

1982 WL 189223 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 29, 1982

**\*1 Re: Proposed change in § 36-9-109(3) CODE OF LAWS OF SOUTH CAROLINA, 1976.**

Mr. W. L. Abernathy  
S. C. State Fair  
Post Office Box 393  
Columbia, SC 29202

Dear Mr. Abernathy:

Attorney General McLeod requested that I review a proposed change in [§ 36-9-109\(3\) CODE OF LAWS OF SOUTH CAROLINA, 1976](#), and give you my thoughts. I pass these on to you for what they may be worth.

First, as I understand it, the purpose of taking pasteurized milk out from under the definition of farm products is to avoid an exception in [§ 36-9-307\(1\) CODE](#). While this section protects a buyer in the ordinary course of business from liens created by the seller, it makes an exception in the case of farm products. The problem with simply avoiding the farm products exception is that a creditor unable to collect its secured debt from a dairy farmer is very likely to bring suit against the purchaser of the milk on the theory that a dairy purchasing all, most, or some of a farmer's milk is not a 'buyer in the ordinary course of business.' They could further argue that the reason for the farm product exception in [§ 36-9-307\(1\) CODE](#) is that the Legislature did not intend the sale of any substantial quantity of farm products to be considered a sale in the 'ordinary course of business.'

Continuing in this line, the lender could argue that the sale of pasteurized milk under the proposed law is a bulk transfer; that is, a transfer of '... a major part of the ... inventory of an enterprise ...' An 'enterprise' is any whose '... principal business is the sale of merchandise from stock, including those who manufacture what they sell.' See [§ 36-6-102 CODE](#). Although farming is specifically exempted from the provisions of the Bulk Transfer laws in the Official Comment to [§ 36-6-102 CODE](#), the effect of the proposed change in the definition of farming goods would apparently shift pasteurized milk into the definition of 'inventory' in [§ 36-9-109\(4\) COKE](#). This could make the sale of pasteurized milk subject to the rather burdensome requirements of the Bulk Transfer laws which require that the debtor list all creditors before a sale and that the buyer notify the listed creditors ten days before the sale goes through. See [§ 36-6-104, et seq. CODE](#).

I do not know if such an argument would be successful; but where large amounts of money are involved, it will probably be made. Whatever the outcome, the litigation will be expensive.

The legislature could probably resolve the question of whether the sale of pasteurized milk by a farmer to a dairy is a sale in the 'ordinary course of business' by simply saying that in the proposed Bill. An even more direct way to be certain that dairies are not subject to liens on the milk they buy is to pass legislation saying exactly that. Such specialized legislation, however, would probably be challenged by a creditor as a violation of the equal protection mandate of [Article I, Section 3 of the South Carolina Constitution](#). In [Broome v. Truluck](#), 270 S.C. 227, 241 S.E.2d 739 (1978), our Supreme Court struck down a statute which limited liability for negligence for architects, engineers, and contractors only. They could see no rational basis for favoring those professions alone.

**\*2** Again whether the challenge is successful or not, the litigation will be costly.

If the above legal analysis is correct, then the proposed change is no guaranteed remedy for the problem. Furthermore, as a practical matter, eliminating the lender's security interest in the milk will make it harder for the marginal dairy farmer to obtain credit. If the legislation is submitted as proposed, I would expect that dairy farmers and institutions which make loans to dairy farmers will oppose the Bill.

Without attempting to make any judgment on the policy issues, but rather simply considering the practical and legal problems involved, I would propose the following solution as an alternative to be considered.

Eliminate the farm products exception to the protection given buyers in the ordinary course of business by [§ 36-9-307\(1\) CODE](#). Add a section to the laws governing bulk transfers which would require persons buying a major part of a farmer's product to obtain from that farmer a sworn list of all creditors having liens on the product, and require the buyer to notify the creditors of the purchase and give the creditor some reasonable number of days to claim the money due him from the proceeds of the collateral. While this would make the buyer a stakeholder of the money and require possible legal action by the creditor to recover the proceeds of his collateral, both would be in a position to prevent the farmer from being unjustly enriched at their expense. This is the only method I can think of to assure that the person who owes the money, the farmer, pays the debt, rather than an innocent third party.

The foregoing is simply an attempt to point out some of the problems I see in the proposed legislation and is not intended as an exhaustive analysis of the issue. Certainly, you should rely on the advice of your own counsel as to the best way to proceed.

With best regards,

C. Richard Kelly  
Assistant Attorney General

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