANCED TO UUI.

Utah Code Ann. 70A-9-318(3) permits an account debtor like LOV to disregard an assignment for which it does not receive a proper notification of assignment. Since West One did not meet the contractual or statutory requirement of directing LOV to pay the commissions directly to West One, the notice was ineffective, and LOV was entitled as a matter of law to pay the commissions directly to UUI even if the payment was in the form a credit for regular payments on a note.

POINT III

WEST ONE WAIVED OR IS ESTOPPED FROM ASSERTING ANY SECURITY INTEREST RIGHTS TO COMMISSIONS RETAINED BY LOV.

Utah Code Ann. 70A-9-306(2) provides that a secured interest may be lost if the secured party authorizes a sale, exchange or other disposition of the collateral. Since common law principles apply to U.C.C. transactions unless stated otherwise, West One's rights were subject to waiver or estoppel. West One either waived its security interests or is estopped from asserting them through its course of dealing and LOV's reliance on West One's representations and actions.

POINT IV

SINCE WEST ONE'S REMEDIES UNDER BOTH THE ASSIGNMENT AND U.C.C. ACCRUE ONLY UPON DEFAULT, IT WAS ERROR FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT WITHOUT ANY EVIDENCE AS TO THE DATE OF DEFAULT.

Since West One's security interest was in the form of an assignment, its only remedy until UUI defaulted, pursuant to Utah Code Ann. 70A-9-501 et seq., was to direct LOV to pay West One directly. West One never gave any instruction to be paid directly, and therefore West One was not entitled to any commissions until UUI defaulted under the assignment or underlying note payable to West One. Since West One did not present evidence of when any alleged default occurred, it was error for the trial court to grant summary judgment.

ARGUMENT

POINT I

BECAUSE WEST ONE'S DID NOT GIVE LOV THE REQUIRED NOTICE OF ASSIGNMENT, ITS SECURITY INTEREST IS SUBJECT TO LOV'S RIGHT TO RETAIN COMMISSIONS PURSUANT TO 70A-9-318(1).

A. The Assignment was not Effective Because LOV Did Not Receive An Effective Notice of Assignment.

Utah Code Ann. § 70A-9-318(3) defines an effective assignment as follows:

The account debtor [here, LOV] is authorized to pay the assignor [here UUI] until the account debtor receives notification that the amount due or to become due has been assigned

and that payment is to be made to the assignee [here, West One].

Thus in order for there to be an effective assignment under Utah Code Ann. § 70A-9-318(3), the account debtor must be notified of two things. "First, he must receive notice that the "amount due or to become due has been assigned," second, the account debtor must also be notified that "payment is to be made to the assignee." Haas v. Metro-Goldwyn-Mayer Inc., 617 F.2d 1136 (5th Cir. 1980).¹

In this case, West One met the first requirement but not the second because West One never directed LOV to make payments directly to West One. West One's own documents postponed the second element to a time contingent on West One's further affirmative conduct. The Notice of Assignment stated

In connection herewith, upon written notice from [West One], all monies due or to become due under the Contract described above are to be paid to [West One] pursuant to this Assignment. (Emphasis added).

Statement of Facts. The Trial Court failed to hold West One to its statutory and contractual limitations as an assignee.

¹ See also, Kirby v. Palos Verdes Escrow Co. Inc., 227 Cal. Rptr. 785 (1986); Vacura v. Haar's Equip. Inc., 364 N.W.2d 387 (Minn. 1985); Warrington v. Dawson, 798 F.2d 1533 (5th Cir. 1986); First Fid. Bank v. Matthews, 692 P.2d 1255 (Mont. 1984); First Trust and Sav. Bank v. Skokie Fed. Sav. and Loan, 466 N.E.2d 1048 (Ill. Ct. App. 1984); Pioneer Commercial Funding v. United Airlines, 122 B.R. 871 (S.D.N.Y 1991).

In Haas, the Fifth Circuit Court of Appeals found that a Notice of Assignment which stated that payments made under the contract assigned were to be made only as directed in the future was "not a demand certain" and that the Assignment was therefore ineffective. 617 F.2d. at 1140. Here, West One also failed to make a demand certain and its assignment was therefore ineffective.

B. West One's Assignment Is Junior To LOV's Right To Be Paid From Commissions.

Utah's Uniform Commercial Code permitted UUI to assign to LOV its rights in the commissions as a method of retaining the \$100,000 advanced by LOV, notwithstanding West One's purported assignment. Utah Code Ann. § 70A-9-311 states:

"The debtor's right in collateral may be voluntarily or involuntarily transferred . . . notwithstanding a provision in the Security Agreement prohibiting any transfer or making the transfer constitute a default."

Therefore the March 1, 1989 Agreement between UUI and LOV was not invalid because of any prohibition in the purported West One assignment. Moreover, as provided by Utah Code Ann. § 70A-9-318(1) and the very terms of West One's own documents, West One's assignment is subject to the March 1, 1989 agreement which gave LOV the right to retain commissions as a method of repayment of the \$100,000 loan to UUI, until West One declared a default by UUI and notified LOV to make commission payments to

West One. Utah Code Ann. § 70A-9-318(1) provides that the right of an assignee are subject to "any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(Emphasis added.)"

Without an effective assignment, LOV acquired a defense against West One's claims of priority when it entered into the March 1989 agreement which allowed it to collect the \$100,000 advanced to UUI with credits to the commissions payable to UUI. Therefore, LOV was entitled to retain the commissions notwithstanding West One's claimed interest.

C. A Form UCC-1 Financing Statement Does Not Constitute An Effective Notice of Assignment.

West One argued below that by filing its UCC-1 financing statement, the world was put on notice of its claim to commissions. However, the Utah Supreme Court has held that the filing of a financing statement does not constitute notice of an assignment to an account debtor. Bank of Salt Lake v. Corporation of President of Church of Jesus Christ of Latter-day Saints, 534 P.2d 887, 889 (Utah 1975). The rationale is obvious: a security interest enforceable only upon default and execution is not the same as a present right to payment as a bona fide assignee.

POINT II

BECAUSE WEST ONE DID NOT GIVE LOV AN EFFECTIVE NOTICE OF ASSIGNMENT, LOV IS NOT NOW REQUIRED TO MAKE A "DOUBLE PAYMENT" TO WEST ONE FOR COMMISSIONS PAID TO UUI IN THE FORM OF A CREDIT AGAINST AMOUNTS ADVANCED TO UUI.

Official Comment 3 to Section 9-318 of the Uniform Commercial Code provides:

"So long as the assignee permits the assignor to collect claims . . ., the account debtor may pay the assignor even though he may know of the assignment. In such a situation, an assignee who wants to take over collections must notify the account debtor to make further payments to him."

As discussed in Point I, supra., instead of notifying LOV that payment of the commissions were to be made directly to assignee West One, the notice only advised LOV that it would be required to make such payments at some indefinite time in the future and then only upon written notice.

Therefore the assignment was ineffective and LOV is entitled to the protection afforded by 70A-9-318(3). The clear purpose of 70A-9-318(3) is to prevent an account debtor from having to make double payments. Pioneer Commercial Funding, 122 B.R. 871, 882 (S.D.N.Y. 1991) (cites omitted).

Here, LOV advanced UUI \$100,000 which was presumably used by UUI to keep the West One Note current. If LOV were required to again pay that amount plus interest to West One after

having given credit against commissions to UUI then West One would receive a possible double benefit. An underlying principle of the UCC established in Utah Code Ann. § 70A-1-106 is that although aggrieved parties be reimbursed for actual damages, no punitive damages should be awarded. First Security Bank v. Utah Turkey Growers, Inc., 610 P.2d 329 (Utah 1980). To allow West One to recover twice would be punitive to LOV, since West One would obtain funds in excess of any actual damages caused by LOV. The trial court was therefore in error in granting summary judgment on this issue.

POINT III

WEST ONE WAIVED OR IS ESTOPPED FROM EXERCISING ANY SECURITY INTEREST RIGHTS TO COMMISSIONS RETAINED BY LOV.

Contrary to the conclusion reached by the Trial Court that a perfected security interest gave West One priority over "anyone, anywhere, anyhow," common law equitable principles do apply to and do mitigate UCC transactions. Allstate Financial Corp. vs. Dundee Mills, Inc., 800 F.2d. 1073, 1075 (11th Cir. 1986).

This concept is explicit in the UCC. Utah Code Ann. § 70A-1-103 (1990) states in relevant part:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including ... 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. (Emphasis added.)

Thus, the common law principals of waiver and estoppel apply in this case.

A. West One Waived Its Security Interest Rights.

Waiver is an intentional relinquishment of a known right, and to waive a right

The parties' actions or conduct must evince unequivocally an intent to waive, or must be inconsistent with any other intent.

Barnes vs. Wood, 750 P.2d. 1226, 1230 (Utah App. 1988). Citing Hunter vs. Hunter, 659 P.2d. 430, 432 (Utah 1983). Whether a right has been waived is generally a question of fact. Id.

The Uniform Commercial Code provides that a secured party's actions will be considered a waiver of its interest in collateral under certain circumstances. Section 70A-9-306(2) Utah Code Ann. provides:

"[A] Security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by secured party in the Security Agreement or otherwise . . ." (Emphasis added.)

Although the Security Agreement between West One and UUI did not give UUI express authority to dispose of the collateral, a genuine issue of fact exists as to whether West One "authorized"

disposition of the collateral by waiver or estoppel. Courts have held that a security interest can be lost pursuant to U.C.C. § 9-306(2) by waiver. A waiver can be implied from the "circumstances of the parties, the nature of the collateral, the course of dealing of the parties, the usage of the trade." Mid-States Sales vs. Mt. Empire Dairyman's, 741 P.2d. 342, 345 (Colo. App. 1987). And, it makes no difference that LOV rather than UUI disposed of the collateral. Utah Code Ann. § 70A-9-306(2) as adopted by the Utah Legislature does not contain the specification of a disposition "by the debtor" included in some earlier counterparts to Utah Code Ann. § 70A-9-306(2). Utah Code Ann. § 70A-9-306(2); see also Mid-States Sales, 741 P.2d. at 345.

In Mid-State Sales, the Colorado Court of Appeals found that where an assignee failed to object over a period of fourteen (14) months to an account debtor's distribution of proceeds, including offsetting expenses under a contract for delivery of milk, the assignee was deemed to have waived its security interest in the proceeds. Mid-State Sales, 741 P.2d. at 345-346; see also Haas vs. Metro Goldwyn-Mayer, Inc., 617 F.2d. 1136 (5th Cir. 1980); Utah Code Ann. 70A-1-205 (1990). Here West One specifically waived its right to its assignment by failing to

direct LOV to pay it directly, and further failing to give any such direction for over four (4) years.

B. Estoppel.

The elements of estoppel are "conduct by one party which leads another party, in reliance thereon, to adopt its course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." Barnes vs. Wood, supra, 750 P.2d. at 1230. The intent to relinquish a right can be implied from conduct, if the party's conduct is "inconsistent with any other intent." Beckstead vs. Deseret Roofing Co., Inc., 831 P.2d. 130, 133 (Utah Appeals 1992).

West One failed to object to LOV either paying commissions directly to LOV for over four (4) years or retaining part of the commissions in 1989 and 1990 per its agreement with UUI. Not only did West One fail to give LOV any such direction, it effectively gave LOV notice that the assignment could be ignored until it received further written directions, Statement of Facts, ¶ 6, the Notice of Assignment, which was ineffective as an assignment, cleared LOV to continue to pay commissions directly to UUI until further notice. Nor did West One, at any time attempt to exercise its rights under its own security agreement because of the default of UUI. West One has still presented no evidence of when UUI become in default.

POINT IV

SINCE WEST ONE'S REMEDIES UNDER BOTH THE ASSIGNMENT AND UCC ACCRUE ONLY UPON DEFAULT, IT WAS ERROR FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT WITHOUT ANY EVIDENCE AS TO THE DATE OF DEFAULT.

West One argued below that a perfected security interest takes priority over a set-off. However, LOV obtained the right to credit the commissions against the entire balance of the money it lent to UUI with no reference to any payments from UUI. Therefore, LOV did not "set-off" the owed commissions as did the parties in the cases which West One cites. The case relied on by the Trial Court, Pioneer Commercial Funding v. United Airlines, 122 B.R. 871 (S.D.N.Y 1991) involves a factual situation somewhat similar to this case, however it is distinguishable in that the Pioneer account debtor exercised a set-off only after default of the assignor.

Until default by UUI to West One, UUI was entitled to use the commissions in any manner not prohibited by the Assignment of Contracts, North West Nat. Bank v. Merrill Lynch, 757 S.W.2d 182 (Ark. App. 1988). As shown above (Point I), Utah Code Ann. § 70A-9-311 also specifically permits UUI to make another assignment, notwithstanding a prohibition in the West One assignment.

After default by UUI to West One, West One was entitled to any rights it might have from its perfected security interest, if not waived. If LOV credited payments against UUI's commissions before UUI defaulted on West One's note or assignment, West One's only remedy was to direct LOV to make the commission payments directly to West One. No such direction was ever given.

West One also produced no evidence of when UUI defaulted in this case. This missing fact is crucial to determine the respective rights of the parties, even if West One's security interest is deemed to have priority, and it was error for the Trial Court to grant summary judgment on this issue.


CONCLUSION

Summary judgment was not appropriate in this case because reasonable minds could differ, given the facts in the record, as to (1) whether West One ever gave the contractually and statutorily notice of the West One's assignment interest; (2) whether lack of an effective notice of assignment bars West One from receiving a double payment benefit, pursuant to Utah Code Ann. 70A-9-318(3); (3) whether West One waived its claims as a secured party or is estopped from asserting them; and (4) whether failure by West One to establish the date of default by UUI

created an issue of material fact. LOV therefore respectfully asks the Court to set aside the Trial Court decision granting West One's motion for summary judgment.

DATED this 20th day of September, 1993.

RICHARDS, BRANDT, MILLER & NELSON

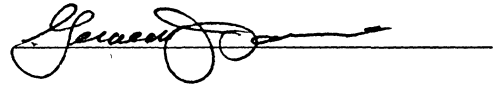


RUSSELL C. FERICKS
GERALD J. LALLATIN
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument, having been executed and entered by the Court, has been mailed, first-class, postage prepaid, on this 20th day of September, 1993, to the following:

Carolyn Montgomery
James H. Woodall
PARSONS, BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "James H. Woodall", is written over a horizontal line.

gjl\licov.brf

ADDENDA

Exhibit A

- 22. Denied.
- 23. Denied.
- 24. No response is necessary.
- 25. Denied.
- 26. Denied.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Neither plaintiff nor its predecessor ever provided Life of Virginia with any specific notice of the existence of an actual debt owed by UUI to plaintiff or its predecessor, nor did plaintiff or its predecessor ever make demand upon Life of Virginia to pay over commissions owed to UUI. Therefore, Life of Virginia is a holder in due course or is a bona fide recipient for value of those funds it collected and which would have been paid to UUI but for UUI's obligations under its March 1, 1989, Promissory Note to Life of Virginia.

THIRD AFFIRMATIVE DEFENSE

Neither plaintiff nor its predecessor in interest have fulfilled the condition precedent to Life of Virginia's obligation to pay over UUI's commissions to plaintiff or its

predecessor by providing the written notice required by the Notice of Assignment.

FOURTH AFFIRMATIVE DEFENSE

By failing to provide timely notice of the actual existence of a debt owing between UUI and plaintiff or its predecessor, and by further failure to provide any actual notice of a default on such an obligation, plaintiff and its predecessor have waived their rights to claim a superior secured interest in the UUI commissions.

FIFTH AFFIRMATIVE DEFENSE

For that period of time in which UUI was in default under its March 1, 1991, Promissory Note to Life of Virginia, all funds collected by Life of Virginia which would have become commissions payable to UUI were in fact held as property of Life of Virginia and never became subject to the security interest, if any, of plaintiff and its predecessor.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff and its predecessor have waived their claimed entitlement to immediate payment without prior written notice because they have never received, demanded, or enforced payment of any UUI commissions prior to initiation of this lawsuit.

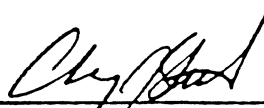
NOTICE OF ASSIGNMENT

Notice is hereby given that United Underwriters, Inc., 555 East 200 South, Salt Lake City, Utah 84102 has assigned to The Continental Bank and Trust Company, as collateral, for all obligations of whatever form or nature, extended in favor of United Underwriters, Inc., all of United Underwriters, Inc. right, title and interest in and to that certain Contract by and between United Underwriters, Inc. and Life of Virginia/American Agency Life.

In connection herewith, upon written notice from Continental Bank and Trust Company, all monies due or to become due under the Contract described above are to be paid to The Continental Bank and Trust Company pursuant to this Assignment.

Notwithstanding any provisions of the Assignment, The Continental Bank and Trust Company is not responsible for any obligations or liabilities of United Underwriters, Inc. under the Contract.

THE CONTINENTAL BANK AND TRUST COMPANY

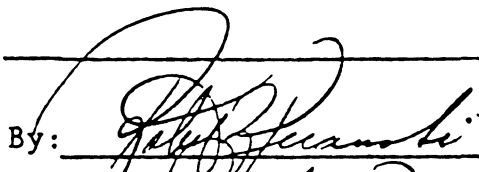
By: 
Its: Commercial Loan Officer

ACKNOWLEDGMENT

The undersigned hereby acknowledges its receipt of the above Notice of Assignment and agrees to pay any and all future monies due or to become due under the Contract to The Continental Bank and Trust Company.

The undersigned does not assume any responsibility for the validity or sufficiency thereof, for any prior existing assignment, or for any payments of commissions made by the undersigned prior to the acknowledgment of the above Assignment.

Dated this 30th day of December, 1987.

By: 
Its: VICE PRESIDENT

pay to Assignee all rents, income, issue and profits accruing under the contracts...." See Exhibit "B" at 4.

7. West One perfected its security interest in the above-described collateral by filing a UCC-1 Financing statement with the Utah Department of commerce and commercial code on March 2, 1988.

8. In December 1987, West One sent Life of Virginia a written Notice of Assignment. The Notice of Assignment provides that "upon written notice from [West One], all monies due or to become due under the [Brokerage contract] are to be paid to [West One] pursuant to this Assignment." A copy of the Notice of Assignment is attached hereto as Exhibit "C".

9. On December 30, 1987, Life of Virginia acknowledged receipt of the Notice of Assignment.

10. West One has alleged that UUI is in default under the terms of the Note and Pledge Agreement, and that UUI currently owes West One in excess of \$668,000.

11. Until shortly before the filing of this action by West One, Life of Virginia was unaware of UUI's default on its obligations to West One, and West One never directed Life of Virginia to pay West One under the Brokerage contract.

12. On or about March 1, 1989, UUI borrowed \$100,000 from Life of Virginia and executed a promissory note in favor of

ASSIGNMENTUCC DEPT
STATE OF UTAH

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, United Underwriters, Inc. in consideration of all present and future advances made to United Underwriters, Inc. by The Continental Bank and Trust Company of whatever form or nature, the receipt of which is hereby acknowledged, does hereby sell, assign, transfer and set over to The Continental Bank and Trust Company all and whatever sum or sums of money now due and/or to become due to the undersigned from Life of Virginia or due to the undersigned under or by virtue of that certain Contract or Agreement described as follows:

Brokerage contract dated October 22, 1986, and effectively dated January 1, 1984

This Assignment shall be made a part of that Assignment of Contract as Collateral dated December 22, 1987, executed by the undersigned, as Assignor, and The Continental Bank and Trust Company and shall be governed by all of the terms, conditions, and covenants contained therein.

IN WITNESS WHEREOF, I hereunto set my hand and seal
this 22nd day of December, 1987.

UNITED UNDERWRITERS, INC.

Its: PPS

ASSIGNMENT OF CONTRACT AS COLLATERAL

THIS AGREEMENT made in Salt Lake City, Utah on the 22 day of ~~December~~ 1987, by and between UNITED UNDERWRITERS, INC., hereafter referred to as "Assignor", and THE CONTINENTAL BANK AND TRUST COMPANY, a Utah corporation, hereafter referred to as "Assignee".

W I T N E S S E T H:

WHEREAS, Assignor has entered or may hereafter enter into Contracts, with various insurance companies, (hereafter the "Companies"), including but not limited to those specific contracts identified on the attached Exhibit "A" wherein and whereby the Assignor has agreed or may agree to provide certain services and the Companies have agreed or may agree to pay commissions for the services provided, upon the terms, conditions, and provisions therein set forth; and

WHEREAS, Assignee desires to acquire from Assignor all the right, title and interest of Assignor in the Contracts and in the amounts due or owing, and that may hereafter be due and owing by the Companies to Assignor to secure Assignor's obligation to Assignee as set forth herein.

NOW, THEREFORE, it is hereby mutually agreed as follows:

1. ASSIGNMENT. Assignor hereby assigns to Assignee, as collateral, Assignor's entire interest, in and to any and all Contracts, together with all amounts due or owing and that may hereafter become due and owing by the Companies to Assignor pursuant to any Contracts which Assignor may now have or may, from time-to-time hereafter, enter into with the Companies for the insurance services provided by Assignor. Each specific assignment will be represented by an Assignment and a Notice and Acknowledgement of Assignment.

2. WARRANTIES. Assignor hereby represents and warrants to Assignee as follows:

- a. That Assignor has duly performed all the conditions, covenants, and terms of the Contract.
- b. That any Contracts which may have been entered into prior to the execution of this Assignment are now in full force and effect, with payments paid current.
- c. That the Contracts are or will be assignable and have not or will not have been previously assigned except as indicated herein.

d. That Assignor is or will be the sole owner of the entire contractor's interest in the Contracts.

e. That the Contracts are or will be valid and enforceable and have not been or will not have been altered, modified, or amended in any manner whatsoever, and shall not be altered, modified, or amended without Assignee's written consent.

f. That Assignor is not in default under any of the terms, covenants or conditions of said Contracts and will not permit its default under any of the Contracts to occur.

g. That the Contracts, together with any Exhibits, Addendums, or other documents relating and attached thereto, and the transaction which they represent are and will be free and clear of all defenses, setoffs, counterclaims, liens, and encumbrances of every kind and nature

4. ASSIGNOR'S COVENANTS. Assignor agrees:

a. To furnish and deliver to Assignee, concurrently with the execution of this Assignment, the originals of all Contracts which Assignor has or may have entered into with the Companies for insurance commissions.

b. To observe and perform all obligations imposed on Assignor under the Contracts hereby assigned and to indemnify Assignee from the consequences of any failure to do so.

c. Not to collect any rent, income, or profits accruing under the Contracts hereby assigned prior to the time when they shall become due.

d. Not to execute any other assignment of Assignor's interest in the Contracts assigned hereby or any other assignment of payments accruing under the Contracts.

e. Not to alter, extend, or modify the terms of the Contracts or give any consent or exercise any renewal or option required or permitted by the terms of the Contracts without the prior written consent of Assignee.

f. Not to terminate, cancel or accept a surrender of any of the Contracts, or transfer, convey, or permit a transfer or conveyance of any rights under the Contracts so as to cause a termination or changing of the obligations of the Companies under the Contracts.

g. Not to agree or consent to any assignment of or subletting under the Contracts, whether or not in

accordance with any contract terms, without the prior written consent of Assignee.

h. To deliver to Assignee any Contracts made subsequent hereto and to execute and deliver to Assignee any Contracts made subsequent hereto and hereby assigns, executes and delivers to Assignee such further assurances and assignments as Assignee shall from time to time require.

i. Assignee may proceed against Assignor directly and independently of the Companies and the cessation of any governmental liability for any reason other than full payment shall not in any way affect the liability of Assignor hereunder, nor shall an extension, forbearance of acceptance, release, or substitution of security, or any impairment or suspension of Assignee's remedies or rights against the Companies in any way affect the liability of Assignor hereunder.

j. To furnish Assignee from time to time now or hereafter, upon Assignee's request, with acknowledgments from the Companies under any of the Contracts. All such acknowledgments shall be in form and manner acceptable to or prepared by Assignee in its sole discretion and shall, in each case, be duly executed by the appropriate Companies.

4. COLLATERAL. This Assignment is made and the rights, title and interest of Assignor are transferred to Assignee and held by Assignee as collateral security for the performance by Assignor, of all terms and covenants under a Promissory Note (the "Note") in the original principal amount of \$1,500,000.00, together with any extensions, modifications or renewals thereof and interest, costs and fees incidental thereto.

5. RE-ASSIGNMENT. Assignee will re-assign the rights, title and interest in the Contracts when the obligations described in the preceding paragraphs are fully performed.

6. DEFAULT. Assignor will be in default hereunder, and Assignee may foreclose this security interest if any of the following events occur:

a. There is any default of any term, condition, or covenants of any of the Contracts by the Assignor.

b. If any statement, representation, or warranty made herein or otherwise by Assignor to Assignee is untrue in any material respect.

c. When a judgment is entered against Assignor.

d. When there is any default of the obligations described in paragraph four (4) above, or of any document therein referenced or in any instrument executed in connection therewith.

e. When Assignor fails to perform any condition, duty, covenant, or warranty of this Assignment.

f. When Assignor defaults in any other obligation or transaction it has entered into with Assignee.

7. REMEDIES. Upon or at any time after default hereunder, Assignee, without in any way waiving such default, may at its option, without notice and without regard to the adequacy of the security for the obligations secured hereby, either in person or by agent, with or without bringing an action or proceeding, or by receiver appointed by a court take any or all of the following action:

a. Make demand and sue for all rents, income, commission and profits under the Contracts with power to make from time to time, such alterations, changes or modifications as may seem proper to Assignee and to apply such rents, income, and issue and profits to payment of the principal, interest and other indebtedness secured hereby, in such priority as Assignee, in its sole discretion may determine. However, the exercise or non-exercise by Assignee of the options granted in this paragraph shall not be considered a waiver of any default by Assignor under any obligation secured hereby. Assignor is further authorized to direct the Companies under any Contracts hereafter entered into by Assignor, on receipt of written notice from Assignee, to pay to Assignee all rents, income, issue and profits accruing under the Contracts and to continue to do so until otherwise notified by Assignee.

b. Declare all sums due and owing under the obligation secured hereby fully accelerated and fully due and payable.

c. Pursue any other remedy allowed it by the terms of the Note or any instrument incidental thereto or any applicable law.

d. Pay any payments or perform or discharge any obligations in such manner and to such extent so it may deem necessary to protect the security hereof and may commence, appear in and defend any action or proceeding purporting to affect the rights or power of Assignor, pay, purchase, contest, or compromise any encumbrance, charge or lien, which in its judgment, appear to be prior or superior hereto, and in exercising any such

powers, incur any liability, expend any amounts in its absolute discretion it may deem necessary, including any costs of evidence of title and attorney's fees. Assignor agrees to repay without demand all sums paid pursuant hereto within ten days from the date of payment and any such repayment shall be secured hereby.

No remedy of Assignee shall be exclusive of any other remedy allowed herein or by law provided but each shall be cumulative and in addition to every other remedy. A waiver of default shall not be a waiver of any other or a subsequent default. In pursuing any of its remedies, Assignor may recover all of its costs, expenses, and fees incurred, including, but not limited to its reasonable attorneys fees for any judicial or non-judicial action Assignee may take any appeal taken therefrom.

8. ASSIGNEE NOT RESPONSIBLE FOR TERMS OF LEASE. It is further understood that this Assignment shall not operate to place responsibility for the control, care or management of the Contracts, upon Assignee, nor for the carrying out of any of the terms and conditions of said Contracts; nor shall it operate to make Assignee responsible or liable for any waste committed on the Property by Assignor or any other party, or for any dangerous or defective condition of the Contract, or for any negligence in the use, occupancy, management, upkeep, repair or control of the Property described in said Contracts resulting in loss or injury or death to any party whatsoever, including but not limited to the Assignor, or its licensees, employees, or agents.

9. ASSIGNOR TO PERFORM TERMS OF LEASE. Assignor covenants with Assignee to observe and perform all the obligations imposed upon Assignor under the Contracts and not to do or permit to be done anything to impair the security hereof; not to execute any other assignment of Assignor's interest in the Contracts; not to mortgage, encumber or hypothecate Assignor's interest in the Contracts to any person other than Assignee hereunder; not to alter modify or change the terms of the Contracts or give up any right or option Assignor may have under or pursuant to the said Contracts or any interest therein so as to affect directly or indirectly, proximately or remotely the rights of or a termination or diminution in the value of Assignor's interest thereunder.

10. LIABILITY OF ASSIGNEE. Assignee shall not be liable for any loss sustained by the Assignor resulting from Assignee's failure to exercise its rights under and pursuant to this Assignment, and nothing contained herein shall require Assignee to exercise its rights pursuant hereto, which said rights shall be exercised at the sole option and discretion of Assignee after the default by Assignor in its obligations secured hereby. Assignee shall not be obligated to perform or discharge, nor does Assignee hereby undertake to perform or discharge any obligation, duty or liability under the Contracts or under or by reason of this Assignment.

11. INDEMNIFICATION. Assignor shall, and does hereby agree to indemnify Assignee for and to hold Assignee harmless from any and all liabilities, losses or damages, which may or might be incurred under said Contracts or under or by reason of this Assignment and from any and all claims and demands whatsoever which may be asserted against Assignee by reason of any alleged obligations or undertakings on its part to perform or discharge any of the terms, covenants, or agreement contained in said Contracts. Should Assignee incur any such liability under the Contracts or under or by reason of this Assignment or in defense of any such claims or demands, the amount thereof, including cost, expenses and reasonable attorney's fees shall be secured hereby and Assignor shall reimburse Assignee therefore immediately upon demand and upon failure to do so, Assignee may, at its option, declare all sums secured hereby immediately due and payable.

12. OTHER SECURITY. Assignee may take or release other security for the payment of the obligations secured hereby, may release any party primarily or secondarily liable therefore and may apply any other security held by it to the satisfaction of said obligations without prejudice to any of its rights under this Assignment.

13. COMPLIANCE. Assignor herein has filed Notice of this assignment and a true copy of this instrument of assignment with the agencies and persons with whom such filing is required and shall, in all other respects, comply with the conditions therein specified.

14. POWER OF ATTORNEY. Assignor appoints Assignee his attorney in fact to demand, receive and enforce payment and to give receipts, releases and satisfactions and to sue for all sums payable either in the name of Assignor or in the name of Assignee, with the same force and effect as Assignor could have done if this Assignment had not been made.

15. MISCELLANEOUS. Nothing contained in this Assignment and no act done or omitted by Assignee pursuant to the powers and rights granted it hereunder shall be deemed to be a waiver by Assignee of its rights and remedies under the agreements now existing or hereafter arising between Assignor and Assignee secured hereby, and this Assignment is made and accepted without prejudice to any of the rights and remedies possessed by Assignee under and pursuant to the terms of said agreements. The right of Assignee to full satisfaction of the obligations secured hereby and to enforce any other security therefore held by it may be exercised by Assignee either prior to, simultaneously with, or subsequent to any action taken by it hereunder. Assignee may assign, transfer, or deliver any of the Contracts to any transferee, and thereafter shall be fully discharged from all responsibility with respect to such Contracts. The transferee shall be vested with all powers and rights of the Assignee

hereunder with respect to such Contracts, but Assignee shall retain all powers and rights hereunder with respect to any of the remaining collateral. Any provisions hereof found to be invalid shall not invalidate the remainder. In the event of Assignor's default hereunder, Assignor agrees to pay immediately and without demand all costs, sums, and expenses that are incurred by Assignee in the enforcement of its rights hereunder, including reasonable attorneys' fees for any judicial action taken by Assignee and any appeal therefrom. Assignor further agrees that any such costs and expenses incurred by Assignee shall constitute an obligation and secured hereby and shall bear interest at the highest rate provided for in any obligation secured hereby until all sums and amounts are fully satisfied. Assignee is authorized to date this instrument and fill in any blanks. If Assignor consists of one or more parties, each of the parties comprising Assignor agree, each and for themselves, that they are jointly and severally liable for each and every covenant, condition, and term in this Agreement.

16. BINDING EFFECT. This Assignment, together with the covenants and warranties herein contained, shall inure to the benefit of Assignee, its successors, representatives and assigns and shall be binding upon Assignor, its successors, representatives and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

ASSIGNEE:
THE CONTINENTAL BANK AND TRUST COMPANY

By: 

Its: Controlled Loan Officer

ASSIGNOR:
UNITED UNDERWRITERS, INC.

By: 

Its: F. H. S.

THE LIFE INSURANCE COMPANY OF VIRGINIA
ASSIGNMENT

ASSIGNEE'S NAME: The Life Insurance Company of Virginia
ASSIGNEE'S ADDRESS: 6610 West Broad Street
Richmond, Virginia 23230
ASSIGNEE'S FEDERAL E.I. NO.: 54-0283385

FOR VALUE RECEIVED, the undersigned (hereinafter referred to as the Assignor) hereby assigns and transfers unto The Life Insurance Company of Virginia all of the Assignor's right, title and interest in and to any and all commissions to which said Assignor is now entitled or may hereafter become entitled, under the terms of the Brokerage Agreement 6/1/83, which is presently in effect between Assignor and The Life Insurance Company of Virginia.

Assignor hereby authorizes and directs The Life Insurance Company of Virginia to credit said commission against the balance of the Assignor's obligation to The Life Insurance Company of Virginia by virtue of the Note dated March 1, 1989 made by Assignor and held by The Life Insurance Company of Virginia.

Witness my hand and seal this 2nd day of March,
1989.

William Reese
Witness

UNITED UNDERWRITERS, INC.

By: [Signature]

George Varanakis

RECORDED FOR: The Life Insurance Company of Virginia

RECORDED BY: [Signature]

Robert L. Peranski, Vice President

DATE RECORDED March 14, 1989

00093

RESPONSE: Provided herewith.

REQUEST NO. 3: Provide a copy of the Form UCC-1 Financing Statement between UUI and Continental dated January 12, 1988, and identified in paragraph 11 of Defendant's Complaint.

RESPONSE: Provided herewith (filed March 2, 1988).

REQUEST NO. 4: Provide a copy of any documentation which evidences that Defendant filed a UCC-1 Financing Statement with the Utah Department of Commerce and Commercial Code on January 12, 1988 by which Defendant claims its security interest in the monies due under the Brokerage Agreement between UUI and Defendant.

RESPONSE: See plaintiff's Response to Request No. 3, above.

REQUEST NO. 5: Provide a copy of the written notice from Continental to Life Insurance Company of Virginia ("Life of Virginia") which was required by your Notice of Assignment.

RESPONSE: No such notice was given, and none was required.

REQUEST NO. 6: Provide a copy of the Brokerage Contract dated October 22, 1986 and effectively dated January 1, 1984 between UUI and Life of Virginia and to which paragraph 9 of your complaint refers.

FINDINGS OF FACT

The case was submitted to the Court largely on undisputed facts which the Court accepts and adopts as its own findings, as follows:

1. Pursuant to a Brokerage Contract dated October 22, 1986 and effectively dated January 1, 1984 ("Brokerage Contract") between UUI and Life of Virginia, Life of Virginia agreed to pay UUI certain insurance commissions.

2. On or about December 22, 1987, West One loaned UUI \$1,500,000. The obligation was evidenced by a promissory note ("Note") in that amount.

3. To secure payment of the Note, UUI executed and delivered to West One a Collateral Pledge Agreement ("Pledge Agreement") whereby West One obtained a security interest in, among other things, the right to receive certain commissions payable to UUI from various insurance companies including the commissions due from Life of Virginia under the Brokerage Contract.

4. As part of the Pledge Agreement, UUI executed and delivered to West One an Assignment dated December 22, 1987 in which UUI assigned to West One all sums of money due or to become due to UUI from Life of Virginia under the Brokerage Contract.

5. The Assignment is part of an Assignment of Contracts as Collateral dated December 22, 1987 and executed by UUI and West One.

00121

6. Paragraph 7.a. of the Assignment of Contracts as Collateral provides in part that "Assignor is further authorized to direct the companies under any contracts hereafter entered into by Assignor, on receipt of written notice from Assignee, to pay to Assignee all rents, income, issue and profits accruing under the contracts . . ."

7. In December 1987, West One sent Life of Virginia a written Notice of Assignment. The Notice of Assignment provides that "upon written notice from [West One], all monies due or to become due under the [Brokerage Contract] are to be paid to [West One] pursuant to this Assignment."

8. On December 30, 1987, Life of Virginia acknowledged receipt of the Notice of Assignment.

9. On March 2, 1988, West One perfected its security interest in the Brokerage Contract by filing a UCC-1 Financing Statement with the Utah Department of Commerce and Commercial Code.

10. On or about March 1, 1989, UUI borrowed \$100,000 from Life of Virginia and executed a promissory note in favor of Life of Virginia in that amount. To secure its obligation to Life of Virginia, UUI assigned to Life of Virginia all of its right, title and interest in and to any and all commissions to which UUI was entitled under the Brokerage Contract.

11. Life of Virginia subsequently used commissions it owed to UUI to satisfy UUI's debt on the \$100,000 loan.

12. UUI defaulted on the Note and Pledge Agreement with West One, and currently owes West One in excess of \$668,000.

13. Until shortly before the filing of this action by West One, Life of Virginia was unaware of UUI's default on its obligations to West One, and West One never directed Life of Virginia to pay West One the commissions owed under the Brokerage Contract.

CONCLUSIONS OF LAW

1. West One's prior perfected security interest in commissions due and owing to UUI gave West One priority over "anyone, anywhere, anyhow," Insley Manufacturing Corp. v. Draper Bank & Trust, 717 P.2d 1341, 1347 (Utah 1986), including Life of Virginia. Life of Virginia's argument that Section 70A-9-318(3), Utah Code Ann. and West One's Notice of Assignment required West One to give Life of Virginia notice of UUI's default are not persuasive. See Pioneer Commercial Funding Corp. v. United Airlines, Inc., 122 Bankr. 875, 882 (S.D.N.Y. 1991).

JUDGMENT

Based upon the foregoing, it is hereby ORDERED that plaintiff's Motion for Summary Judgment is granted, and defendant's Motion for Summary Judgment is denied, with prejudice. And, based upon the representations made to the Court by counsel for the parties, JUDGMENT is granted against defendant and in favor of plaintiff in the amount of \$123,316.54, with

Exhibit B

UNIFORM COMMERCIAL CODE

70-3-17, Act not to affect pending actions.
This act shall not affect any suit, proceeding or appeal pending at the time this act takes effect. 1997

TITLE 70A

UNIFORM COMMERCIAL CODE

Chapter

1. General Provisions.
2. Sales.
- 2a. Leases.
3. Negotiable Instruments.
4. Bank Deposits and Collections.
- 4a. Funds Transfers.
5. Letters of Credit.
6. Bulk Sales.
7. Warehouse Receipts, Bills of Lading and Other Documents of Title.
8. Investment Securities.
9. Secured Transactions — Sales of Accounts, Contract Rights and Chattel Paper.
10. Effective Date and Repealer.
11. Corrected Uniform Commercial Code — Effective Date and Transition Provisions.

CHAPTER 1

GENERAL PROVISIONS

Part 1

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

Section	
70A-1-101.	Short title.
70A-1-102.	Purposes — Rules of construction — Variation by agreement.
70A-1-103.	Supplementary general principles of law applicable.
70A-1-104.	Construction against implicit repeal.
70A-1-105.	Territorial application of title — Parties' power to choose applicable law.
70A-1-106.	Remedies to be liberally administered.
70A-1-107.	Waiver or renunciation of claim or right after breach.
70A-1-108.	Severability.
70A-1-109.	Section captions.

Part 2

General Definitions and Principles of Interpretation

70A-1-201.	General definitions.
70A-1-202.	Prima facie evidence by third-party documents.
70A-1-203.	Obligation of good faith.
70A-1-204.	Time — Reasonable time.
70A-1-205.	Course of dealing and usage of trade.
70A-1-206.	Statute of frauds for kinds of personal property.
70A-1-207.	Performance or acceptance under reservation of rights.
70A-1-208.	Option to accelerate at will.

PART 1-101

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

70A-1-101. Short title.

This act shall be known and may be cited as the Uniform Commercial Code.

70A-1-102. Purposes — Rules of construction — Variation by agreement.

- (1) This act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this act are:
 - (a) to simplify, clarify and modernize the law governing commercial transactions;
 - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (c) to make uniform the law among the various jurisdictions.

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

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

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

- (a) words in the singular number include the plural, and in the plural include the singular;
- (b) words of the masculine gender include the feminine and the neuter, and words which indicate words of the neuter gender include any gender.

70A-1-103. Supplementary general principles of law applicable.

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

70A-1-104. Construction against implicit repeal.

This act being a general act intended to provide coverage of its subject matter, no law shall be deemed to be implicitly repealed by this act unless such construction can be justified.

70A-1-105. Territorial application of title — Parties' power to choose applicable law.

(1) Except as provided in this section, the law of the jurisdiction in which a transaction takes place shall govern the rights and obligations of the parties to the transaction and also to such extent as may be necessary to give effect to the law of the jurisdiction in which the transaction takes place.

(2) Where a transaction is governed by the law of a jurisdiction which is not a party to this act, the law of that jurisdiction shall govern the transaction to the extent that it is not inconsistent with the public policy of the jurisdiction in which the transaction takes place.

extent permitted by the law, including the conflict of laws rules, so specified:

- (a) Rights of creditors against sold goods under Section 70A-2-402.
- (b) Applicability of the chapter on leases under Sections 70A-2a-105 and 70A-2a-106.
- (c) Applicability of the chapter on Bank Deposits and Collections under Section 70A-4-102.
- (d) Bulk sales subject to the chapter on bulk sales under Section 70A-6-103.
- (e) Applicability of the chapter on Investment Securities under Section 70A-8-106.
- (f) Perfection provisions of the chapter on Secured Transactions under Section 70A-9-103.

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70A-1-106. Remedies to be liberally administered.

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

(2) Any right or obligation declared by this act is enforceable by action unless the provision declaring it specifies a different and limited effect. 1965

70A-1-107. Waiver or renunciation of claim or right after breach.

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party. 1965

70A-1-108. Severability.

If any provision or clause of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable. 1965

70A-1-109. Section captions.

Section captions are parts of this act. 1965

PART 2

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

70A-1-201. General definitions.

In addition to definitions contained in the subsequent chapters of this title and unless the context otherwise requires, in this title:

- (1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity, and any other proceedings in which rights are determined.
- (2) "Aggrieved party" means a party entitled to resort to a remedy.
- (3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in Sections 70A-1-205 and 70A-2-208. Whether an agreement has legal consequences is determined by the provisions of this title, if applicable; otherwise by the law of contracts as provided in Section 70A-1-103. Compare the definition of "contract" in Subsection (11).

(4) "Bank" means any person engaged in the business of banking.

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

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

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

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

(9) "Buyer in ordinary course of business" means a person who, in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like, including oil and gas, at wellhead or minehead are considered to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

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

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this title and any other applicable rules of law. Compare the definition of "agreement" in Subsection (3).

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

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

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

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt, or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately representing that the person in possession of it is entitled to receive, hold and dispose of the document and

...the party who is not a party to a contract...
...in return for any consideration...
...to support a simple contract.

(4) "Receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

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

70A-1-202. Prima facie evidence by third-party documents.

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

70A-1-203. Obligation of good faith.

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

70A-1-204. Time — Reasonable time — "Seasonably."

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

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

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

70A-1-205. Course of dealing and usage of trade.

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

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

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The language of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable, consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

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

...the other party...
...given the other party...
...sufficient to prevent unfair enrichment.

70A-1-206. Statute of frauds — Personal property not covered.

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

(2) Subsection (1) of this section does not apply to contracts for the sale of goods (Section 70A-2-201) or of securities (Section 70A-8-319) nor to security agreements (Section 70A-9-203).

70A-1-207. Performance or acceptance with reservation of rights.

(1) A party who with explicit reservation of rights performs or promises performance or accedes 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.

(2) Subsection (1) does not apply as an accord and satisfaction.

70A-1-208. Option to accelerate at will.

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

CHAPTER 2

SALES

Part 1

Short Title, General Construction and Scope

Section 70A-2-101. Short title, general construction, and scope.

70A-2-101. Short title, general construction, and scope. This chapter shall be known and may be cited as the Uniform Commercial Code.

70A-2-103. Definitions and inclusion of definitions.

70A-2-103. Definitions and inclusion of definitions. The definitions in this chapter shall apply to this act unless otherwise stated.

70A-2-105. Definitions and inclusion of definitions.

70A-2-105. Definitions and inclusion of definitions. The definitions in this chapter shall apply to this act unless otherwise stated.

70A-2-106. Definitions and inclusion of definitions.

70A-2-106. Definitions and inclusion of definitions. The definitions in this chapter shall apply to this act unless otherwise stated.

70A-2-107. Definitions and inclusion of definitions.

70A-2-107. Definitions and inclusion of definitions. The definitions in this chapter shall apply to this act unless otherwise stated.

(2) If a security interest is originally perfected in any way permitted under this chapter and is subsequently perfected in some other way under this chapter, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this chapter. 1985

70A-9-304. Perfection of security interest in instruments, documents, and goods covered by documents — Perfection by permissive filing — Temporary perfection without filing or transfer of possession.

(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments, other than certificated securities or instruments which constitute part of chattel paper, can be perfected only by the secured party's taking possession, except as provided in Subsections (4) and (5) of this section and Subsections (2) and (3) of Section 70A-9-306 on proceeds.

(2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments, other than certificated securities, or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, other than a certificated security, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor:

(a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to Section 70A-9-312; or

(b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal, or registration of transfer.

(6) After the 21-day period in Subsections (4) and (5) perfection depends upon compliance with applicable provisions of this chapter. 1985

70A-9-305. When possession by secured party perfects security interest without filing.

A security interest in letters of credit and advices of credit as provided in Subsection 70A-9-304(2)(a), goods, instruments, other than certificated securities, money, negotiable documents, or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods

covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this chapter. The security interest may be otherwise perfected as provided in this chapter before or after the period of possession by the secured party. 1981

70A-9-306. "Proceeds" — Secured party's rights on disposition of collateral or debtor's insolvency.

(1) "Proceeds" includes whatever is received upon the sale, lease, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds are "noncash proceeds."

(2) Except where this chapter or Chapter 2a, Leases, otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless:

(a) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds;

(b) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or

(c) the security interest in the proceeds is perfected before the expiration of the ten-day period. Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this chapter for original collateral of the same type.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:

(a) in identifiable noncash proceeds that are in separate deposit accounts containing only proceeds;

(b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks that are not cashed or deposited in a deposit account prior to the insolvency proceedings;

(d) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings.

(A) the payments to the secured party on account of cash proceeds received by the debtor during such period, and
(B) the cash proceeds received by the debtor during such period to which the secured party is entitled under Subsections (a) through (c) of this Subsection (4)

(5) If a sale or lease of goods results in an account or chattel paper which is transferred by the seller or lessor to a secured party, and if the goods are returned to or are repossessed by the seller, lessor, or the secured party, the following rules determine priorities:

(a) If the goods were collateral at the time of sale or lease, for an indebtedness of the seller or lessor which is still unpaid, the original security interest attaches again to the goods covered by the sale or lease and continues as a perfected security interest if it was perfected at the time when the goods were sold or leased. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under Subsection (a) to the extent that the transferee of the chattel paper was entitled to priority under Section 70A-9-306.

(c) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under Subsection (a).

(d) A security interest of an unpaid transferee asserted under Subsection (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

70A-9-307. Protection of buyers of goods.

(1) A buyer in ordinary course of business (Subsection (9) of Section 70A-1-201) who purchases goods from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

(2) In the case of consumer goods a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and in the ordinary course of his household purposes or for the purpose of obtaining credit. The secured party has filed a financing statement covering such goods.

(3) A buyer who takes a good in the ordinary course of business (Subsection (9) of Section 70A-1-201) who purchases goods from a person engaged in farming operations takes free of a security interest to the extent that the buyer does not know of the security interest at the time he purchases the goods.

(4) Notwithstanding Subsection (1) of this section, a purchaser of goods from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence if the goods are sold in the ordinary course of business from or by a person engaged in farming operations unless the buyer has complied with the rules stated by the Director of the Division of Corporations and Commercial Code under authority granted by Section 70A-1-201.

70A-9-308. Purchase of chattel paper and instruments.

A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument:

- (1) Which is perfected under Section 70A-9-304 (permissive filing and temporary perfection) or under Section 70A-9-306 (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or
- (2) Which is claimed merely as proceeds of inventory subject to a security interest (Section 70A-9-306) even though he knows that the specific paper or instrument is subject to the security interest.

70A-9-309. Protection of purchasers of negotiable instruments, documents, and securities.

Nothing in this chapter limits the rights of a holder in due course of a negotiable instrument as provided in Section 70A-3-307 or of a holder to whom a negotiable document of title has been duly negotiated as provided in Section 70A-7-501, or of a bona fide purchaser of a security as provided in Section 70A-9-308, or of a purchaser of a security interest even though perfected under this chapter does not constitute a security interest in such holder or purchaser.

70A-9-310. Priority of security interests in goods.

When a person in the ordinary course of his business purchases goods or a security interest in goods from a person engaged in farming operations, he takes free of a security interest in the goods or security interest created by the seller even though the security interest is perfected and even though the buyer knows of its existence if the goods are sold in the ordinary course of business from or by a person engaged in farming operations unless the buyer has complied with the rules stated by the Director of the Division of Corporations and Commercial Code under authority granted by Section 70A-1-201.

70A-9-311. Effect of filing of financing statement.

(1) The filing of a financing statement covering goods creates a security interest in the goods in favor of the person who files the financing statement.

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding Subsection (4)(a) but otherwise subject to Subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

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70A-9-314. Accessions.

(1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in Subsection (3) and subject to Section 70A-9-315(1).

(2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in Subsection (3) but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.

(3) The security interests described in Subsections (1) and (2) do not take priority over

- a subsequent purchaser for value of any interest in the whole; or
- a creditor with a lien on the whole subsequently obtained by judicial proceedings; or
- a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale other than the holder of a perfected security interest purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(4) When under Subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may, on default, subject to the provisions of Part 5, remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has

not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the security party gives adequate security for the performance of this obligation.

70A-9-315. Priority when goods are commingled or processed.

(1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if

(a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass; or

(b) a financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled.

In a case to which Paragraph (b) applies, no separate security interest in that part of the original goods which has been manufactured, processed or assembled into the product may be claimed under Section 70A-9-314.

(2) When under Subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

70A-9-316. Priority subject to subordination.

Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

70A-9-317. Secured party not obligated on contract of debtor.

The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions.

70A-9-318. Defenses against assignee — Modification of contract after notification of assignment — Term prohibiting assignment ineffective — Identification and proof of assignment.

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 70A-9-207, the rights of an assignee are subject to

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment was constituted under an assigned contract has not been fully satisfied by performance, and notwithstanding notification of the assignment, any modification of the contract for the contract made in good faith and in accordance with reasonable commercial standards is enforceable against the assignee. The assignee may provide identification or verification of the assignment to the account debtor.

(3) The account debtor is not obligated to sign any document or to take any action to facilitate the enforcement of the assignment.

signed and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must reasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

(4) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in chattel paper or a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

PART 4

FILING

70A-9-400. Rules to implement central filing system.

The director of the Division of Corporations and Commercial Code shall issue such rules as are necessary to implement a central filing system which will conform to the requirements of the Food Security Act of 1985, P.L. 99-198, as now enacted or as it may be hereafter amended.

70A-9-401. Place of filing — Erroneous filing — Removal of collateral.

(1) The proper place to file in order to perfect a security interest is as follows:

(a) (i) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to Subsection 70A-9-103(5), or when the financing statement is filed as a fixture filing (Section 70A-9-313) and the collateral is goods which are or are to become fixtures, then in the office of the county recorder in each county in this state in which any mortgage on the real estate would be recorded; and

(ii) if the secured party is a seller or purchase money lender of the collateral, with the Division of Corporations and Commercial Code;

(b) in all other cases, with the Division of Corporations and Commercial Code.

(2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this chapter and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of or notice of the contents of such financing statement.

(3) A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.

(4) The rules stated in Section 70A-9-400 determine whether filing is necessary in this state.

(5) Notwithstanding the preceding subsections, and subject to Subsection 70A-9-302(5), the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is with the Division of Corporations and Commercial Code. This filing constitutes a fixture filing (Section 70A-9-313) as to the collateral described therein which is or is to become fixtures.

(6) For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business.

70A-9-402. Formal requisites of financing statement — Amendments — Mortgage as financing statement — Form of financing statement.

(1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor or an authorized officer or other party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. To facilitate the indexing of financing statements, persons filing financing statements are urged to supply either separately or as a part of the financing statement the social security number of the debtor or the federal income tax employer's identification number if the debtor is not an individual. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a legal description of the real estate concerned and the name of the record owner. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to Subsection (5) of Section 70A-9-103, or when the financing statement is filed as a fixture filing (Section 70A-9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with Subsection (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this state.

(2) A financing statement which otherwise complies with Subsection (1) is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in:

(a) collateral already subject to a security interest in another jurisdiction when it is brought into this state or when the debtor's location is changed to this state. Such a financing statement must state that the collateral was brought into this state or that the debtor's location was changed to this state under such circumstances;

(b) proceeds under Section 70A-9-309 of the security interest in the original collateral was perfected. Such a financing statement must state that the original collateral was perfected;

(c) collateral as to which the filing was delayed; or

(d) collateral brought into a change of state, identity or description of the collateral after the filing of the financing statement.

(3) A financing statement is not necessary to comply with Subsection (1) if the secured party is a transmitting utility and the collateral is a security interest in the real estate of a transmitting utility.

from the time it was rendered; and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

(Amended effective January 1, 1985.)

Rule 55. Default.

(a) Default.

(1) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) Notice to party in default. After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the state or officer or agency thereof. No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(Amended effective Sept. 4, 1986.)

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expi-

ration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party con-

employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to Chapter 33 of Title 78, U.C.A. 1953, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

Rule 58B. Satisfaction of judgment.

(a) **Satisfaction by owner or attorney.** A judgment may be satisfied, in whole or in part, as to any or all of the judgment debtors, by the owner thereof, or by the attorney of record of the judgment creditor where no assignment of the judgment has been filed and such attorney executes such satisfaction within eight years after the entry of the judgment, in the following manner: (1) by written instrument, duly acknowledged by such owner or attorney; or (2) by acknowledgment of such satisfaction signed by the owner or attorney and entered on the docket of the judgment in the county where first docketed, with the date affixed and witnessed by the clerk. Every satisfaction of a part of the judgment, or as to one or more of the judgment debtors, shall state the amount paid thereon or for the release of such debtors, naming them.

(b) **Satisfaction by order of court.** When a judgment shall have been fully paid and not satisfied of record, or when the satisfaction of judgment shall have been lost, the court in which such judgment was recovered may, upon motion and satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

(c) **Entry by clerk.** Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register of actions. He shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

(d) **Effect of satisfaction.** When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) **Filing transcript of satisfaction in other counties.** When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on motion for a new trial in an action tried without a jury, the court may open the judgment if no has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment with or without a new trial.

(i) Irregularity in the proceedings of the trial, jury or adverse party; or any error of the attorney