

## Contracting Around Presentment

Within 44 U.S. 534, 3 How. 534, 11 L.Ed. 714, THE STATE OF MARYLAND, FOR THE USE OF WASHINGTON COUNTY, PLAINTIFF IN ERROR, v. THE BALTIMORE AND OHIO RAILROAD COMPANY, DEFENDANTS. January Term, 1845 we find uttered “*No one can contract to commit a crime;...*”, very logical statement and common sense as no husband has a right to hire a hit man to kill his wife, in a different context, one should not be able to contract with a drug dealer to financial fund a killer drug.

Such reasoning of not being able to create a contract to commit a criminal act requires attention to be directed to the Uniform Commercial Code, § 1-304<sup>1</sup> and traveling further into the Uniform Commercial<sup>2</sup> code we find a contract can be varied by the parties agreeing, but will such agreement require that a crime not be

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<sup>1</sup>§ 1-304. Obligation of Good Faith

Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.

<sup>2</sup> § 1-302. Variation by Agreement.

(a) Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever [the Uniform Commercial Code] requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of [the Uniform Commercial Code] of the phrase "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

contemplated? Can varying or creating a contract that commits or aids in committing a crime be a contract in “good faith?”

Uniform Commercial Code § 1-103<sup>3</sup> seems to be in controversy to §3-202<sup>4</sup>. Upon closer examination of §3-202 we notice §3-202 addresses not the creation but assignment of the creation. Further following an attempted negotiation leads us to § 3-203 of the code, “*TRANSFER OF INSTRUMENT; RIGHTS ACQUIRED BY TRANSFER*<sup>5</sup>”. The UCC does define elegantly the term Holder<sup>6</sup>. However, to be a

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<sup>3</sup> § 1-103. Construction of [Uniform Commercial Code] to Promote its Purposes and Policies: Applicability of Supplemental Principles of Law.

(a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

<sup>4</sup> § 3-202. NEGOTIATION SUBJECT TO RESCISSION.

(a) Negotiation is effective even if obtained (i) from an infant, a corporation exceeding its powers, or a person without capacity, (ii) by fraud, duress, or mistake, or (iii) in breach of duty or as part of an illegal transaction.

(b) To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy.

<sup>5</sup> § 3-203. TRANSFER OF INSTRUMENT; RIGHTS ACQUIRED BY TRANSFER.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due

subsequent payable party with rights to enforce the instrument the instrument would have needed to be lawfully negotiated to a subsequent party. Just stating one is the Assignee, Transferee, Indorsee, etc. without following legal requirements to transfer rights is just a scream in the night. To further cloud and continue the illusion of lawful creation and negotiation legitimacy we turn attention to §1-108<sup>7</sup> and 15 USC §7003 (a) (3)<sup>8</sup>. Whereas §1-108 of the code states

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course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this Article and has only the rights of a partial assignee.

<sup>6</sup> "Holder" means: (A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or (B) the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.

<sup>7</sup> § 1-108. Relation to Electronic Signatures in Global and National Commerce Act.

This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., except that nothing in this article modifies, limits, or supersedes Section 7001(c) of that Act or authorizes electronic delivery of any of the notices described in Section 7003(b) of that Act.

<sup>8</sup> §7003. Specific exceptions

(a) Excepted requirements

The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by-

(3) the Uniform Commercial Code, as in effect in any State, other than sections 1–107 and 1–206 and Articles 2 and 2A.

the code can modify, limit or supersede the E-Sign Act, the E-Sign Act codified at 15 USC §7003 (a) (3) itself states that all of the Uniform Commercial Code is excluded with the exceptions of Article 1–107<sup>9</sup> and 1–206<sup>10</sup> and Articles 2<sup>11</sup> and 2A<sup>12</sup>. As a result of Article 3 being excluded from application of E-Sign, the instrument under governance of Article 3 would be required to be in tangible written form. If such a tangible instrument no longer exists in tangible form the security instrument under governance of local laws of jurisdiction, such security

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<sup>9</sup> § 1-107. Section Captions.

Section captions are part of [the Uniform Commercial Code].

<sup>10</sup> § 1-206. Presumptions.

Whenever [the Uniform Commercial Code] creates a "presumption" with respect to a fact, or provides that a fact is "presumed," the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence.

<sup>11</sup> U.C.C. - ARTICLE 2 - SALES

PART 1. SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER [Table of Contents]

§ 2-101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code-Sales.

§ 2-102. Scope; Certain Security and Other Transactions Excluded From This Article.

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

<sup>12</sup> ARTICLE 2A - LEASES

instrument would not have a tangible instrument to remain perfected too and as a result rights once contained within the security instrument would cease to be enforceable. A fact of reality is that the security instrument may have been filed of record but such filing upon expiration of the tangible instrument is only a record that no longer reflects enforceable rights.

Upon reviewing many mortgage loan contracts it is very common to find notice that the Obligor has waived rights for the Obligee to present the instrument upon making a demand for payment.

Most Obligor are not sophisticated and learned in law and there is no way such a common person would learn all the legal complexities in the midst of signing closing documents, the Obligor place trust in the Obligee and/or agent to apply good faith in the formation of the mortgage loan contract(s).

More alarming is watching Congressional and Senate hearings where suppose to be learned lawmakers are inquiring to determine the failure that lead to a financial crisis. Is it not these same lawmakers that passed the laws that allowed the crisis? A grave concern raises as to how these alleged learned allowed such conflicting laws to be enacted into law. Where the supposed learned are trying to learn and understand there are the many in judiciary who being further down the ladder still follows the old premises, you bought it and did not pay for it then as a result you should not possess it without tendering the money. There is another aspect that many in judiciary fail to realize as a result of the complex cover up, a crook can never prosper from committing an illegal contract. Where a member of judiciary fails to apply both principles such member not only rules for crooked value but aids in perpetuating the criminal enterprise.

So why waive presentment of the instrument?

Were a holder claiming to be in possession of a bearer instrument with rights would only need to complete negotiation by identifying one self as the “Indorsee”. In this world of securitization the governing/creating trust documents define a method and means to lawfully transfer, assign, convey, etc. all rights of enforcement to the certificate trust. But where one would appear in court and simply indorse ones name as being the Indorsee would be an admission that compliance with an investment vehicle was not actually in compliance.

To look at it in the elevator version, if the originating lender indorsed the note in blank and then the alleged agent/law firm/servicer for the investment trust was to place the indorsement as Indorsee the process would violate the trust documents and IRS taxing requirements. To avoid this potential liability, one could suppose the designers of the process designed such process to avoid the possibility of discovering the fraud by requiring presentment.<sup>13</sup>

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<sup>13</sup> § 3-501. PRESENTMENT.

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

(b) The following rules are subject to Article 4, agreement of the parties, and clearing-house rules and the like:

(1) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to any one of two or more makers, acceptors, drawees, or other payors.

(2) Upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on

(21) "Holder" means: (A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or (B) the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.

(35) **"Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9.** "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 2-401 is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to Section 1-203.

Is it time to replace the old lawmakers and judges? If so, vote them out of office!!!!

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behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cut-off hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cut-off hour.