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Steven J. Delaney

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the federal courts because of the *Zahn* decision will never have their day in court.

Hopefully, the Supreme Court will not approve this further restraint on the effectiveness of rule 23 as a tool of judicial economy and efficiency.³⁵ Should such an unfortunate result arise, congressional modification of the jurisdictional statute appears to be the only available solution.

ROBERT G. FRAME

CONSUMER WAIVER OF DEFENSES UNDER THE UCC

Defendants, husband and wife, purchased a new Dodge automobile on an installment contract which contained a waiver of defenses against the dealer's assignee. Three months later the buyers returned the car, complaining that serious defects had not been corrected although the car had been brought back for repairs six times. After repossession and sale of the car, Chrysler Credit Corporation, the assignee of the installment contract, sued for the deficiency. The purchasers raised the defense of failure of consideration, and they requested a jury trial on all issues. The trial court entered a judgment on the pleadings against the purchasers. On appeal, the District Court of Appeal, Second District, *held*, reversed and remanded: An assignee of a retail installment sales contract who is "too closely connected" to the retail merchant to be considered a holder in good faith, cannot rely on the contract clause whereby the buyer waived all defenses against the assignee. *Rehurek v. Chrysler Credit Corp.*, 262 So.2d 452 (Fla. 2d Dist.), *cert. denied*, 267 So.2d 833 (Fla. 1972).

The court's interpretation of section 9-206¹ of the Uniform Com-

35. On February 20, 1973, the United States Supreme Court granted certiorari to review the Second Circuit's decision in *Zahn. Zahn v. International Paper Co.*, 93 S. Ct. 1370 (1973).

1. FLA. STAT. § 679.206(1) (1971):

AGREEMENT NOT TO ASSERT DEFENSES AGAINST ASSIGNEE

Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, *an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the chapter on commercial paper* (chapter 673). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement (emphasis supplied).

2. RESTATEMENT OF CONTRACTS § 167 (1932):

(1) An assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment, or are based on facts arising thereafter prior to knowledge of the assignment by the obligor.

(2) Except as stated in Subsection (3), an assignee's right against the obligor

mercial Code provides another answer to the problem of contractual waiver of consumer defenses. This case is only the latest chapter in the checkered history of finance companies' attempts to achieve immunity from consumer defenses. The pre-UCC finance company was faced with the rule that an assignee of a contract right was subject to those defenses which the obligor could have asserted against the assignor.² To counter this, conditional sales contracts and finance agreements were designed to afford the dual protections of negotiability and contractual waiver³ in one transaction. The waiver, although usually well hidden in text, was generally upheld in early cases, based on traditional theories of contractual freedom and equality of parties.⁴ Other courts have enforced the waiver on the theory that it was used by the obligor to make the contract more attractive to assignees, and the obligor was, therefore, estopped from raising his defenses.⁵ Regardless of which theory the courts enunciated, the underlying policy was to encourage business by allowing an innocent purchaser of commercial paper to be free from purchaser claims. To this end, The Uniform Negotiable Instruments Act⁶ codified the holder in due course status, which insulated a party, who took an instrument for value and in good faith, from defenses of which he did not have notice. Today, however, as the holder's degree of good faith decreases, the probability increases that the courts will find a way to deny him protection from consumer defenses.⁷

Before consumer protection came into vogue, many courts refused to enforce waivers on the grounds that they violated public policy regulating negotiability of paper.⁸ This rationale was generally used to protect a victim of fraud, usury or other serious seller abuse,⁹ and to some extent, consumers are still having success with this defense.¹⁰ In a pre-UCC

is subject to all set-offs and counterclaims which would have been available against the assignee if he were the original obligee.

(3) A sub-assignee's right against the obligor is not subject to the set-off or counterclaim of a right of the obligor against a prior assignee unless the obligor's right was acquired prior to any sub-assignment by the prior assignee, nor even in that case if a sub-assignee claiming under such prior assignee is a bona fide purchaser for value of the assigned right, without notice of the existence of the obligor's right.

For an explanation of the underlying rationale see A. CORBIN, CORBIN ON CONTRACTS §§ 892, 895 (one vol. ed. 1952).

3. B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES 36 (1972).

4. Refrigeration Discount Corp. v. Haskew, 149 Ark. 549, 108 S.W.2d 908 (1937); accord, RESTATEMENT OF CONTRACTS § 70 (1932). But see Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965), representing a trend away from the Restatement position. This has been recognized also in RESTATEMENT (SECOND) OF CONTRACTS § 23, comment b at 108 (Tent. Draft No. 1, 1964).

5. Baldino v. ABC Appliance Serv., 83 Pa. D. & C. 305, 307 (Philadelphia Cty. Ct. 1952).

6. Ch. 4524, [1897] Fla. Laws (repealed 1965).

7. Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

8. E.g., American Nat'l Bank v. A.G. Somerville, Inc., 191 Cal. 364, 216 P. 376 (1923).

9. Pacific Acceptance Corp. v. Whalen, 43 Idaho 15, 248 P. 444 (1926); Industrial Loan Co. v. Grisham, 115 S.W.2d 214 (Mo. App. 1938).

10. Fairfield Credit Corp. v. Donnelly, 158 Conn. 543, 264 A.2d 547 (1969); Quality

case¹¹ dealing with the related question of whether a finance company was a holder in due course, the Supreme Court of Florida rejected a similar negotiability argument, relying instead on an Arkansas case in which a finance company was found to be too closely connected with the buyer to be an innocent purchaser of the instrument.¹²

Other states have found the waiver to be contrary to public policy relying on statutes which refuse to give effect to a purchaser's contractual surrender of a right granted by law.¹³ While Florida has no statute protecting purchasers of consumer goods, and indeed section 9-206¹⁴ could be construed against such an argument, there are analogous provisions in the Home Improvement Sales and Finance Act¹⁵ which not only refuse to give effect to a waiver, but make the inclusion of a waiver in a contract punishable as a misdemeanor.¹⁶

In this field of consumer contractual waivers, the courts have generally refused to disregard legal precedent, and apply a functional approach,¹⁷ that would recognize the consumer's need for protection. However, when more traditional rationale is available, courts have been generous with pro-consumer dicta.¹⁸

Prior to the instant case, the question of the validity of express consumer waivers had not reached the appellate courts in Florida. Rather, the case law governing an assignee's rights had been developed in the context of whether the purchaser of negotiable paper was a holder in due course. One requirement under the Negotiable Instrument Act for finding a party to be a holder in due course was that he had taken in good faith.¹⁹

Fin. Co. v. Hurley, 337 Mass. 150, 148 N.E.2d 385 (1958); Toker v. Perl, 108 N.J. Super. 129, 260 A.2d 244 (1970).

11. Mutual Fin. Co. v. Martin, 63 So.2d 649 (Fla. 1953).

12. Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940).

13. Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 298 P. 705 (1931).

14. FLA. STAT. § 679.206 (1971). Section numbers throughout the text refer to numbers of sections in the Uniform Commercial Code. The accompanying footnotes contain the corresponding section numbers in the Florida Statutes.

15. FLA. STAT. §§ 520.74, 520.99 (1971).

16. See also Fla. Laws 1973, ch. 73-192, creating FLA. STAT. § 516.31(2), which makes assignees, who are small loan companies, subject to claims and defenses of consumers.

17. See generally Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), dealing with the proposition that judges should base their decisions not on abstract legal concepts and precedents but on the actual experience and verifiable realities of the society.

18. E.g., Mutual Fin. Co. v. Martin, 63 So.2d 649, 653 (Fla. 1953), based on the close relationship doctrine. However, Justice Drew's pro-consumer dictum has been extensively cited by courts and commentators alike:

It may be that our holding here will require some changes in business methods and will impose a greater burden on the finance companies. We think the buyer—Mr. & Mrs. General Public—should have some protection somewhere along the line. We believe the finance company is better able to bear the risk of the dealer's insolvency than the buyer and in a far better position to protect his interests against unscrupulous and insolvent dealers. . . . If this opinion imposes great burdens on finance companies it is a potent argument in favor of a rule which will afford protection to the general buying public against unscrupulous dealers in personal property.

19. Ch. 4524, [1897] Fla. Laws (repealed 1965).

Pre-UCC cases in Florida adopted the holding of *Commercial Credit Co. v. Childs*,²⁰ that a close relationship between an automobile dealer and a finance company precluded a finding of good faith. Instead of a holder in due course, the court found that Commercial Credit Co. was "to all intents and purposes a party to the agreement and instrument from the beginning."²¹ This rationale was cited in *Mutual Finance Co. v. Martin*²² allowing a grocery store owner to assert failure of consideration against a finance company bringing suit on a promissory note attached to a conditional sales agreement for a defective deep freezer and a meat saw. The court rested its conclusion on the fact that the assignee had prepared and furnished the dealer with the printed forms for the sales contract and promissory note. The finance company had also investigated and approved the maker's credit, and had agreed in advance to purchase the note if the sale were made. Because of this close relationship, the court found that the finance company had constructive notice of the security agreement's infirmity, and allowed the purchaser to interpose his personal defenses.

In *Industrial Credit Co. v. Mike Bradford & Co.*,²³ the District Court of Appeal, Third District, broadened the close connection theory of *Mutual Finance*. Based on a dealer-assignee relationship factually similar to that in *Mutual Finance*, a purchaser of construction equipment was allowed to set up a defense of failure of consideration against the finance company, even though the purchaser and assignee had negotiated an extension agreement ten months after the sale, and notwithstanding the fact that all parties were aware that half the equipment had not been delivered because of title problems.²⁴

In an apparent attempt to give a sounder explanation for the close connection theory than prior Florida cases, the District Court of Appeal, Third District, added a novel twist in the companion cases, bearing the same name, of *National State Bank v. Robert Richter Hotel, Inc.*²⁵ In these cases, a close relationship was held not to be the element determinative of whether the assignee of a conditional sales contract was a holder in due course. Rather, the court stated that the issue turned on whether the assignee controlled the dealer to such an extent that the dealer was

20. 199 Ark. 1073, 137 S.W.2d 260 (1940).

21. *Id.* at 1077, 137 S.W.2d at 262.

22. 63 So.2d 649 (Fla. 1953) [hereinafter cited as *Mutual Finance*].

23. 177 So.2d 878 (Fla. 3d Dist. 1965) [hereinafter cited as *Mike Bradford*].

24. Murray, *Negotiable Instruments*, 22 U. MIAMI L. REV. 585, 587 n.7 (1968), having criticized the *Mike Bradford* opinion as "rather cloudy" and the reasoning in *Mutual Finance* as "obscure," stated:

It is not certain that the courts are denying a holder in due course status of the finance company because of a presumption that the finance company had notice of a defect in the underlying transaction, or because of a presumed lack of good faith by the finance company.

25. 186 So.2d 321 (Fla. 3d Dist. 1966); 188 So.2d 18 (Fla. 3d Dist. 1966) [hereinafter cited as *Richter*]; accord *Westfield Inv. Co. v. Fellers*, 24 N.J. Super. 575, 181 A.2d 809 (1962).

acting as the bank's agent. Based on this "control" theory, the court in the first *Richter* case held *Mutual Finance* to be limited and of "doubtful value."²⁶ However, the second *Richter* case cited *Mutual Finance* and *Mike Bradford*, even though these cases were based on the "relationship" theory, and did not contain the slightest mention of "control."

Less than six months after the second *Richter* decision, the UCC entered the already confused Florida scene. Section 9-206(1)²⁷ purports to protect a bona fide assignee from the personal defenses of a buyer who expressly waives defenses, or who signed a negotiable instrument and a security agreement as part of one transaction. This section was made "[s]ubject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods." According to Official Comment 2,²⁸ the purpose of this sentence was to avoid taking a stand on the controversial issue of whether a consumer could give up his personal defenses through a contractual clause or execution of a negotiable instrument; nevertheless, the court was squarely faced with this question in the instant case.

The District Court of Appeal, Second District, had a variety of options available. It could have followed the reasoning of Section 9-206(1)²⁹ which upholds waivers in a consumer setting where there are no statutes or decisions to the contrary.³⁰ This was the situation in Florida.³¹ However, the closely analogous cases of *Mutual Finance*,³² *Mike Bradford*³³ and *Richter*,³⁴ involving transactions between businessmen, established a public policy of protecting obligors from bad faith assignees, which a fortiori ought to be extended to consumers.

Another possible approach to the problem had been presented in *Tiger Motor Co. v. McMurty*.³⁵ This case, on the one hand, appeared to uphold the validity of a waiver of defenses, but still allowed rescission of the contract in equity because the waiver left the buyer with no legal remedy.

There were, however, two other alternative theories of reasoning which would be in keeping with the trend to protect consumers. First, the court could have denied the validity of all waivers executed by consumers, and relied on the wording of section 9-206(1),³⁶ since there are no statutes or decisions to the contrary involving consumer sales in Florida. This would also be in line with Official Comment 2³⁷ which states

26. 186 So.2d 321, 323 (Fla. 3d Dist. 1966).

27. FLA. STAT. § 679.206(1) (1971).

28. FLA. STAT. ANN. § 679.9-206, comment 2 (1966).

29. FLA. STAT. § 679.206(1) (1971).

30. *Jennings v. Universal C.I.T. Credit Corp.*, 442 S.W.2d 565 (Ky. 1969).

31. *But see* Fla. LAWS 1973, ch. 73-192, *creating* FLA. STAT. § 516.31(2).

32. 63 So.2d 649 (Fla. 1953).

33. 177 So.2d 878 (Fla. 3d Dist. 1965).

34. 186 So.2d 321 (Fla. 3d Dist. 1966); 188 So.2d 18 (Fla. 3d Dist. 1966).

35. 284 Ala. 283, 224 So.2d 638 (1969).

36. FLA. STAT. § 679.206(1) (1971).

37. FLA. STAT. ANN. § 679.9-206, comment 2 (1966).

that section 9-206 takes no position on consumer goods waivers.³⁸ Under this rationale, a good faith assignee could still enforce a waiver against a businessman obligor who presumably would not need as much protection as a consumer.³⁹

The second alternative theory, and the one upon which the *Rehurek* court relied, does not consider the opening phrase of section 9-206(1).⁴⁰ Instead, it concentrates on the provision that the assignee must be a taker in good faith to enforce a waiver. In determining whether there was good faith, the court rejected the assignee's contention that a mere close business relationship, without any other inference of dishonesty, should not be equated with lack of good faith. In addition, section 1-201(19),⁴¹ which takes a subjective view of good faith, was, apparently, unpersuasive.⁴² The court instead followed its objective, pre-UCC close relationship theory, which was established for holders in due course of negotiable paper and which had been bolstered by *Unico v. Owen*,⁴³ a widely-noted New Jersey case. Apparently, the *Richter* cases⁴⁴ have fallen by the judicial wayside. The *Rehurek* court did not mention control and agency as factors, but relied instead on several allegations to support a close relationship: Chrysler Credit Corporation was formed exclusively for the purpose of financing the sale of Chrysler products; it furnished the forms for the sales contracts which contained preprinted assignments to Chrysler Credit Corporation; it investigated the purchaser's credit rating; and it "did all of the things which are enumerated in the cited cases⁴⁵ to bring them in close relationship with Brooks-Massey,"⁴⁶ the dealer.

The court's reasoning for applying the close relationship theory is somewhat misleading. The decision purports to rely on *Mike Bradford*⁴⁷

38. See generally Marinelli, *Negotiable Instruments and the Holder in Due Course of Consumer Paper*, 8 AM. BUS. L.J. 253, 257 (1970), stating that "in depriving a consumer of his right to withhold payment the consumer is deprived of his most useful weapon."

39. Compare Murray, *Security Interests and the Security of Your Clients Under the U.C.C., Part I*, THE BARRISTER LEGAL REFERENCE SERIES 2, with Note, *The Status of U.C.C. 9-206—The Waiver of Defense Clause*, 31 U. PITT. L. REV. 687, 688 (1970). But see Eisenberg, *Good Faith Under the U.C.C.—A New Look at an Old Problem*, 54 MARQ. L. REV. 1, 2 (1971) [hereinafter cited as Eisenberg]:

[T]he day has passed when courts will close their eyes to the facts involved and enforce a contract or transaction because it was purportedly entered into between seemingly knowledgeable and experienced businessmen who considered themselves to be in an equal bargaining situation when they entered into the transaction or agreement.

40. FLA. STAT. § 679.206(1) (1971). In quoting what it felt to be the pertinent part of the statute, the court deleted the words "[s]ubject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods. . . ." 262 So.2d at 453.

41. FLA. STAT. § 671.201(19) (1971).

42. For a discussion of various theories of good faith, see Eisenberg, *supra* note 39.

43. 50 N.J. 101, 232 A.2d 405 (1967).

44. Cases cited at note 25 *supra*.

45. *Mutual Fin. Co. v. Martin*, 63 So.2d 649 (Fla. 1953); *Industrial Credit Co. v. Mike Bradford and Co.*, 177 So.2d 878 (Fla. 3d Dist. 1965); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

46. 262 So.2d at 454.

47. 177 So.2d 878 (Fla. 3d Dist. 1965).

as a precedent for refusing to uphold waivers. However, that case did not involve an express contractual waiver, or one of the type contemplated by section 9-206(1).⁴⁸ Rather, *Mike Bradford* was concerned with whether an implied waiver or estoppel was raised by the purchaser's execution of an extension agreement. Without ever deciding whether there was actually a waiver, the court held that the assignee was not a holder in due course and therefore could not enforce this kind of waiver even if there had been one.

The consequences of the court's carrying over the good faith requirements of a holder in due course into the area of section 9-206(1)⁴⁹ waivers are twofold. First, the areas of application for section 9-206(1)⁵⁰ will be almost non-existent, and the instant case will generally eliminate the waiver's effect in cases where such a close connection is involved.

The second consequence of the court applying the good faith theory will be that an occasional consumer may still find that he is liable to a bad faith assignee. Since the court declined to directly say that waivers are ineffective in consumer cases,⁵¹ the purchaser in each case will have to prove a lack of good faith or notice of defect on the part of the assignee before he will be able to raise a personal defense. This means that the party most needing protection, the consumer who cannot afford extensive discovery and investigation, will be the one most likely to suffer from the inconsistencies of this case.⁵²

While it may have been preferable for the court to have explicitly held that waiver clauses are not enforceable in consumer cases, *Rehurek* is unquestionably a step in the right direction. In language similar to that of *Mutual Finance*, the court declared that:

When a purchaser answers the inducements made in the tremendous advertising campaigns carried on by the automobile industry and purchases a new automobile, he has the right to expect the automobile to perform properly and as represented. If it does not, through no fault of his, it appears to us that he should be allowed to seek redress After a thorough study

48. FLA. STAT. § 679.206(1) (1971).

49. *Id.*

50. *Id.*

51. The NATIONAL CONSUMER ACT proposed by the National Consumer Law Center at Boston College Law School, seeks to do away with the consumer waiver completely:

§ 2.406 Assignee Subject to Defenses

Notwithstanding any term or agreement to the contrary, an assignee of the rights of the creditor is subject to all claims and defenses of the consumer arising out of a consumer credit transaction or consumer lease.

Comment

This action makes ineffective and unenforceable agreements of consumers in form contracts which waive their defenses against assignees. Thus the subterfuge *used even when holder in due course does not apply* is not permitted at all (emphasis added).

NATIONAL CONSUMER ACT § 2.406 (1970).

52. *Man v. Leasko*, 179 Cal. App. 2d 692, 4 Cal. Rptr. 124 (1960), is an example of a case where a consumer was unable to establish sufficient evidence to satisfy the court that a close relationship existed, even though the assignee did a large business in buying the obligee's commercial paper and it furnished him with the form contracts.

of the financial transaction involved in this business, we do not believe this opinion will in any way obstruct the free flow of commerce. We do not anticipate that we are placing an undue burden upon the automobile industry in requiring them to shoulder the responsibility of making sure their products perform as they have been represented.⁵³

In furtherance of this stated policy of allowing consumers to seek redress, the courts would do well to abandon the tests of "close relationship" and "good faith," of "control" and "agency," in a consumer setting and, in the future, hold all such consumer waivers invalid per se.

STEVEN J. DELANEY

THE POLYGRAPH: SCIENTIFIC v. JUDICIAL ACCEPTANCE

The defendant was indicted for perjury as a result of allegedly making false statements under oath before a grand jury. He pleaded not guilty to the charge and attempted to include as part of his defense an offer of testimony by polygraph examiners, which he claimed would show that he believed his allegedly perjurious statements to be truthful. After hearing evidence on the value and reliability of polygraph tests, the federal district court *held*: Testimony concerning the results of polygraph tests by the court's expert or by the defendant's expert is admissible if, and only if, the tests conducted by the court-appointed polygraph expert indicate either that defendant was or was not telling the truth on issues directly involved in the case. *United States v. Ridling*, 350 F. Supp. 784 (E.D. Mich. 1972).

The polygraph referred to is not a "lie detector"; simply stated, it does not show when the subject is lying, but rather when he is telling the truth.¹ More accurately, it records "physiological phenomena that may be used as the basis for the application of a reliable *technique* for diagnosing truth or deception."² The theory behind the instrument is that a person's autonomic nervous system continues to function normally when he tells the truth, but that the necessity for concealment—either through an outright lie or less than full disclosure—will result in observable stress responses, especially when coupled with a fear of detection.

The machine generally used is actually a combination of several devices which measure and record the body's reaction to stress. These devices include a rubber tube placed around the subject's chest to record

53. 262 So.2d at 456.

1. For a thorough discussion of polygraph theory and technique, see J. REID AND F. INBAU, *TRUTH AND DECEPTION* (1966) [hereinafter cited as REID & INBAU].

2. *Id.* at 3 (emphasis in original).