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The State of South Carolina

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March 31, 1980

Administrative Interpretation No. 3.404-8003

LIMITATION ON REASONABLE ATTORNEY'S FEES TO 15% OF UNPAID DEBT AFTER DEFAULT DOES NOT APPLY TO RESTRICTED LOANS.

You have asked whether the restriction on reasonable attorney's fees to 15% of the unpaid debt after default in Consumer Protection Code Section 3.404 [S.C. Code Ann. §37-3-404 (Cum. Supp. 1979)] applies to a restricted loan made after the effective date of that section. Section 3.404 provides:

Except as provided by the provisions on limitations on attorney's fees as to certain supervised loans (§37-3-514), with respect to a consumer loan the agreement may provide for the payment by the debtor of reasonable attorney's fees not in excess of 15% of the unpaid debt after default and referral to an attorney not a salaried employee of the lender. A provision in violation of this section is unenforceable. (Emphasis added)

That section as written applies to consumer loans in general with the exception of supervised loans having a loan finance charge greater than 18% per year with a principal of \$1,000 or less for which attorney's fees are prohibited.

The loan prompting your question was made under the Consumer Finance Law, Act 988 of 1966, and therefore is a "restricted loan" as defined in Consumer Protection Code Section 3.501(3) [S.C. Code Ann. §37-3-501 (Cum. Supp. 1979)]. Although a restricted loan is one type of consumer loan and is governed by the Consumer Protection Code in many respects, such a loan is treated differently for certain purposes from both consumer loans made by unlicensed lenders and supervised loans made by lenders who have a license to make supervised loans under the Consumer Protection Code. Section 1.202 [S.C. Code Ann. §37-1-202 (Cum. Supp. 1979)], the exclusionary section of the Consumer Protection Code, provides:

This title does not apply to: . . .

- (5) Licensing or examining restricted lenders
[§37-3-501(4)]; . . .

TELEPHONES [AREA CODE 803]

ADMINISTRATION
758-3017

CONSUMER COMPLAINTS
758-2040
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PUBLIC INFORMATION
758-7546

NOTIFICATION
758-8587

CONSUMER ADVOCACY
758-5864

(7) Rates and charges on restricted loans [§37-3-501(3)]
. . . . (Emphasis added)

It is the opinion of this Department that a charge made by a lender to a consumer for attorney's fees is a "charge" in connection with the loan and when made by a restricted lender is a "charge on a restricted loan" whose amount is governed by the Consumer Finance Law, Act 988 of 1966, rather than the Consumer Protection Code.

Section 3.404 of the Consumer Protection Code is Alternative B of Section 3.404 of the Official 1968 Text of the Uniform Consumer Credit Code. The official comment to that section refers to the comment to UCCC Section 2.413, Alternative B (the parallel section for sales) which provides in part:

This section reflects a policy decision to treat attorney's fees not as part of the [lender's] general overhead to be indirectly borne by all his customers but as a charge to be imposed, at least in part, on the defaulting [borrower] who gives rise to the expense. This section allows the parties to agree that upon default and referral of the claim to an attorney a charge can be made (Emphasis added)

Thus the amount of an attorney's fee that may be passed on to the consumer under the Consumer Protection Code is categorized by the drafters of the Uniform Consumer Credit Code as a charge to the consumer, in addition to other charges that may be incurred in connection with a consumer credit transaction such as the finance charge, "additional charges," delinquency charges, deferral charges, and other default charges.

Categorizing the amount to be paid by the consumer for attorney's fees as a "charge" under the Consumer Finance Law, Act 988 of 1966, is also consistent with Section 34-29-140 (1976 as amended) of that law, captioned "maximum charges," which provides in subsection (e):

In addition to the charges and fees provided for by this chapter, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, or received, except . . . a delinquent charge However, such restriction shall not apply to . . . actual and reasonable attorney fees as determined by the court in which suit is filed If any amount in excess of the charges permitted by this chapter is charged, contracted for, or received, except as the result of an accidental or bona fide error, the contract of loan shall be void, and the licensee shall have no right to collect or receive any principal, interest, charge or recompense whatsoever (Emphasis added)