

1976 S.C. Op. Atty. Gen. 262 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4413, 1976 WL 23030

Office of the Attorney General

State of South Carolina

Opinion No. 4413

August 2, 1976

***1 The purchases of notes and purchase money security agreements by Andrews Bank and Trust Company from O & W Toyota, Inc., by assignments with recourse against the dealer and with further personal guarantees by the company's owners, are subject to the maximum loan limitations of Section 8–225.**

Commissioner of Banking

You have asked whether the purchases of notes and purchase money security agreements by Andrews Bank and Trust Company from O & W Toyota, Inc., pursuant to a dealer security agreement, by which the contracts are assigned with recourse against O & W Toyota, Inc., and are further personally guaranteed by the owners of O & W Toyota, Inc., are subject to maximum loan limitations of Section 8–225, South Carolina Code of Laws (1962), as amended, or excepted therefrom as commercial paper?

Section 8–225, South Carolina Code of Laws (1962), as amended, provides, *inter alia*, as follows:

The total liabilities to any bank of any person for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock, capital notes and debentures of any such bank actually paid in and its surplus, except by two-thirds vote of the directors of the bank, in which case such liabilities other than those mentioned in § 8–228 may be extended to fifteen percent of the capital stock, capital notes and debentures actually paid in and the surplus of such bank . . . [T]he discount of commercial or business paper shall not be considered as money borrowed.

The question presented then is whether the purchases of the notes and security agreements of O & W Toyota, Inc., are exempt from the limitations of Section 8–225 as the discounting of commercial or business paper. The term ‘commercial paper’ in the Uniform Commercial Code, Title 10.3 S. C. Code (1962), as amended, generally includes within its scope drafts, checks, certificates of deposit and notes. In order to be a negotiable instrument and, thus, ‘commercial paper,’ a writing must meet the following requirements of Section 10.3–104, S. C. Code (1962), as amended:

- (a) be signed by the maker or drawer; and
- (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation, or power given by the maker or drawer except by this Title; and
- (c) be payable on demand or at a definite time; and
- (d) be payable to order or to bearer.

Sections 10.3–105 through 10.3–112, S. C. Code (1962), as amended, further define the above requirements. Therefore, the question narrows to whether the particular instrument used by O & W Toyota, Inc., and purchased by Andrews Bank and Trust Company meets the UCC's requirements of negotiability, which would classify it as ‘commercial paper.’

An examination of the instrument in question reveals the inclusion of terms and conditions which render the instrument non-negotiable, and thus not commercial paper within the meaning of Title 10.3. Basically, the instrument intermingles a contract to purchase, a note, a purchase money security agreement, and an assignment. However, the following terms and conditions included in the note render it non-negotiable.

*2 1. On the reverse side of the instrument, which is incorporated by reference in the note, the customer warrants in (D) and (F) to carry certain insurance and to pay all taxes and assessments. Since these charges cannot be ascertained or determined by an examination of the instrument alone, the note is not payable in a sum certain as required by Sections 10.3–104(1)(b) and 10.3–105(2)(a). Thus, the provision for the payment of taxes, insurance, and assessments render the instrument non-negotiable as it requires the holder to look to other documents (e.g., insurance policy, tax records, etc.) to compute the total terms of payment. 2 *Bender's U.C.C.*, § 2.09(3); 2 *Auderson's U.C.C.*, § 3–106.10; see also, *Allen-Parker Co. v. Lollis*, 257 S. C. 266, 185 S. E. 2d 739 (1971) and *Bank of Commerce v. Waters*, 215 S. C. 593, 56 S. E. 2d 350 (1949) (cases decided under Negotiable Instruments Law prior to the adoption of the U.C.C.).

2. Section 10.3–104(1)(b) provides that the note must contain an unconditional promise to pay and ‘no other promise, order, obligation or power given’ except as provided in Section 10.3–112. The note in question contains promises and powers that either are not provided for or are beyond the scope of the additional terms allowed by Section 10.3–112. For example, on the reverse side of the instrument, which is incorporated by reference into the note, the seller is allowed to waive particular defaults or remedies without waiving others, and it requires the written consent of the seller for any transfer of the buyer's obligation. The note further provides that ‘CUSTOMER WILL ASSERT TO CLAIM OR DEFENSE HE MAY HAVE AGAINST SELLER, AGAINST ANY ASSIGNEE OF THIS AGREEMENT.’ In *Geiger Finance Co. v. Graham*, 123 Ga. App. 771, 182 S. E. 2d 521 (1971), the Georgia Court of Appeals was presented with a similar instrument which likewise had the following provisions:

- a. right of holder to waive particular defaults or remedies without waiving others;
- b. requirement of holders written consent for any transfer of buyer's obligation;
- c. an application for insurance;
- d. the waiver by the buyer of any defense, counterclaim or cross-examination that the buyer could have asserted against the seller.

The court held that the provisions of that particular note went further than ‘an unconditional promise or order to pay’ as contemplated by U.C.C. provision 3–104(1) (Section 10.3–104(1)). The Court particularly noted that the waiver of ‘any defense’, which would presumably include infancy, incompetency, discharge in bankruptcy, etc., was not the type of waiver contemplated by 3–112(e) (Section 10.3–112(e)). The South Carolina courts reached the same conclusion of non-negotiability in two pre-U.C.C. cases which included some or all of the following provisions:

1. obligation of buyer to pay taxes;
2. obligation of buyer to insure property;
3. requirement of seller's written consent to transfer buyer's obligation;

*3 4. provision for sale of property upon default

5. warranty not to use property illegally
6. warranty not to remove property from state without seller's written consent;

7. warranty not to use the property for hire *Bank of Commerce v. Waters*, 215 S. C. 593, 56 S. E. 2d 350 (1949); *Allen-Parker Co. v. Lollis*, 257 S. C. 266, 185 S. E. 2d 739 (1971).

3. Other factors which to a lesser extent mitigate against negotiability are the description of the payee in the note as 'seller' rather than specifically naming the payee as required by Section 10.3–110 (reader must look to security agreement to determine the seller contrary to Section 10.3–105(2)), see *Hong Kong Importers v. American Express Corp.* — La. —, 301 So. 2d 707 (1974); the provision for refund in case of prepayment according to the Rule of 78, when the finance charge does not appear in the note. *Walls v. Morris Chevrolet, Inc.*, — Okla. —, 515 P. 2d 1405 (1973).

The intent of Title 10.3 of the Uniform Commercial Code is that a negotiable instrument carry nothing but a simple promise to pay, with certain limited exceptions as specified in Section 10.3–112. See, Official Comment 3, Section 10.3–104, S. C. Code (1962), as amended. Where there is any doubt, the presumption is against negotiability. Official Comment 5, *supra*; *Geiger Finance Co., v. Graham, supra*. It is apparent that the note in question contains provisions which makes the instrument non-negotiable. Therefore, it would be controlled by Title 10.9, 'Secured Transactions,' and would not be considered 'commercial paper.'

Richard B. Kale, Jr.
Assistant Attorney General

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