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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 5, 2000

The Honorable D. Leslie Tindal
Commissioner, Department of Agriculture
P.O. Box 11280
Columbia, South Carolina 29211

RE: Informal Opinion

Dear Commissioner Tindal

By your letter of June 10, 2000, you have requested an opinion of this Office concerning the Grain Dealer's Guaranty Fund. Specifically you wish to know whether the Department of Agriculture may require claimants seeking payment from this fund to pledge collateral to secure their guarantee of the loan from the Insurance Reserve Fund to the Department.

By way of background you provide the following information:

> ... The Act establishes a fund which will provide money to grain dealers in SC who suffered losses because of the bankruptcy of another grain dealer, the Southern Soya company of Estill, SC. After the creditors of Southern Soya company have received these payments for their losses, money will be available to grain dealers who suffer losses in the future because of bankruptcy, fraud, or embezzlement of other grain dealers.
>
> This fund will be funded by assessments on grain dealers licensed by the Department and will be at the rate of two cents a bushel. The Department instituted these assessments on July 1, 2000. However, inasmuch as it will take several years for the assessments to build up the fund, the Department is authorized to immediately borrow $4.5 million from the Insurance Reserve Fund to pay losses incurred by the Southern Soya creditors. This loan from the Insurance Reserve Fund to the Department is to be repaid over a five year period from the assessments levied.

Further, you inform us that in implementing the claims process, the Department of Agriculture has sent to the creditors of Southern Soya claim forms which require the putative claimants to pledge collateral to secure the loan from the Insurance Reserve Fund [IRF] to the Department. For obvious

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reasons, the claimants object to requirement of pledged collateral.

The basis for the dispute lies in the language of the newly enacted Section 46-40-50, which reads:

> (A) The Insurance Reserve Fund of the State Budget and Control Board is authorized to lend an amount up to four million two hundred thousand dollars on a onetime basis to the department for the use of the Grain Dealers Guaranty Fund herein established to pay claims approved by the department if the fund, through its assessments, has insufficient monies to pay the claims.... *The participants in the loan shall execute a document approved by the State Treasurer severally guaranteeing the loan.* The Insurance Reserve Fund shall prepare a written loan agreement which must be executed by the department prior to entering into the loan authorized by this section.
>
> (B) Any federal funds or other funds not derived from grain assessments received by the department to reimburse claims or losses under this chapter must be paid into the fund and used for loan payments or loan principal reduction to the extent any monies are due under subsection (A) to the Insurance Reserve Fund or the state general fund. *Each grain dealer severally guaranteeing this loan shall have his pro rata share of the debt obligation reduced accordingly based on the amount of the federal or other payment....*

(Emphasis added).

Although typically analyzed in the framework of contract law, in South Carolina a guarantee is defined as a "promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is himself, in the first instance, liable to such payment or performance." McGee v. F.W. Poe Mfg. Co., 176 S.C. 288, 180 S.E. 48 (1935). In other words, a party who guarantees a loan accommodates the recipient of the loan by providing secondary liability on the loan agreement. The recipient of the loan is the accommodated party because the creditor, in this case the Insurance Reserve Fund, is more likely to loan money to the recipient if the creditor can look to a second party for payment in the event the recipient is unable to make the annual installments. Guarantees come in many forms, and when bargained for, may have many conditions imposed before the loan is made. A statutorily imposed requirement of guaranty is somewhat unique in that none of the participants in the loan appear to have any authority to bargain for the conditions of the loan. However, in the law of guaranty the language employed is to have a reasonable interpretation, and by a reasonable interpretation "it is not meant that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation so as to attain the objects for which the instrument is designed and the purpose to which it is applied." Hudepohl Brewing Co. v. Bannister, 45 F.Supp. 201, 203 (S.C.D.C. 1942). With these rules in mind we are left to interpret whether "guaranteeing the loan," found in Section 46-40-50 (A) and (B), includes pledging collateral to secure the guarantee.

In the context of creditor rights, the difference between a secured transaction and an unsecured transaction is profound. A security interest in a debtor's collateral entitles the creditor to priority over other unsecured creditors. See e.g. Finance America Corp. v. Galaxy Boat Mfg. Co., 292 S.C. 494, 357 S.E.2d 460 (1987). Conversely, a debtor whose assets are encumbered by a security interest is less able to pledge the same collateral to other creditors to obtain necessary financing. A debtor has the right to prefer his creditors and pay or secure those preferred. Meinhard v. Strickland, 29 S.C. 491, 7 S.E. 838 (1888). Because the security interest in collateral is a highly valuable and costly aspect of the creditor-debtor relationship, its omission or addition from a statutorily imposed obligation would not have been inadvertent. As such, this Office declines to read that the grain dealers must provide security interests, or pledge collateral, into the statute's language of "guaranteeing the loan." To interpret "guaranteeing the loan" to mean "guaranteeing the loan and, in addition, pledging collateral to create a secured guarantee" would force an unnatural interpretation of otherwise unambiguous language directing the grain dealers only to promise to pay.

Similar to the law governing the interpretation of a guaranty is a basic principle of statutory construction that a statute's words must be given their plain and ordinary meaning without resort to subtle or forced construction either to limit or expand the statute's operation, State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). As we have suggested above, the plain meaning of "guarantee" is the promise for payment of another's debt. A requirement of more than a promise, by the pledging of collateral, is not mandated by the plain language of Section 46-40-50. In further support of this conclusion is another cardinal rule of statutory construction that the enumeration of particular things in a statute excludes the idea of something else not mentioned. Pennsylvania Natl. Mutual Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (1984) ("expressio unius est exclusio alterius"). South Carolina Code of Laws Section 46-60-90 addresses the continuation of the Fund to compensate grain dealers who suffer a loss from the bankruptcy or fraud of another in the future. Parts (B) and (C) both mention "collateral" in reference to future claimants who seek repayment from the fund. While it may be true that some in the Legislature may have intended a requirement of collateral to be imposed upon the immediate claimants, such subjective intent cannot be taken into consideration absent specific language in the statute to that effect. See Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796 (1928). The fact that the General Assembly declined to mention collateral with respect to the immediate claimants in Section 46-60-50, but expressly made reference to the term for future claimants strengthens the conclusion that the immediate claimants are not required to pledge collateral to secure their guarantee of the loan.

Finally, although Section 3 of the Act gives the Department of Agriculture the authority to "promulgate rules and regulations necessary to carry out the provisions of Chapter 40 of Title 46 of the 1976 Code," the Department cannot contravene the plain language of the statute by enacting a regulation that imposes a greater burden on the dealers than the statute requires. The regulations should facilitate the implementation of Fund procedures, but are limited to the parameters of the Department's authority as determined by the statute. Because the statute requires no pledge of collateral--which, as we have noted, would have a tremendous impact on the relationship between grain dealers and the Department-- such a requirement cannot be written into the statute solely by regulation.

In sum, based upon a reasonable interpretation of the guaranty clause in Section 46-40-50, the plain language of the statute, and the General Assembly's failure to mention collateral in this particular provision, it is the opinion of this Office that the immediate claimants of Southern Soya guaranteeing the loan from the IRF to the Department of Agriculture are not additionally required to pledge collateral as part of that guarantee.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General not officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General