

IN THE SUPREME COURT OF OHIO

CORE FUNDING GROUP, LLC,

Appellee,

vs.

DIANA McDONALD etc., et al.,

Appellants.

* Supreme Court Case No. 2006-0927

* On Appeal from the
* Lucas County Court of Appeals,
* Sixth Appellate District

* Court of Appeals
* Case No. L-05-1291

*

APPENDIX TO MERIT BRIEF OF APPELLEE
CORE FUNDING GROUP, LLC

Jack J. Brady (0010146) (Counsel of Record)

Email: jjbrady@bcslawyers.com

Margaret G. Beck (0059789)

Email: mgbeck@bcslawyers.com

BRADY, COYLE & SCHMIDT, LTD

4052 Holland-Sylvania Road

Toledo, OH 43623

Telephone: (419) 885-3000

Facsimile: (419) 885-1120

Jeffrey W. Morris (0061443)

Email: jmorris@porterwright.com

PORTER, WRIGHT, MORRIS & ARTHUR

One Dayton Centre

Suite 1600

One South Main Street

Dayton, OH 45402-2028

Telephone: (937) 449-6708

Facsimile: (937) 449-6820

ATTORNEYS FOR APPELLEE, CORE FUNDING GROUP, LLC

Rick E. Marsh (0002110) (Counsel of Record)

rmarsh@lah4law.com

Lane, Alton & Horst

175 South Third Street, Suite 700

Columbus, OH 43215

Telephone: (614) 228-5100

Facsimile: (614) 228-0146

Paige J. McMahon (0040755)

Paige.McMahon@Adelphia.net

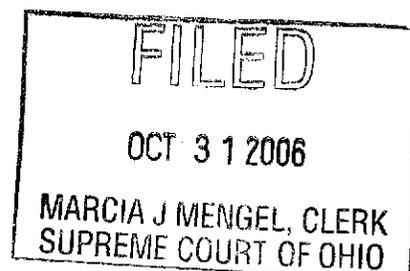
Spetnagel and McMahon

42 East Fifth Street

Chillicothe, OH 45601

Telephone: (740) 774-2142

Facsimile: (740) 774-2147



COUNSEL FOR APPELLANTS, WILLIE GARY AND GARY, WILLIAMS, PARENTI, FINNEY, LEWIS,
McMANUS & WATSON

APPENDIX

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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XIII. COMMERCIAL TRANSACTIONS
CHAPTER 1309. SECURED TRANSACTIONS; SALES OF ACCOUNTS AND CHATTEL PAPER
APPLICABILITY AND DEFINITIONS

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1309.01 DEFINITIONS

<Note: See also following version of this section, and Publisher's Note below.>

(A) As used in sections 1309.01 to 1309.50 of the Revised Code, unless the context otherwise requires:

(1) "Account debtor" means the person who is obligated on an account, chattel paper, or general intangible.

(2) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.

(3) "Collateral" means the property subject to a security interest, and includes accounts and chattel paper which have been sold.

(4) "Debtor" means the person who owes payment or other performance of the obligations secured, whether or not the person owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of sections 1309.01 to 1309.50 of the Revised Code dealing with the collateral, the obligor in any provision dealing with the obligation and may include both where the context so requires.

(5) "Deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union, or like organization, other than an account evidenced by a certificate of deposit.

(6) "Document" means document of title as defined in division (O) of section 1301.01 of the Revised Code, and a receipt of the kind described in division (B) of section 1307.06 of the Revised Code.

(7) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

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R.C. § 1309.01

(8) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures under section 1309.32 of the Revised Code, but does not include money, documents, instruments, investment property, commodity contracts, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. "Goods" also include standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, and growing crops.

(9) "Instrument" means a negotiable instrument as defined in section 1303.03 of the Revised Code, or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment. "Instrument" does not include investment property.

(10) "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like.

(11) An advance is made "pursuant to commitment" if the secured party has bound itself to make it, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the secured party's obligation.

(12) "Security agreement" means an agreement which creates or provides for a security interest.

(13) "Secured party" means a lender, seller, or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement, or the like are represented by a trustee or other person, the representative is the secured party.

(14) "Transmitting utility" means any person primarily engaged in the railroad, street railway, or trolley bus business, the electric or electronic communications business, the transmission of goods by pipeline, or the transmission or the production and transmission of electricity, steam, gas, or water, or the provision of sewer service.

(15) "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

(16) "General intangibles" means any personal property, including things in action, other than goods, accounts, chattel paper, documents, instruments, investment property, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

(B) Other definitions applying to sections 1309.01 to 1309.50 of the Revised Code are:

(1) "Attach," as defined in section 1309.14 of the Revised Code;

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- (2) "Construction mortgage," as defined in section 1309.32 of the Revised Code;
- (3) "Consumer goods," as defined in section 1309.07 of the Revised Code;
- (4) "Equipment," as defined in section 1309.07 of the Revised Code;
- (5) "Farm products," as defined in section 1309.07 of the Revised Code;
- (6) "Fixture," as defined in section 1309.32 of the Revised Code;
- (7) "Fixture filing," as defined in section 1309.32 of the Revised Code;
- (8) "Inventory," as defined in section 1309.07 of the Revised Code;
- (9) "Lien creditor," as defined in section 1309.20 of the Revised Code;
- (10) "Proceeds," as defined in section 1309.25 of the Revised Code;
- (11) "Purchase money security interest," as defined in section 1309.05 of the Revised Code;
- (12) "Commodity contract," "commodity customer," "commodity intermediary," "control," and "investment property," as defined in section 1309.112 of the Revised Code;
- (13) "United States," as defined in section 1309.03 of the Revised Code.

(C) As used in sections 1309.01 to 1309.50 of the Revised Code, "check" and "note" have the meaning set forth in section 1303.03 of the Revised Code; "contract for sale" and "sale" have the meaning set forth in section 1302.01 of the Revised Code; and "holder in due course" has the meaning set forth in section 1303.31 of the Revised Code.

(D) The terms and principles of construction and interpretation set forth in sections 1301.01 to 1301.14 of the Revised Code are applicable to sections 1309.01 to 1309.50 of the Revised Code.

CREDIT(S)

(1997 H 170, eff. 1-1-98; 1984 S 283, eff. 9-20-84; 1978 S 85; 130 v. H 1; 129 v. 13; UCC 9-105, 9-106)

<Note: See also following version of this section, and Publisher's Note below.>

R.C. § 1309.01

OH ST § 1309.01

END OF DOCUMENT

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XIII. COMMERCIAL TRANSACTIONS
CHAPTER 1309. SECURED TRANSACTIONS; SALES OF ACCOUNTS AND CHATTEL PAPER
APPLICABILITY AND DEFINITIONS

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1309.02 POLICY AND SCOPE

(A) Except as otherwise provided in section 1309.04 of the Revised Code on excluded transactions, sections 1309.01 to 1309.50 of the Revised Code apply:

(1) To any transaction, regardless of its form, which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts; and also

(2) To any sale of accounts or chattel paper.

(B) Sections 1309.01 to 1309.50 of the Revised Code apply to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract, and lease or consignment intended as security. Sections 1309.01 to 1309.50 of the Revised Code do not apply to statutory liens except as provided in section 1309.29 of the Revised Code.

(C) The application of sections 1309.01 to 1309.50 of the Revised Code to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which sections 1309.01 to 1309.50 of the Revised Code do not apply.

CREDIT(S)

(1978 S 85, eff. 1-1-79; 129 v 13; UCC 9-102)

COMMENTARY

Uniform Commercial Code (UCC)

1978:

Official Comment

The main purpose of this Section is to bring all consensual security interests in personal property and fixtures under this Article [RC Ch 1309], except for certain types of transactions excluded by Section 9-104 [RC 1309.04]. In addition certain sales of accounts and chattel paper are brought within this Article to avoid

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difficult problems of distinguishing between transactions intended for security and those not so intended. As to security interests in fixtures created under the law applicable to real estate, see Section 9-313(1) [RC 1309.32(A)].

1. Except for sales of accounts and chattel paper, the principal test whether a transaction comes under this Article [RC Ch 1309] is: is the transaction intended to have effect as security? For example, Section 9-104 [RC 1309.04] excludes certain transactions where the security interest (such as an artisan's lien) arises under statute or common law by reason of status and not by consent of the parties. Transactions in the form of consignments or leases are subject to this Article if the understanding of the parties or the effect of the arrangement shows that a security interest was intended. (As to consignments the provisions of Sections 2-326, 9-114 and 9-408 [RC 1302.39, 1309.111, and 1309.431] should be consulted). When it is found that a security interest as defined in Section 1-201(37) [RC 1301.01(KK)] was intended, this Article [RC Ch 1309] applies regardless of the form of the transaction or the name by which the parties may have christened it. The list of traditional security devices in subsection (2) [(B)] is illustrative only; other old devices, as well as any new ones which the ingenuity of lawyers may invent, are included, so long as the requisite intent is found. The controlling definition is that contained in subsection (1) [(A)].

The Article does not in terms abolish existing security devices. The conditional sale or bailment-lease, for example, is not prohibited; but even though it is used, the rules of this Article govern.

2. If an obligation is to repay money lent and is not part of chattel paper, it is either an instrument or a general intangible. A sale of an instrument or general intangible is not within this Article [RC Ch 1309], but a transfer intended to have effect as security for an obligation of the transferor is covered by subsection 1(a) [(A)(1)]. In either case the nature of the transaction is not affected by the fact that collateral is transferred with the instrument or general intangible. Such a transfer is treated as a transfer by operation of law, whether or not it is articulated in the agreement.

An assignment of accounts or chattel paper as security for an obligation is covered by subsection (1) (a) [(A)(1)]. Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by subsection (1) (b) [(A)(2)] whether intended for security or not, unless excluded by Section 9-104 [RC 1309.04]. The buyer then is treated as a secured party, and his interest as a security interest. See Sections 9-105(1) (m), 1-201(37) [RC 1309.01(A)(13), 1301.01(KK)]. Certain sales which have nothing to do with commercial financing transactions are excluded by Section 9-104(f) [RC 1309.04(E)]; compare *Spurlin v. Sloan*, 368 S.W.2d 314 (Ky. 1963). See also Section 9-302(1) (e) [RC 1309.21(A)(5)], exempting from filing casual or isolated assignments, and Section 9-302(2) [RC 1309.21(B)], preserving the perfected status of a security interest against the original debtor when a secured party assigns his interest.

3. In general, problems of choice of law in this Article [RC Ch 1309] as to the validity of security agreements are governed by Section 1-105 [RC 1301.05].

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Problems of choice of law as to perfection of security interests and the effect of perfection or non-perfection thereof, including rules requiring reperfecting, are governed by Section 9-103 [RC 1309.03].

4. An illustration of subsection (3) [(C)] is as follows:

The owner of Blackacre borrows \$10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This Article [RC Ch 1309] is not applicable to the creation of the real estate mortgage. Nor is it applicable to a sale of the note by the mortgagee, even though the mortgage continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this Article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage. This Article leaves to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an assignment of the mortgagee's interest. See Section 9-104(j) [RC 1309.04(I)]. But under Section 3-304(5) [RC 1303.33(E)] recording of the assignment does not of itself prevent X from holding the note in due course.

5. While most sections of this Article [RC Ch 1309] apply to a security interest without regard to the nature of the collateral or its use, some sections state special rules with reference to particular types of collateral. An index of sections where such special rules are stated follows:

ACCOUNTS		
[RC Section]	[UCC] Section	
[1309.02 (A) (2)]	9-102(1) (b)	Sale of accounts subject to Article [RC Ch 1309]
[1309.03 (A), (C)]	9-103(1)	When Article [RC Ch 1309] applies; conflict of laws rules
[1309.04 (E)]	9-104(f)	Certain sales of accounts excluded from Article [RC Ch 1309]
[1309.01 (A) (15)]	9-106	Definitions
[1309.16]	9-205	Permissible for debtor to make collections
[1309.17 (A)]	9-206(1)	Agreement not to assert defenses against assignee
[1309.20 (A) (4)]	9-301(1) (d)	Unperfected security interest subordinate to certain transferees
[1309.21 (A) (5)]	9-302(1) (e)	What assignments need not be filed
[1309.25 (E)]	9-306(5)	Rule when goods whose sale gave rise to an account return to seller's possession
[1309.37 (A)]	9-318(1)	Rights of assignee subject to defenses

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[1309.37(B)]	9-318(2)	Modification of contract after assignment of contract right
[1309.37(C)]	9-318(3)	When account debtor may pay assignor
[1309.37(D)]	9-318(4)	Term prohibiting assignment ineffective
[1309.38]	9-401	Place of filing
[1309.45]	9-502	Collection of rights of secured party
[1309.47(B)]	9-504(2)	Rights on default where underlying transaction was sale of accounts or contract rights

CHATTEL PAPER

[1309.02(A)(2)]	9-102(1)(b)	Sale subject to Article [RC Ch 1309]
[1309.04(E)]	9-104(f)	Certain sales excluded from Article [RC Ch 1309]
[1309.01(A)(2)]	9-105(1)(b)	Definition
[1309.16]	9-205	Permissible for debtor to make collections
[1309.17(A)]	9-206(1)	Agreement not to assert defenses against assignee
[1309.18(A)]	9-207(1)	Duty of secured party in possession to preserve rights against prior parties
[1309.20(A)(3)]	9-301(1)(c)	Unperfected security interest subordinate to certain transferees
[1309.23(A)]	9-304(1)	Perfection by filing
[1309.24]	9-305	When possession by secured party perfects security interest
[1309.25(E)]	9-306(5)	Rule when goods whose sale results in chattel paper return to seller's possession
[1309.27]	9-308	When purchasers of chattel paper have priority over security interest
[1309.37(A)]	9-318(1)	Rights of assignee subject to defenses
[1309.37(C)]	9-318(3)	When account debtor may pay assignor
[1309.45]	9-502	Collection rights of secured party
[1309.47(B)]	9-504(2)	Rights on default where underlying transaction was sale

DOCUMENTS AND INSTRUMENTS

[1309.01(A)(6)]	9-105(1)(e) [(f)]	Definition of document (and see 1-201[RC 1301.01])
[1309.01(A)(9)]	9-105(1)(g) [(i)]	Definition of instrument
[1309.17(A)]	9-206(1)	Rule where buyer of goods signs both negotiable instrument and

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[1309.18(A)]	9-207(1)	security agreement Duty of secured party in possession of instrument to preserve rights against prior parties
[1309.20(A)(3)]	9-301(1)(c)	Unperfected security interest subordinate to certain transferees
[1309.21(A)(2) and (6)]	9-302(1)(b) and (f)	What interests need not be filed
[1309.23(A)]	9-304(1)	How security interest can be perfected
[1309.23(B), (C)]	9-304(2, 3)	Perfection of security interest in goods in possession of issuer of negotiable document or of other bailee
[1309.23(D), (E)]	9-304(4, 5)	Perfection of security interest in instruments or negotiable documents without filing or transfer of possession
[1309.24]	9-305	When possession by secured party perfects security interest
[1309.27]	9-308	When purchasers of instruments have priority over security interest
[1309.28]	9-309	When purchasers of negotiable instruments or negotiable documents have priority over security interest
[1309.44(A)]	9-501(1)	Rights on default where collateral is documents
[1309.45]	9-502	Collection rights of secured party
GENERAL INTANGIBLES		
[1309.03(B), (C)]	9-103(2)	When Article [RC Ch 1309] applies; conflict of laws rules
[1309.01]	9-105	Obligor is "account debtor"
[1309.01(A)(15), (16)]	9-106	Definition
[1309.20(A)(4)]	9-301(1)(d)	Unperfected security interest subordinate to certain transferees
[1309.37(A)]	9-318(1)	Rights of assignee subject to defenses
[1309.37(C)]	9-318(3)	When account debtor may pay assignor
[1309.45]	9-502	Collection rights of secured party
GOODS		
(See also Consumer Goods, Equipment, Farm Products, Inventory)		
[1309.03] applies	9-103	When Article [RC Ch 1309] applies

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		with regard to goods of a type normally used in more than one jurisdiction; goods covered by certificate of title; conflict of laws rules
[1309.01 (A) (8)]	9-105(1) (h)	Definition
[1309.07]	9-109	Classification of goods as consumer goods, equipment, farm products and inventory
[1309.14]	9-203	Formal requisites of security agreement covering certain types of goods (crops or timber)
[1309.15]	9-204	Validity of after-acquired property clause covering certain types of goods (crops, consumer goods)
[1309.16]	9-205	Permissible for debtor to accept returned goods
[1309.17 (B)]	9-206(2)	When security agreement can limit or modify warranties on sale
[1309.20 (A) (3)]	9-301(1) (c)	Unperfected security interest subordinate to certain transferees
[1309.23 (B) , (C)]	9-304(2, 3)	Perfection of security interest in goods in possession of issuer of negotiable document or of other bailee
[1309.23 (E)]	9-304(5)	Perfection of security interest without filing or transfer of possession where goods in possession of certain bailees
[1309.24]	9-305	When possession by secured party perfects security interest
[1309.25 (E)]	9-306(5)	Rule when goods whose sale gave rise to account or chattel paper return to seller's possession
[1309.26]	9-307	When buyers of goods from debtor take free of security interest
[1309.32]	9-313	Goods which are or become fixtures
[1309.33]	9-314	Goods affixed to other goods
[1309.34]	9-315	Goods commingled in a product
[1309.38 (A)]	9-401(1)	Place of filing for fixtures
[1309.39]	9-402	Form of financing statement covering fixtures
[1309.47 (A)]	9-504(1)	Sale of goods by secured party after default subject to Article 2 [RC Ch 1302] (Sales)

CONSUMER GOODS

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[1309.07(A)]	9-109(1)	Definition
[1309.14(B)]	9-203(2)	Transaction, although subject to this Article [RC Ch 1309], may also be subject to certain regulatory statutes
[1309.15(B)]	9-204(2)	Validity of after-acquired property clause
[1309.17(A)]	9-206(1)	Buyer's agreement not to assert defenses against an assignee subject to statute or decision which establishes rule for buyers of consumer goods
[1309.21(A)(4)]	9-302(1)(d)	When filing not required
[1309.26(C)]	9-307(2)	When buyers from debtor take free of security interest
[1309.38(A)(2)]	9-401(1)(a)	Place of filing
[1309.48(A)]	9-505(1)	Secured party's duty to dispose of repossessed consumer goods
[1309.50(A)]	9-507(1)	Secured party's liability for improper disposition of consumer goods after default
EQUIPMENT		
[1309.03(B)] applies	9-103(2)	When Article [RC Ch 1309] with regard to certain types of equipment normally used in more than one jurisdiction; conflict of laws rules
[1309.07(B)]	9-109(2)	Definition
[1309.21(A)(3)]	9-302(1)(c)	When filing not required to perfect security interest in certain farm equipment
[1309.26(B)]	9-307(2)	When buyers of certain farm equipment from debtor take free of security interest
[1309.38(A)]	9-401(1)	Place of filing for equipment used in farming operation
[1309.46]	9-503	Secured party's right after default to remove or to render equipment unusable
FARM PRODUCTS		
[1309.07(C)]	9-109(3)	Definition
[1309.14(A)(2)]	9-203(1)(b)	Formal requisites of security agreement covering crops
[1309.26]	9-307	When a buyer of farm products takes free of security interest
[1309.31(B)]	9-312(2)	Priority of secured party who gives new value to enable debtor to produce crops
[1309.38(A)]	9-401(1)	Place of filing
[1309.39(A)]	9-402(1)	Form of financing statement

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and (C)]	and (3)	covering crops
		INVENTORY
[1309.03(C)] applies	9-103(3)	When Article [RC Ch 1309] with regard to certain types of inventory normally used in more than one jurisdiction; conflict of laws rules
[1309.07(D)]	9-109(4)	Definition
[1309.111]	9-114	Consigned goods
[1309.25(E)]	9-306(5)	Rule where goods whose sale gave rise to account or chattel paper return to seller's possession
[1309.26(A)]	9-307(1)	When buyers from debtor take free of security interest
[1309.31(C), 1309.23(E)]	9-312(3), 9-304(5)	When purchase money security in- terest takes priority over conflicting security interest
[1309.431]	9-408	Financing statements covering consigned or leased goods

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Reason for Change

The omissions in the first paragraph of subsection (1) [(A)] make applicable the general choice of law principles of Section 1-105 [RC 1301.05] (except for special rules stated in Section 9-103 [RC 1309.03]), instead of an incomplete statement in this section.

The omission in clause (1) (b) [(A)(2)] conforms to the elimination of the term "contract rights" from the Article [RC Ch 1309]. See Reasons for Change under Section 9-106 [1978 Commentary under RC 1309.01].

Legislative Service Commission

1961:

This section spells out the coverage of Article IX [RC Ch 1309]. Under Ohio law, chattel mortgages, conditional sales, crop mortgages, trust receipts, railroad equipment mortgages, factor's liens, and accounts receivable financing are governed by statute found in RC Chapters 1316., 1319., and 1325. and 1311.59 to 1311.63 and 1701.66.

In accord with the provision on jurisdiction, see 9 OJur 2d, Conflicts of Law § 90, Restatement of Conflicts of Law § 265.

CROSS REFERENCES

Leases of goods, transfers of rights and interests, creation of security interest,

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R.C. § 1309.02

1310.31

Security interests in uncertificated securities, 1308.07

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WESTLAW Topic No. 349A.

C.J.S. Secured Transactions §§ 6 to 10, 18 to 23.

OJur 3d: 7, Automobiles and Other Vehicles § 67, 71; 65, Landlord and Tenant § 380; 81, Sales and Exchanges of Personal Property § 73; 83, Secured Transactions § 35, 38 to 41, 52, 56, 61, 66, 67, 75, 78, 80 to 82

Am Jur 2d: 15A, Commercial Code § 49 to 54; 68, Secured Transactions § 15, 48, 103, 104

Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts. 10 ALR2d 447

Carrier's certificate of convenience and necessity, franchise, or permit as subject to transfer or encumbrance. 15 ALR2d 883

Bill of sale, absolute on its face, as a chattel mortgage. 33 ALR2d 364

Lease of realty for term of years as subject of chattel mortgage. 33 ALR2d 1277

Necessity that mortgage covering oil and gas lease be recorded as real-estate mortgage, and/or filed or recorded as chattel mortgage. 34 ALR2d 902

Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 ALR2d 1396

Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property. 68 ALR2d 1259

Validity of chattel mortgage on stock of goods which mortgagor has right to sell, where mortgagee takes possession of goods before third person's rights attach. 71 ALR2d 1416

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like. 72 ALR2d 342

Construction and effect of UCC Art 9, dealing with secured transactions, sales of accounts, contract rights and chattel paper. 30 ALR3d 9

Equipment leases as security interest within Uniform Commercial Code sec. 1-201(37). 76 ALR3d 11

Construction and effect of "future advances" clauses under UCC Article 9. 90 ALR4th 859

1 & 2 Ferriell, Baldwin's Ohio Practice, Commercial Code § 5.15, 10.7, 53.1, 53.5, 53.9, 53.12, 54.9 (1996)

Williams, Ohio Consumer Law (1997 Ed.), Text 9.16, 13.75, 19.2, 19.3, 19.4

LAW REVIEW AND JOURNAL COMMENTARIES

Conflict of Laws Problems Under the Uniform Commercial Code, Robert K. Cullen. 48 Ky L J 417 (Spring 1960).

Easing Transfer and Security Interest Transactions in Intellectual Property: An Agenda for Reform, Harold R. Weinberg and William J. Woodward. 79 Ky L J 61 (1990-91).

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NOTES OF DECISIONS AND OPINIONS

Consensual security interests 2
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Licenses, security interests in 1

1. Licenses, security interests in

The holder of a liquor license may transfer to a lender a security interest in a liquor license as constituting "property" with unique value, even though title thereto could not be transferred to the lender. *Paramount Finance Co. v. U.S.* (C.A.6 (Ohio) 1967) 13 Ohio Misc. 195, 379 F.2d 543, 41 O.O.2d 353, 42 O.O.2d 225.

2. Consensual security interests

Naming a transaction a lease, when its intention is to create a security interest, does not preclude application of Uniform Commercial Code (UCC) Article 9. R.C. 1309.01 et seq. *Telmark, Inc. v. Schierloh* (Putnam 1995) 102 Ohio App.3d 801, 658 N.E.2d 43.

If parties intend to enter into enforceable agreement which gives rise to security interest, acceptable written document or documents must be executed and filed by the parties; such written requirements may include not only written document, signed by debtor and containing description of crops and land, but also other documents which establish that parties manifested intent to create security interest. *Silver Creek Supply v. Powell* (Hardin 1987) 36 Ohio App.3d 140, 521 N.E.2d 828.

Statutory landlord's liens and other landlord's liens arising by operation of law are not covered by RC Ch 1309 pursuant to RC 1309.02(A)(1), since they are not transactions intended to create security interests. *Walcher Grain Co v Slane*, No. H-86-3 (6th Dist Ct App, Huron, 3-20-87).

Consensual liens in personal property and fixtures and claims arising from defaults are governed by RC Ch 1309, even if the debtor is in bankruptcy. In re *Allen* (Bkrtcy.S.D. Ohio 1991) 123 B.R. 580.

3. Jurisdiction

Determination that case lies within admiralty jurisdiction does not necessarily preclude the assertion of a lien for personal property under Ohio's version of Uniform Commercial Code (UCC). In re *Harbour Lights Marina, Inc.* (Bkrtcy.S.D. Ohio 1992) 146 B.R. 963, affirmed 153 B.R. 781.

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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XIII. COMMERCIAL TRANSACTIONS
CHAPTER 1309. SECURED TRANSACTIONS; SALES OF ACCOUNTS AND CHATTEL PAPER
RIGHTS OF THIRD PARTIES; PERFECTED AND UNPERFECTED SECURITY INTERESTS; RULES
OF PRIORITY

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1309.37 DEFENSES AGAINST ASSIGNEE; MODIFICATION OF CONTRACT AFTER NOTIFICATION OF ASSIGNMENT; TERM PROHIBITING ASSIGNMENT INEFFECTIVE; IDENTIFICATION AND PROOF OF ASSIGNMENT

(A) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in section 1309.17 of the Revised Code, the rights of an assignee are subject to:

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

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

(B) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(C) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

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

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(1978 S 85, eff. 1-1-79; 129 v 13; UCC 9-318)

COMMENTARY

Uniform Commercial Code (UCC)

1978:

Reason for Change

The principal changes conform to the elimination of the term "contract right" in Section 9-106 [RC 1309.01].

Minor changes in subsections (3) and (4) [(C) and (D)] eliminate technical difficulties in the 1962 Code which arose out of the fact that the term "account debtor" used in these subsections is defined to include debtors under general intangibles and chattel paper, and is therefore broader than the term "account" heretofore used in these subsections. Subsection (4) [(D)] is broadened to apply to general intangibles for money due as well as to accounts.

1961:

Official Comment

1. Subsection (1) [(A)] makes no substantial change in prior law. An assignee has traditionally been subject to defenses or set-offs existing before an account debtor is notified of the assignment. When the account debtor's defenses on an assigned claim arise from the contract between him and the assignor, it makes no difference whether the breach giving rise to the defense occurs before or after the account debtor is notified of the assignment (paragraph (1) (a) [(A)(1)]). The account debtor may also have claims against the assignor which arise independently of that contract: an assignee is subject to all such claims which accrue before, and free of all those which accrue after, the account debtor is notified (paragraph (1) (b) [(A)(2)]). The account debtor may waive his right to assert claims or defenses against an assignee to the extent provided in Section 9-206 [RC 1309.17].

2. Prior law was in confusion as to whether modification of an executory contract by account debtor and assignor without the assignee's consent was possible after notification of an assignment. Subsection (2) [(B)] makes good faith modifications by assignor and account debtor without the assignee's consent effective against the assignee even after notification. This rule may do some violence to accepted doctrines of contract law. Nevertheless it is a sound and indeed a necessary rule in view of the realities of large scale procurement. When for example it becomes necessary for a government agency to cut back or modify existing contracts, comparable arrangements must be made promptly in hundreds and even thousands of subcontracts lying in many tiers below the prime contract. Typically the right to payments under these subcontracts will have been assigned. The government, as sovereign, might have the right to amend or terminate existing contracts apart from statute. This subsection gives the prime contractor (the account debtor) the right to make the required arrangements directly with his subcontractors without

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undertaking the task of procuring assents from the many banks to whom rights under the contracts may have been assigned. Assignees are protected by the provision which gives them automatically corresponding rights under the modified or substituted contract. Notice that subsection (2) [(B)] applies only so far as the right to payment has not been earned by performance, and therefore its application ends entirely when the work is done or the goods furnished.

3. Subsection (3) [(C)] clarifies the right of an account debtor to make payment to his seller-assignor in an "indirect collection" situation (see Comment to Section 9-308 [RC 1309.27]). So long as the assignee permits the assignor to collect claims or leaves him in possession of chattel paper which does not indicate that payment is to be made at some place other than the assignor's place of business, the account debtor may pay the assignor even though he may know of the assignment. In such a situation an assignee who wants to take over collections must notify the account debtor to make further payments to him.

4. Subsection (4) [(D)] breaks sharply with the older contract doctrines by denying effectiveness to contractual terms prohibiting assignment of sums due and to become due under contracts of sale, construction contracts and the like. Under the rule as stated, an assignment would be effective even if made to an assignee who took with full knowledge that the account debtor had sought to prohibit or restrict assignment of the claims.

It is only for the past hundred years that our law has recognized the possibility of assigning choses in action. The history of this development, at law and equity, is in broad outline well known. Lingering traces of the absolute common law prohibition have survived almost to our own day.

There can be no doubt that a term prohibiting assignment of proceeds was effective against an assignee with notice through the nineteenth century and well into the twentieth. Section 151 of the Restatement of Contracts (1932) so states the law without qualification, but the changing character of the law is shown in the proposed Section 154 of the Restatement, Second, Contracts.

The original rule of law has been progressively undermined by a process of erosion which began much earlier than the cited section of the Restatement of Contracts would suggest. The cases are legion in which courts have construed the heart out of prohibitory or restrictive terms and held the assignment good. The cases are not lacking where courts have flatly held assignments valid without bothering to construe away the prohibition. See 4 Corbin on Contracts (1951) §§ 872, 873. Such cases as *Allhusen v. Caristo Const. Corp.*, 303 N.Y. 446, 103 N.E.2d 891 (1952), are rejected by this subsection.

This gradual and largely unacknowledged shift in legal doctrine has taken place in response to economic need: as accounts and other rights under contracts have become the collateral which secures an ever increasing number of financing transactions, it has been necessary to reshape the law so that these intangibles, like negotiable instruments and negotiable documents of title, can be freely assigned.

Subsection (4) [(D)] thus states a rule of law which is widely recognized in the

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cases and which corresponds to current business practices. It can be regarded as a revolutionary departure only by those who still cherish the hope that we may yet return to the views entertained some two hundred years ago by the Court of King's Bench.

5. The Federal Assignment of Claims Act of 1940--to which of course this section is subject--requires that assignments of claims against the United States be filed as provided in that Act. Many large business enterprises, situated like the United States in that claims against them are held by hundreds or thousands of subcontractors or suppliers, often require in their contract or purchase order forms that assignments against them be filed in a prescribed way. Subsection (3) [(C)] requires reasonable identification of the account assigned and recognizes the right of an account debtor to require reasonable proof of the making of the assignment and to that extent validates such requirements in contracts or purchase order forms. If the notification does not contain such reasonable identification or if such reasonable proof is not furnished on request, the account debtor may disregard the assignment and make payment to the assignor. What is "reasonable" is not left to the arbitrary decision of the account debtor; if there is doubt as to the adequacy either of a notification or of proof submitted after request, the account debtor may not be safe in disregarding it unless he has notified the assignee with commercial promptness as to the respects in which identification or proof is considered defective.

6. If the thing to be assigned is the beneficiary's right under a letter of credit, Section 5-116 [RC 1305.15] should be consulted.

Legislative Service Commission

1961:

(1) (a) [(A)(1)] is in accord with RC 1325.07 in that an assignee is subject to any good faith dealing between the assignor and the account debtor prior to the time notice of assignment is received by the account debtor.

(1) (b) [(A)(2)] RC 1325.07 also provides that an assignment shall not prejudice any counterclaim or defense of the account debtor existing prior to the time of notification. However, it further provides that where a breach of warranty is not discovered until after notification, it may be asserted to the extent of the unpaid balance.

(2), (3), and (4) [(B), (C), and (D)] are new.

LIBRARY REFERENCES

Secured Transactions ↪181, 185 to 191.

WESTLAW Topic No. 349A.

C.J.S. Secured Transactions §§ 88 to 96.

OJur 3d: 7, Automobiles and Other Vehicles § 67, 71; 83, Secured Transactions § 298 to 303

Am Jur 2d: 6, Assignments § 18, 22, 68, 96, 99, 102, 104; 11, Bills and Notes §

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377; 13, Buildings and Construction Contracts § 95; 15A, Commercial Code § 74; 69, Secured Transactions § 451 to 457

Validity of anti-assignment clause in contract. 37 ALR2d 1251

Transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as subject to defenses which chattel purchaser could assert against seller. 44 ALR2d 8

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller. 39 ALR3d 518

1 & 2 Ferriell and 3 Deal & Sykes, Baldwin's Ohio Practice, Commercial Code § 5.15, 38.6, 54.18, 61.7, 61.8, 61.10, 61.11, 61.35, 68.33, 68.34, 68.35 (1996)

NOTES OF DECISIONS AND OPINIONS

Construction 4

Notification of assignment 1

Prohibition of assignment 2

Warranties 3

1. Notification of assignment

In order for a secured party to exercise its collection rights under RC 1309.45(A), it must, pursuant to RC 1309.37(C), give the account debtor notification which sets forth: (1) that the account has been assigned; (2) that payment is to be made directly to the secured party; and (3) a reasonable identification of the rights assigned. Surety Sav. & Loan Co. v. Kanzig (Ohio 1978) 53 Ohio St.2d 108, 372 N.E.2d 602, 7 O.O.3d 187.

Consent document signed by account debtors met general notification requirement for valid assignment of being in form as to enable ordinary account debtor to understand that account had been assigned and that payment was to be made to assignee, where notification contained indication that account had been assigned, contained specific direction that payment was to be made to assignee, rather than assignor, there was reasonable and express identification of rights assigned, and notification was in form that enabled account debtors to understand from it that account had been assigned. S. Floridabanc Sav. Assn. v. Prof. Inv. of America (Cuyahoga 1991) 77 Ohio App.3d 435, 602 N.E.2d 677, cause dismissed 63 Ohio St.3d 1436, 588 N.E.2d 863.

Effective notice to the promisor on a note that the promisee has assigned the right to payment must direct the promisor to pay the assignee; language in the assignment merely "authorizing" such payment is insufficient to require the promisor to pay the assignee rather than pay the promisee-assignor. Union Inv., Inc. v. Midland-Guardian (Hamilton 1986) 30 Ohio App.3d 59, 506 N.E.2d 271, 30 O.B.R. 114.

2. Prohibition of assignment

A nonnegotiable, nontransferable promissory note is a "general intangible" within the meaning of RC 1309.01, and the maker of the note is therefore an "account

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debtor" under that section, so that an assignment of the amount due on the note by the promisee as collateral creates a security interest in the assignee within the meaning of RC 1301.01; the prohibition of transfer does not prevent assignment of the amount due under the note. *Union Inv., Inc. v. Midland-Guardian* (Hamilton 1986) 30 Ohio App.3d 59, 506 N.E.2d 271, 30 O.B.R. 114.

3. Warranties

When a merchant, in the regular course of business, assigns a security agreement to a finance company for a valuable consideration there is an implied warranty that the security agreement is merchantable. *Public Finance Corp. of Youngstown No. 2 v. Furnitureland of Youngstown, Inc.* (Mahoning 1969) 17 Ohio App.2d 213, 245 N.E.2d 740, 46 O.O.2d 306.

Where there is such a serious question of failure of consideration that a security agreement can be enforced only by the filing of a lawsuit, such as where the buyer has returned the goods which are the subject of the security agreement to the seller and does not have replacement goods in his possession, the security agreement is not merchantable, and the assignee of the security agreement has the right to rescind the assignment agreement and to recover from the assignor the amount of consideration paid for the assignment of such security agreement. *Public Finance Corp. of Youngstown No. 2 v. Furnitureland of Youngstown, Inc.* (Mahoning 1969) 17 Ohio App.2d 213, 245 N.E.2d 740, 46 O.O.2d 306.

4. Construction

A creditor providing floor plan financing is not an "assignee" for purposes of RC 1309.37, which limits assignees' rights. *General Elec. Capitol Corp. v. Deere Credit Services, Inc.* (S.D. Ohio 1992) 799 F.Supp. 832.

A security interest in chattel paper is not alone an "assignment" under RC 1309.37, since it might relate to accounts receivable. *General Elec. Capitol Corp. v. Deere Credit Services, Inc.* (S.D. Ohio 1992) 799 F.Supp. 832.

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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XIII. COMMERCIAL TRANSACTIONS
CHAPTER 1309. SECURED TRANSACTIONS; SALES OF ACCOUNTS AND CHATTEL PAPER
APPLICABILITY AND DEFINITIONS

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1309.04 TRANSACTIONS EXCLUDED

<Note: See also following version of this section, eff. 7-1-98>

Sections 1309.01 to 1309.50 of the Revised Code do not apply:

(A) to a security interest subject to any statute of the United States such as the "Ship Mortgage Act, 1920," 41 Stat. 1000, 46 U.S.C. 911, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or

(B) to a lien given by statute or other rule of law for services or materials except as provided in section 1309.29 of the Revised Code on priority of such liens; or

(C) to a transfer of a claim for wages, salary, or other compensation of an employee; or

(D) to a transfer by a governmental subdivision or agency; or

(E) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract, or a transfer of a single account to an assignee in whole or partial satisfaction of a pre-existing indebtedness; or

(F) to a transfer of an interest or claim in or under any policy of insurance, except as provided with respect to proceeds under section 1309.25 of the Revised Code and priorities in proceeds under section 1309.31 of the Revised Code; or

(G) to a right represented by a judgment, other than a judgment taken on a right to payment which was collateral; or

(H) to any right of set-off; or

(I) except to the extent that provision is made for fixtures in section 1309.32 of the Revised Code, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or

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(J) to a transfer in whole or in part of any claim arising out of a tort; or

(K) to a transfer of an interest in any deposit account, division (A) (5) of section 1309.01 of the Revised Code, except as provided with respect to proceeds under section 1309.25 of the Revised Code, and priorities in proceeds under section 1309.31 of the Revised Code.

CREDIT(S)

(1993 H 152, eff. 7-1-93; 1988 H 449; 1978 S 85; 129 v 13; UCC 9-104)

<Note: See also following version of this section, eff. 7-1-98>

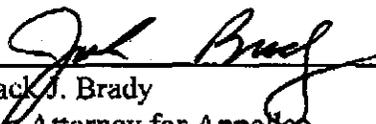
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *Appendix to Merit Brief of Appellee Core Funding Group, LLC* was sent this 30th day of October, 2006, via ordinary U.S. Mail, to: Appellants Diana McDonald, 2633 Winzley Place, Duluth, Georgia 30097 and Diana McDonald, P.C., 2800 Peachtree Industrial Boulevard., Suite C, Duluth, Georgia 30097; and to Rick E. Marsh, Esq., Attorney for Appellees Willie Gary and Gary, Williams, Lanc, Alton & Horst, 175 South Third Street, Suite 700, Columbus, OH 43215; and to Paige J. McMahon, Esq., Attorney for Appellees Willie Gary and Gary, Williams, Parenti, Finney, Lewis, McManus & Watson, Speinagel & McMahon, 42 East Fifth Street, Chillicothe, Ohio 45601-3302.



Jack J. Brady
Attorney for Appellee