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Article 12

Conditional Sales - Waiver of Defense Clause Valid as Between Assignee of Vendor and Vendee

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stances before examining the Canons. If the motives and conduct are warranted, and a violation of the Canons nevertheless exists, censure may be the proper punishment but not disbarment or suspension.

CONDITIONAL SALES–WAIVER OF DEFENSE CLAUSE VALID AS BETWEEN ASSIGNEE OF VENDOR AND VENDEE

Defendant signed and executed a conditional sales contract for the purpose and installation of an air conditioning unit. A clause in the conditional sales contract read: "This contract may be assigned and/or said note may be negotiated without notice to me and when assigned and/or negotiated shall be free from any defense, counter claim or cross complaint by me." The note was endorsed and the contract was assigned to the plaintiff. The payee of the note failed to deliver and install the unit sold. Plaintiff confessed judgment upon the note. Pleadings, alleging failure of consideration and that the plaintiff had knowledge that the note was given for the purchase and installation of the unit, were filed by defendant to vacate the judgment. The judgment was opened and defendant was allowed to defend. Upon motion of plaintiff, the trial court struck all of the pleadings of defendant and rendered judgment for the plaintiff. The Appellate Court of Illinois for the First District affirmed on the ground that the defense relied upon was barred by the waiver clause and that the Uniform Sales Act, sec. 71,[1]which provides: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale," permits such clause. *Commercial Credit Corp. v. Biagi*, 11 Ill. App. 2d 80, 136 N.E. 2d 580 (1956).

Since a conditional sales contract is normally held to be a non-negotiable instrument,[2] the rights of the assignee[3] are no greater than those of the assignor and are subject to all defenses that the buyer had against the seller at the time of the assignment.[4] But if the instrument sued on is negotiable and the plaintiff is a holder in due course, he will ordinarily be immune to many of the defenses which the chattel purchaser could assert against the seller.[5] For this reason, finance companies hope to impart limited elements of negotiability to conditional sales contracts by using such

[1] Ill. Rev. Stat. (1955) c. 121½.

[2] E.g., Security Finance Co. v. Comini, 119 Or. 460, 249 P. 83 (1921).

[3] Generally a financing institution.

[4] E.g., Doub v. Rawson, 142 Wash. 190, 252 P. 920 (1927).

[5] E.g., Commercial Credit Co. v. Seale, 30 Ala. App. 440, 8 So. 2d 199 (1942), cert. denied 242 Ala. 661, 8 So. 2d 202 (1942).

devices[6] as the no-defense waiver clause in these contracts. The court in the instant case held that the waiver clause barred the defense asserted regardless of whether the assignee was a holder in due course under the Uniform Negotiable Instruments Act.[7]

The Uniform Conditional Sales Act makes no provision for a clause in a conditional sales contract waiving the purchaser's defenses as against the assignee. The Act does state, in section 26, that the buyer before or at the time of the making of the contract cannot validly waive the provisions of sections 18, 19, 20, 21 and 25,[8] except that the contract may provide for rescission by the seller upon default by the buyer under section 16 and that if the contract so provides, the seller may retake the goods without complying with sections 17 to 25 inclusive[9] upon crediting the buyer with the purchase price of the goods. However, an applicable provision does appear in the Uniform Commercial Code[10] which provides that an agreement by a buyer of consumer goods as part of the contract for sale that he will not assert against an assignee any claim or defense arising out of the sale is not enforceable by any person. It also provides that in all other cases an agreement by a buyer not to assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee who takes for value, in good faith, and without notice of a claim or defense except to defenses which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3).[11]

The court have not been uniform in their holdings as to the validity of a provision in a conditional sales contract waiving the purchaser's defenses as against the assignee. Courts have generally allowed parties to contract away the defense of breach of warranty or failure of consideration.[12] In

[6] A negotiable instrument executed for the purchase price is the principal device employed for this purpose. For a treatment of this subject, see: Consumer Sales Financing—Placing the Risk for Defective Goods, 102 Pa. L. Rev. 782 (1954).

[7] Ill. Rev. Stat. (1955) c. 98, § 79.

[8] These sections relate to redemption and resale by the seller in the case of default by the buyer.

[9] Ibid.

[10] The Uniform Commercial Code became law in Pennsylvania on July 1, 1954. This is the only jurisdiction which has adopted it to date.

[11] Purdon's Pa. Stat. Ann. (1953) Title 12A, §§ 9-206.

[12] United States ex. rel. Admr. of F.H.A. v. Troy-Parisian, Inc., 115 F. 2d 224 (9th Cir., 1940), cert. denied, 312 U.S. 699 (1941); Jones v. Universal C.I.T. Credit Corp., 88 Ga. App. 24, 75 S.E. 2d 822 (1953); National City Bank v. Prospect Syndicate, Inc., 170 Misc. 611, 10 N.Y.S. 2d 759 (N.Y. Mun. Ct., 1939); Refrigeration Discount Corp. v. Haskew, 194 Ark. 549, 108 S.W. 2d 908 (1937); Anglo-California Trust Co. v. Hall, 61 Utah 223, 211 P. 991 (1922); Elzey v. Ajax Heating Co., 10 N.J. Misc. 281, 158 A. 851 (1932); see National City Bank v. La Porta, 109 N.Y.S. 2d 143 (S. Ct., 1951); Public

United States ex rel. Admr. of F.H.A. v. Troy-Parisian, Inc.,[13] which involved a conditional sales contract with a clause similar to the one in the instant case, the court held that the breach of warranty defense would not be allowed, holding that "unless in circumstances affronting public policy, it is no part of the business of the courts to decline to give effect to contracts which the parties have fairly and deliberately made."[14]

In several cases in which the defense sought to be waived was breach of warranty or failure of consideration, courts have ruled the waiver of defense provision in the contract to be invalid.[15] Also, courts consider such clauses invalid where the defense attempted to be waived by a provision of the type involved in the instant case involves moral turpitude, such as fraud[16] and usury.[17] The reasons given for refusing to give effect to the no-defense clause in these cases is that the waiver is against public policy;[18] that the parties to a non-negotiable instrument could not by stipulation give it the effect of a negotiable instrument,[19] and that the fraud which vitiates the contract also vitiates the waiver clause.[20]

National Bank & Trust Co. of N.Y. v. Fernandez, 121 N.Y.S. 2d 721 (N.Y. Mun. Ct., 1952); Glens Falls Nat'l Bank & Trust Co. v. Sansivere, 136 N.Y.S. 2d 672 (County Ct., 1955); President & Directors of Manhattan Co. v. Monogram Associates, Inc., 276 App. Div. 766, 92 N.Y.S. 2d 579 (2d Dep't, 1949), appeal denied, 300 N.Y. 677, 91 N.E. 2d 328 (1950).

[13] 115 F. 2d 224 (9th Cir., 1940), cert. denied, 312 U.S. 699 (1941).

[14] Ibid., at p. 226.

[15] San Francisco Securities Corp. v. Phoenix Motor Co., 25 Ariz. 531, 220 P. 229 (1923); American Nat'l Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 216 Pac. 376 (1923); Progress Finance & Realty Co. v. Stempel, 231 Mo. App. 721, 95 S.W. 2d 834 (1936); Industrial Loan Co. of Cape Girardeau v. Grisham, 115 S.W. 2d 214 (Mo. App., 1938); see Pacific Acceptance Corp. v. Whalen, 43 Idaho 15, 248 P. 444 (1926).

[16] Equipment Acceptance Corp. v. Arwood Can Mfg. Co., 117 F. 2d 442 (C.A. 6th, 1942); First Acceptance Corp. v. Kennedy, 95 F. Supp. 861 (D.C. Iowa, 1951), rev'd on other grounds, 194 F. 2d 819 (C.A. 8th, 1952); Pacific Acceptance Corp. v. Whalen, 43 Idaho 15, 248 P. 444 (1926); cf. Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 298 P. 703 (1931); see American Nat'l Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 216 Pac. 376 (1923); Malas v. Lounsbury, 193 Wis. 531, 214 N.W. 332 (1927); President & Directors of Manhattan Co. v. Monogram Associates, Inc., 276 App. Div. 766, 92 N.Y.S. 2d 579 (2d Dep't, 1949), appeal denied, 300 N.Y. 677, 91 N.E. 2d 328 (1950).

[17] Motor Contract Co. v. Van Der Volgen, 161 Wash. 449, 298 P. 703 (1931).

[18] San Francisco Securities Corp. v. Phoenix Motor Co., 25 Ariz. 531, 220 P. 229 (1923); Progress Finance & Realty Co. v. Stempel, 231 Mo. App. 721, 95 S.W. 2d 834 (1936); Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 298 P. 703 (1931); Industrial Loan Co. of Cape Girardeau v. Grisham, 115 S.W. 2d 214 (Mo. App., 1938).

[19] Equipment Acceptance Corp. v. Arwood Can Mfg. Co., 117 F. 2d 442 (C.A. 6th, 1942); American Nat'l Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 216 Pac. 376 (1923); Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 298 P. 703 (1931); see Industrial Loan Co. of Cape Girardeau v. Grisham, 115 S.W. 2d 214 (Mo. App., 1938).

[20] First Acceptance Corp. v. Kennedy, 95 F. Supp. 861 (D.C. Iowa, 1951), rev'd on other grounds, 194 F. 2d 819 (C.A. 8th, 1952). See American Nat'l Bank v. A. G. Som-

A few cases indicate that a conditional sales contract with a waiver of defense provision in event of an assignment of the contract may serve as a basis for an estoppel in pais, but generally not an estoppel by contract, barring the conditional purchaser from asserting his defenses where he made the representation with the intent that it should be relied upon by the assignee and the assignee purchased for value in good faith relying thereon.[21]

By permitting the defenses of the buyer to be barred in an action by the assignee on a conditional sales contract with a waiver of defense clause of the type involved here, the courts are giving the assignee the rights of a holder in due course and thereby placing the risk of loss on the buyer when the dealer has become insolvent after delivering defective goods or after failing to deliver the goods. Where the dealer is not insolvent, the buyer, if he can afford it, must now bring a second action against the dealer. But, because of the reduced risk involved, dealers will be able to more readily assign these contracts to financing institutions thereby increasing the availability of credit to the purchaser. And since the waiver would operate only in favor of a good faith assignee and the purchaser would have an action against the dealer for any breach, the waiver provision would not encourage wrongs and anti-social actions.

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merville, Inc., 191 Cal. 364, 216 Pac. 376 (1923); President & Directors of Manhattan Co. v. Monogram Associates, Inc., 276 App. Div. 766, 92 N.Y.S. 2d 579 (2d Dep't, 1949), appeal denied, 300 N.Y. 677, 91 N.E. 2d 328 (1950).

[21] Guaranty Securities Co. v. Equitable Trust Co., 136 Md. 417, 110 A. 860 (1920); Bank of Centerville v. Larson, 47 S.D. 374, 199 N.W. 46 (1924); see National City Bank v. Prospect Syndicate, Inc., 170 Misc. 611, 10 N.Y.S. 2d 759 (N.Y. Mun. Ct., 1939); American Nat'l Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 216 Pac. 376 (1923); President & Directors of Manhattan Co. v. Monogram Associates, Inc., 276 App. Div. 766, 92 N.Y.S. 2d 579 (2d Dep't, 1949), appeal denied, 300 N.Y. 677, 91 N.E. 2d 328 (1950).

CONSTITUTIONAL LAW–FEDERAL STATUTES PRE-EMPT ENFORCEMENT OF STATE LAWS ON SEDITION AGAINST THE UNITED STATES

Steve Nelson, a Pennsylvania Communist Party leader, was tried, convicted and sentenced for the crime of sedition against the United States in accordance with the Pennsylvania Sedition Act.[1] On appeal to the Superior court, a sentence of 20 years imprisonment, a $10,000 fine and $13,000 costs of prosecution was affirmed.[2] Defendant Nelson again appealed, his major contention being that the Pennsylvania law was superseded and nullified by the federal government's enactment of the national

[1] Pa. Penal § 207, 18 Purd. Pa. Stat. Ann. § 4207 (1939).

[2] 172 Pa. Super. 125, 92 A. 2d 431 (1952).