

UNPUBLISHED OPINION  
IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

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In re	)	Bankruptcy Case No. 83C-01378
	)	
SALINA TRUCK & AUTO PARTS,	)	
INC., dba ELDON PUGH'S TRUCK	)	
PARTS, a Utah corporation,	)	
	)	
Debtor.	)	
	)	
NATIONAL ACCEPTANCE COMPANY	)	Chapter 7
OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
SALINA TRUCK & AUTO PARTS,	)	
INC., dba ELDON PUGH'S TRUCK	)	Civil Proceeding No. 84PC-1082
PARTS, a Utah corporation,	)	
EAST SLOPE TRUCK & AUTO	)	
PARTS, INC., a Wyoming	)	
corporation, ROGER G. SEGAL,	)	
Trustee of the Estates of	)	
Salina Truck & Auto Parts,	)	
Inc., and East Slope Truck	)	
& Auto Parts, Inc., ELDON D.	)	
PUGH and BONNIE L. PUGH,	)	MEMORANDUM OPINION
	)	
Defendants.	)	

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Appearances: Danny C. Kelly and M. Catherine Caldwell, Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for National Acceptance Company of America; Steven T. Waterman, Watkiss & Campbell, Salt Lake City, Utah, for Roger G. Segal, Trustee; Noel S. Hyde, Nielsen & Senior, Salt Lake City, Utah, for Salina Truck & Auto Parts, Inc. and East Slope Truck & Auto Parts, Inc.

National Acceptance Company of America ("NAC") commenced this adversary proceeding against Roger G. Segal, trustee of the Chapter 7 estates of Salina Truck & Auto Parts, Inc. ("Salina") and East Slope Truck & Auto Parts, Inc. ("East Slope"), and Eldon D. and Bonnie L. Pugh, owners of both of the debtor corporations, seeking a determination that it holds a properly perfected first priority security interest in the seller's interest under a Utah Uniform Real Estate Contract. The trustee counterclaimed under 11 U.S.C. § 544 to avoid the security interest of NAC for failure to properly perfect its interest in property of the debtor.

The trustee claims that the seller's interest in a Utah Uniform Real Estate Contract is personal property classified as an "instrument" under the Utah Uniform Commercial Code, which requires possession by the secured party in order to perfect. NAC argues that the real estate contract is a "general intangible," which requires filing to perfect.

#### FINDINGS OF FACT

The basic facts are not in dispute.<sup>1</sup> On November 1, 1979,

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At a prior hearing on the parties' cross-motions for summary judgment the Court determined that this matter could not be resolved as a matter of law in view of conflicting affidavits as to the manner in which the seller's interest in Utah Uniform Real Estate Contracts is transferred "in the ordinary course of business." Whether a U.C.C. definition is satisfied is typically a question of fact. 8 R. Anderson,

Eldon D. Pugh and Bonnie L. Pugh ("Pughs"), as sellers, sold certain real property in Salt Lake County to Kyle W. Follet and Reva J. Follet, as buyers, using a Utah Uniform Real Estate Contract ("Real Estate Contract"). Only one original of the Real Estate Contract was executed by the parties. Upon execution, the original was delivered to the Pughs. The Real Estate Contract is a standard form entitled "Form 106--Uniform Real Estate Contract," which states on its face that it is an "Approved Form: Utah State Securities Commission and Utah State Realty Association." At all times following its execution, Eldon D. Pugh retained possession of the Real Estate Contract, either on his own behalf or on behalf of Salina.

On or about August 28, 1980, NAC entered into a financing agreement with Salina, East Slope, and Pugh Truck Parts, a sole proprietorship of Eldon D. Pugh. The Pughs were the sole shareholders of Salina and East Slope. Pursuant to the financing agreement, NAC was granted security interests in, among other things, all of the accounts, inventory, equipment, contract rights, chattel paper, goods, and general intangibles of Salina, East Slope, and Pugh Truck Parts. At that time and in connection with the financing agreement, the Pughs executed and delivered the following documents to NAC: (1) A Guarantor's Security

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ANDERSON ON THE UNIFORM COMMERCIAL CODE § 9-105:7, at 555 (1985).

Agreement, whereby the Pughs granted to NAC a first priority security interest in and to all of the Pughs' right, title and interest in the Real Estate Contract; (2) An Assignment of Contract (for security), whereby the Pughs, as assignors, assigned to NAC, as assignee, all right, title, and interest of the Pughs in the Real Estate Contract; and (3) A Trust Deed with Assignment of Rents, covering all right, title and interest of the Pughs in the real property described in the Real Estate Contract. The Assignment was not a preprinted form but was prepared by NAC. It recited, in reference to the Real Estate Contract, "which Contract is delivered herewith." However, NAC never requested the Pughs to deliver the original Real Estate Contract, and, consequently, it was never delivered to NAC.

On September 4, 1980, NAC filed with the Office of the Utah Secretary of State a financing statement evidencing NAC's security interest in the Real Estate Contract. On September 10, 1980, NAC recorded the Assignment and the Trust Deed with the Office of the Salt Lake County Recorder.

On or about October 1, 1982, the Pughs assigned all their right, title, and interest as sellers in the Real Estate Contract and delivered possession of the original Real Estate Contract to Salina. Subsequently, Salina, East Slope, and the Pughs defaulted on their obligations to NAC.

On May 16, 1983, Salina and East Slope each filed a petition for relief under Chapter 7 of the Bankruptcy Code. Roger G. Segal was appointed trustee in each case pursuant to 11 U.S.C. § 702.

At trial, the parties' presentation of evidence was limited to a single point relating to the definition of an "instrument" under Article 9.<sup>2</sup>

The parties paraded a host of notables from the Salt Lake City commercial lending community before the Court in an effort to disclose whether or not the seller's interest in a Utah Uniform Real Estate Contract is transferred by delivery in the ordinary course of business. The evidence presented at trial established that there is no uniform practice in this community regarding the transfer of interests in real estate contracts. While some lenders require or prefer to have possession of the original contract, others do not. The testimony further disclosed that it is not uncommon for Uniform Real Estate Contracts to be executed in multiple originals.

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An "instrument" is defined in Utah Code Ann. § 70A-9-105(1)(i) as "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 the ordinary course of business transferred by delivery with any necessary indorsement or assignment." (Emphasis added).

### DISCUSSION

Determining the nature of the sellers' interest in a Real Estate Contract is a question of state law. See Butner v. United States, 440 U.S. 48, 54-55, 99 S.Ct. 914, 59 L.Ed.2d 136, 4 B.C.D. 1259, Bankr.L.Rep. (CCH) ¶ 67,046 (1979); In re American Mariner, 734 F.2d 426, 435, 12 B.C.D. 227, Bankr.L.Rep. (CCH) ¶ 69,886, 10 C.B.C.2d 910 (9th Cir. 1984); Matter of Village Properties, Ltd., 723 F.2d 441, 443, 12 B.C.D. 370, Bankr.L.Rep. (CCH) ¶ 69,583, 10 C.B.C.2d 224 (5th Cir.) cert. denied 466 U.S. 974, 104 S.Ct. 2350, 80 L.Ed.2d 823 (1984); In re Busick, 719 F.2d 922, 926, 11 B.C.D. 433, Bankr.L.Rep. (CCH) ¶ 69,464 (7th Cir. 1983); Johnson v. First National Bank of Montevideo, 719 F.2d 270, 274, 11 B.C.D. 290, Bankr.L.Rep. (CCH) ¶ 69,424, 9 C.B.C.2d 579 (8th Cir. 1983), cert. denied 465 U.S. 1012, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984); Gray v. Snyder, 704 F.2d 709, 712, 10 B.C.D. 566, Bankr.L.Rep. (CCH) ¶ 69,111 (4th Cir. 1983). The state law applicable to this proceeding is, of course, the Utah Uniform Commercial Code.

Article 9 of the Utah Uniform Commercial Code applies to any transaction intended to create a security interest in personal property. Utah Code Ann. § 70A-9-102(1)(a). Both parties agree that the assignment by the Pughs of their interest in the Real Estate Contract was intended as security for the loans from NAC.

Therefore, provided the Real Estate Contract is properly classified as "personal property," the transaction is subject to Article 9.

In this Court's view, the Utah Supreme Court, applying the doctrine of equitable conversion, would certainly hold that a Utah Uniform Real Estate Contract is personal property within the meaning of Article 9 of the Uniform Commercial Code. See Franklin Financial v. Fillmore (In re Peterson), slip op., nos. B-75-386 & B-75-387 (Bkrtcy. D. Utah Dec. 3, 1976) (per Jenkins, J.); In re Estate of Willson, 28 Utah 2d 197, 499 P.2d 1298, 1300 (1972); Allred v. Allred, 15 Utah 2d 396, 393 P.2d 791, 792 (1964). Cf. Matter of Equitable Development Corp., 617 F.2d 1152, 1157-58 (5th Cir. 1980); In re Southworth, 22 B.R. 376, 378, 34 U.C.C.R.S. (D. Kan. 1982); In re D.J. Maltese, Inc., 42 B.R. 589, 592, 39 U.C.C.R.S. 657 (Bkrtcy. E.D. Mich. 1984); In re Equitable Development Corp., 20 U.C.C.R.S. 1349, 1354 (Bkrtcy. S.D. Fla. 1976); In re Freeborn, 94 Wash.2d 336, 617 P.2d 424, 426-27, 29 U.C.C.R.S. 1625 (1980).

Thus, when the Pughs pledged their interest in the Real Estate Contract as collateral to NAC, they pledged personal property. It follows that recording in the real property records of the County Recorder is ineffective and the Utah Uniform Commercial Code governs the method of perfection. See In re Staff Mortgage & Investment Corp, 625 F.2d 281, 283-84, 6 B.C.D.

1385, 29 U.C.C.R.S. 639 (9th Cir. 1980); In re Equitable Development Corp., 617 F.2d at 1152; Shuster v. Doane (In re Shuster), 47 B.R. 920, 924, 40 U.C.C.R.S. 1840 (D. Minn. 1985), rev'd 784 F.2d 883, 42 U.C.C.R.S. 1433 (8th Cir. 1986).

Since Article 9 applies, the Court must determine the proper method of perfection. To do this, the collateral must first be classified. The parties disagree as to the classification of the Real Estate Contract--the plaintiff calling it a "general intangible" as defined by Utah Code Ann. § 70A-9-106, and the trustee insisting that it is an "instrument" within the meaning of § 70A-9-105(1)(i). Generally, under Article 9, filing is required for perfection of all security interests except those excepted under § 70A-9-302(1). Security interests in "instruments" must be perfected by possession, while security interests in "general intangibles" are perfected by filing. Utah Code Ann. § 70A-9-304(c)(1).

The definition of an "instrument" under Article 9 has generated little controversy, in Utah or elsewhere, and the relatively few cases which have considered it have been primarily concerned with whether items such as nonnegotiable certificates of deposit qualify as "instruments." See 8 W. Hawkland, R. Lord & C. Lewis, UNIFORM COMMERCIAL CODE SERIES § 9-105:10, at Art. 9-p. 179 (1986). The kinds of writings which courts have most often found to be "instruments" are stock certificates,



municipal bonds, and certificates of deposit. See In re Air Florida System, Inc., 49 B.R. 321, 325, 41 U.C.C.R.S. 197 (Bkrctcy. S.D. Fla. 1985).

The trustee concedes that a Utah Uniform Real Estate Contract is neither a negotiable instrument nor a security, but argues that the seller's interest therein satisfies the third alternative definition of an "instrument" found in § 70A-9-105(1)(i)(C). The requirements of that provision may be subdivided into six parts: (1) a writing; (2) which evidences the right to the payment of money; (3) and is not itself a security agreement; (4) or a lease; and (5) is of a type which is in the ordinary course of business transferred by delivery; with (6) any necessary indorsement or assignment.

The term "general intangibles" is a residual classification of collateral included in Article 9. It was intended to include any intangible asset not specifically defined or excluded elsewhere in the Uniform Commercial Code. The Official Comment notes that the term refers to "miscellaneous types of contractual rights and other personal property which are used or may be used as commercial security." Section 70A-9-106 provides:

Definitions -- "Account" -- "General intangibles." "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper,

documents, instruments, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

Among the kinds of collateral which have been held to be "general intangibles" are the following: a liquor license;<sup>3</sup> patents and trademarks;<sup>4</sup> the right to a condemnation award;<sup>5</sup> tax refunds;<sup>6</sup> the right to receive rent from a real property

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See, e.g., In re O'Neill's Shannon Village, 750 F.2d 679, 682, 39 U.C.C.R.S. 1781 (8th Cir. 1984); Bogus v. American National Bank, 401 F.2d 458, 461-62, 5 U.C.C.R.S. 937 (10th Cir. 1968); Paramount Finance Corp. v. United States, 379 F.2d 543, 544-45, 4 U.C.C.R.S. 502 (6th Cir. 1967); In re Coed Shop, Inc., 435 F.Supp. 472, 473, 22 U.C.C.R.S. (N.D. Fla. 1977), aff'd 567 F.2d 1367 (5th Cir. 1978); Gibson v. Alaska Alcoholic Beverage Control Board, 377 F.Supp. 151, 153, 14 U.C.C.R.S. 1024 (D. Alas. 1974); In re Ratcliff Enterprises, Inc., 44 B.R. 778, 780, 39 U.C.C.R.S. 1794 (Bkrtcy. E.D. Mich. 1984); In re Midland Services, Inc., 10 U.C.C.R.S. 499, 502 (Bkrtcy. D. Neb. 1971); Queen of the North, Inc. v. LeGrue, 582 P.2d 144, 148, 24 U.C.C.R.S. 1301 (D. Alas. 1978).

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See, e.g., In re Magnum Opus Electronics, Ltd., 19 U.C.C.R.S. 242, 243 (S.D.N.Y. 1976); In re Roman Cleanser Co., 43 B.R. 940, 943, 39 U.C.C.R.S. 1770 (Bkrtcy. E.D. Mich. 1984); In re Emergency Beacon Corp., 23 U.C.C.R.S. 766, 770 (Bkrtcy. S.D.N.Y. 1977); Reis v. Ralls, 250 Ga. 721, 301 S.E.2d 40, 35 U.C.C.R.S. 951, 954 (1983).

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See, e.g., In re Candy Lane Corp., 38 B.R. 571, 576, 38 U.C.C.R.S. 1721 (Bkrtcy. S.D.N.Y. 1984).

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See, e.g., In re TWI, Inc., 39 U.C.C.R.S. 1031, 1033 (4th Cir. 1984); In re Metric Metals International, Inc., 20 B.R. 633, 636, 33 U.C.C.R.S. 1495 (S.D.N.Y. 1981); In re American Home Furnishings Corp., 48 B.R. 905, 908, 41 U.C.C.R.S. 631 (Bkrtcy. W.D. Wash. 1985); In re Carmack, 48 B.R. 175, 177, 41 U.C.C.R.S. 227 (Bkrtcy. N.D. Okla. 1985); In re Kendrick & King Lumber, Inc., 14 B.R. 764, 766, 8 B.C.D. 261, Bankr.L.Rep. (CCH) ¶ 68,417, 32 U.C.C.R.S. 575 (Bkrtcy. W.D.

leasehold;<sup>7</sup> payment in kind ("PIK") benefits;<sup>8</sup> unissued stock;<sup>9</sup> an insurance company's customer lists;<sup>10</sup> an expected recovery from litigation;<sup>11</sup> rights arising under a cable television installation agreement;<sup>12</sup> a patent application;<sup>13</sup> a

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Okla. 1981); In re Certified Packaging, Inc., 8 U.C.C.R.S. 95, 102 (Bkrtcy. D. Utah 1970) (per Jenkins, J.).

See, e.g., In re Sabre Farms, Inc., 27 B.R. 532, 536, 39 U.C.C.R.S. 1031 (Bkrtcy. D. Ore. 1982).

See, e.g., In re Sunberg, 729 F.2d 561, 562-63, 11 B.C.D. 1254, Bankr.L.Rep. (CCH) ¶ 69,728, 37 U.C.C.R.S. 1700 (8th Cir. 1984); In re Mattick, 45 B.R. 615, 617-18, 40 U.C.C.R.S. 704 (Bkrtcy. D. Minn. 1985); In re Liebe, 41 B.R. 965, 39 U.C.C.R.S. 1025 (Bkrtcy. N.D. Iowa 1984); In re Judkins, 41 B.R. 369, 373 & n. 4, Bankr.L.Rep. (CCH) ¶ 69,986, 39 U.C.C.R.S. 1018 (Bkrtcy. M.D. Tenn. 1984); In re Schmidt, 38 B.R. 380, 383, 38 U.C.C.R.S. 589 (Bkrtcy. D.N.D. 1984); In re Barton, 37 B.R. 545, 546-47, 38 U.C.C.R.S. 598 (Bkrtcy. E.D. Wash. 1984); In re Kruse, 35 B.R. 958, 964, 37 U.C.C.R.S. 1303 (Bkrtcy. D. Kan. 1983).

See, e.g., General Electric Co. v. Tracey Service Co., 38 U.C.C.R.S. 330, 332 (3d Cir. 1984).

See, e.g., In re Davies Insurance Service, Inc., 33 B.R. 252, 254, 37 U.C.C.R.S. 899 (Bkrtcy. W.D. Pa. 1983).

See, e.g., Merchants National Bank v. Ching, 681 F.2d 1383, 34 U.C.C.R.S. 270 (11th Cir. 1982); Kapp v. United States, 20 U.C.C.R.S. 1355, 1357 (N.D. Ill. 1976); In re Phoenix Marine Corp., 20 B.R. 424, 426, 34 U.C.C.R.S. 280 (Bkrtcy. E.D. Va. 1982); Board of County Commissioners v. Berkeley Village, 40 Colo.App. 431, 580 P.2d 1251, 1255, 24 U.C.C.R.S. 975 (1978); In re Estate of Hill, 27 Ore.App. 893, 557 P.2d 1367, 20 U.C.C.R.S. 1319 (1976).

See, e.g., Dynair Electronics, Inc. v. Video Cable, Inc., 55 Cal.App.3d 11, 127 Cal.Rptr. 268, 18 U.C.C.R.S. 1047, 1053 (1976).

See, e.g., Holt v. United States, 13 U.C.C.R.S. 336, 338 (D.D.C. 1973).

newsletter;<sup>14</sup> blueprints, technical data and cost estimates;<sup>15</sup>  
a commercial clamming license;<sup>16</sup> a certificate of public  
convenience and necessity;<sup>17</sup> a member's capital reserve account  
in a farm cooperative;<sup>18</sup> the right to a refund of a security  
deposit under a lease of real property;<sup>19</sup> and the seller's  
interest under land sales contracts.<sup>20</sup>

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See, e.g., In re Washington Communications Group, Inc., 10 B.R. 676, 678, Bankr.L.Rep. (CCH) ¶ 67,993, 6 C.B.C.2d 491, 31 U.C.C.R.S. 280 (Bkrtcy. D.D.C. 1981).

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See, e.g., United States v. Antenna Systems, Inc., 251 F.Supp. 1013, 1016, 3 U.C.C.R.S. 258 (D.N.H. 1966).

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See, e.g., First Pennsylvania Bank v. Wildwood Clam Co., 535 F.Supp. 266, 268, 33 U.C.C.R.S. 686 (E.D. Pa. 1982).

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See, e.g., Cleveland Freight Lines, Inc., 14 B.R. 777, 780, 32 U.C.C.R.S. 1597 (Bkrtcy. N.D. Ohio 1981). Contra, In re L & K Transportation Co., 8 B.R. 921, 30 U.C.C.R.S. 1745 (Bkrtcy. D. Mass. 1981).

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See, e.g., In re Cosner, 3 B.R. 445, 448, 29 U.C.C.R.S. 674 (Bkrtcy. D. Ore. 1980).

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See, e.g., United States v. Samuel Refining Corp., 313 F.Supp. 684, 686-87, 7 U.C.C.R.S. 914 (E.D. Pa. 1970), aff'd 461 F.2d 941 (3d Cir. 1972).

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See, e.g., In re Shuster, 47 B.R. at 920 (assignment of vendor's interest under contract for deed is a general intangible); In re D.J. Maltese, Inc., 42 B.R. 589, 592, 39 U.C.C.R.S. 657 (Bkrtcy. E.D. Mich. 1984) (debtor's right to receive payments pursuant to contract for the sale of real estate is a general intangible); In re Himlie Properties, Inc., 36 B.R. 32, 34-35, 38 U.C.C.R.S. 323 (Bkrtcy. W.D. Wash. 1983) (assignment of vendor's right to receive payments under real estate contracts is a general intangible); In re S.O.A.W. Enterprises, Inc., 32 B.R. 279, 285, 11 B.C.D. 16, 37 U.C.C.R.S. 885 (Bkrtcy. W.D. Tex. 1983) (real estate sales contracts are general intangibles for Article 9 purposes; In re Southworth, 22 B.R. 376, 378-79 (Bkrtcy. D. Kan. 1982)

Each court that has considered the issue has determined that the vendor's interest in a real estate contract, when pledged as security, is a "general intangible." But in no reported decision has a party argued, as the trustee has done in the present case, that the real estate contract was an "instrument."

Since this Court is compelled by the provisions of Article 9 to classify the Real Estate Contract as falling into one of two mutually exclusive categories, it must look to the evidence to determine whether the requirements of each have been met. At trial, the trustee identified each element of an "instrument," under Section 70A-9-105(1)(i) and presented evidence to show that the contract fell within the scope of the statutory definition. The trustee's proof failed to satisfy the Court that a Utah Uniform Real Estate Contract is in the "ordinary course of business transferred by delivery with any necessary endorsement

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(perfection of an interest in vendor's right to receive payments under an installment land contract requires U.C.C. filing); In re Freeborn, 94 Wash.2d 336, 617 P.2d 424 (1980) (assignee under assignment of vendor's right to real estate contract payments must file pursuant to Article 9 in order to perfect). See also B. Clark, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 1.8[10][a], at 1-71 to -72 (1980) (a security interest in contracts for the sale of land probably constitutes a "general intangible"); Nelson & Whitman, Installment Land Contracts--The National Scene Revisited, 1985 B.Y.U.L.Rev. 1,60 (an installment land contract is correctly understood to be a "general intangible"); Bowmar, Real Estate Interests as Security Under the UCC: The Scope of Article 9, 12 U.C.C.L.J. 99, 142-43 (1979) (pledge of vendor's rights under a real estate contract appears to be a "general intangible").

or assignment."<sup>21</sup> On this basis alone, it is clear that the Real Estate Contract involved here is not an "instrument." This Court therefore concludes that since the assignment of the seller's interest in a Utah Uniform Real Estate Contract does not clearly fall within the definition of "instrument" provided by Article 9, this collateral must be characterized as a "general intangible."

Counsel for NAC shall prepare and submit an appropriate order in accordance with the foregoing within 10 days.

DATED this 4 day of Sept, 1986.

BY THE COURT:

  
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GLEN E. CLARK  
UNITED STATES BANKRUPTCY JUDGE

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Professors Nelson and Whitman have opined that real estate contracts would have difficulty satisfying this requirement. "Customs vary from one area of the nation to another, but it would be difficult to say that there is a broad custom of transferring or pledging installment contracts by delivery of the original contract document." Installment Land Contracts--The National Scene Revisited, supra, note 20, at 60 n. 232.