

STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider,
Attorney General

July 7, 1976

ATTORNEY GENERAL OPINION NO. 76- 209

Mr. R. G. Henley, Chief
Municipal Accounting Section
Department of Administration
11th Floor - State Office Building
Topeka, Kansas 66612

Re: Cash-Basis Law--Cancelable Purchase Orders--Risk of Loss

Synopsis: Under K.S.A. 84-2-509 of the Uniform Commercial Code, the buyer and seller may contractually agree that the risk of loss shall not pass to the buyer upon delivery, but may agree that the risk shall be borne by the seller until a date certain agreed upon in said contract. Thus, the risk of loss of goods delivered to a school district pursuant to a cancelable purchase order may remain with the seller until a date certain, despite earlier delivery of the goods to the buyer.

* * *

Dear Mr. Henley:

You inquire what effect delivery of goods has on the passage of title when the vendor of school supplies claims the privilege granted by K.S.A. 10-1113 by affixing a sticker to the shipping document which provides substantially as follows:

"This order which is being sent to School Specialty Supply, Inc., represents a 'CANCELABLE PURCHASE ORDER' issued under authority of K.S.A. 10-1113. Title and risk of loss shall not pass to the School District until after July 1."

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You advise that a number of companies throughout the state ship school supplies upon receipt of the cancelable purchase order, and the schools receive the supplies well before June 30, the close of the school budget year. The general rule followed by most independent auditors is that an obligation occurs whenever a purchase order is sent to a vendor under the cash-basis law, but that under a cancelable purchase order, no obligation occurs until the goods are received by the school district. If no obligation accrues until July 1, the school district may then obligate its next budget period, rather than the one in which it receives the merchandise.

K.S.A. 10-1113 provides that no municipality may create any indebtedness in excess of the amount of funds actually on hand at the time available for such purpose. School districts and community junior colleges may, however,

"issue cancelable purchase orders for school supplies and equipment, school buses, books purchased in conjunction with textbook rental programs and data processing equipment in advance of the budget year during which moneys will become available to pay for such purposes, but contracts for the purchase of such school supplies and equipment, books, buses and data processing equipment cannot be entered into except during the budget year in which moneys will become available for such purchases and risk of loss and title thereto shall not pass to the school district or community junior college prior to entering into such contracts. Issuance of such a cancelable purchase order shall not constitute an indebtedness within the meaning of K.S.A. 79-2935."

Under the Uniform Commercial Code, risk of loss is no longer an incident of title. Passage of title as a determinant of risk of loss has been abandoned, and in its stead, the status of the contractual relation between the buyer and seller is the principal determinative point. K.S.A. 84-2-509(1) states in pertinent part thus:

"Where the contract requires or authorizes the seller to ship the goods by carrier
(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods

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are duly delivered to the carrier even though the shipment is under reservation . . . but

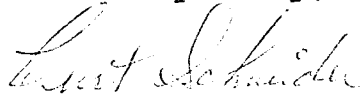
(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery."

Subsection (4) further states thus:

"The provisions of this section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval . . . and on effect of breach on risk of loss."

Thus, the parties may by agreement place the risk of loss as they deem appropriate, and if the vendor contracts with the buyer that the risk of loss shall remain with the seller until a prescribed date certain, despite delivery of the goods to the seller prior to that date, that contractual agreement must be respected. In addition, under K.S.A. 84-2-401, rules are prescribed to govern the passage of title "unless otherwise explicitly agreed to" by the parties. Thus, as to both passage of title and risk of loss, the parties are free to provide, under the Kansas Uniform Commercial Code, by express and explicit agreement when both shall pass from the buyer to the seller. If such an express agreement exists, the delivery of the goods has no effect whatever to shift either risk of loss or title to the property from the seller to the purchaser until such time as they have expressly agreed upon.

Yours very truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj