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ADMINISTRATOR

# The State of South Carolina

## Department of Consumer Affairs

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August 4, 1976

Administrative Interpretation No. 2.404-7607

BUYER MAY ASSERT CLAIMS AND DEFENSES AGAINST ASSIGNEE ONLY BY WAY OF COUNTERCLAIM OR SET-OFF. BUT AN AMENDMENT TO SECTION 2.404, EFFECTIVE SEPTEMBER 29, 1976, PERMITS BUYER'S DIRECT ACTION.

You have requested an administrative interpretation of the following question:

Is the assignee of a consumer credit sale contract liable to the purchaser in damages for alleged defects in the goods by virtue of Section 2.404 of the South Carolina Consumer Protection Code [S. C. Code Section 8-800.194 (1962) (as amended)]?

Under the present Consumer Protection Code, an assignee of the rights of a seller of goods sold pursuant to a consumer credit sale agreement is liable to the buyer in damages for alleged defects in the goods by virtue of Consumer Protection Code Section 2.404 only as a defense to or set-off against a claim by the assignee. Section 2.404 of the Consumer Protection Code is Alternative A of the 1969 final revised draft of Uniform Consumer Credit Code Section 2.404 and reads in pertinent part:

With respect to a consumer credit sale . . . an assignee of the rights of the seller . . . is subject to all claims and defenses of the buyer . . . against the seller . . . arising out of the sale . . . notwithstanding an agreement to the contrary, but the assignee's liability under this section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. Rights of the buyer . . . under this section can only be asserted as a matter of defense to or set-off against a claim by the assignee. (Emphasis added)

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The purpose of this section of the Consumer Protection Code is to make inoperative certain provisions in consumer credit sale agreements which otherwise had the effect of cutting off a consumer's claims or defenses arising out of the sale when the agreement was subsequently assigned to a third party. Devices such as printing waiver of defense clauses in standard retail instalment contract forms and taking negotiable instruments in consumer credit sales effectively cut off the consumer's right to assert claims or defenses in response to a claim for full payment by an assignee. Apparently the South Carolina General Assembly determined that taking away the consumer's right to assert claims or defenses against an assignee in a consumer credit sale is against public policy notwithstanding an "agreement" to the contrary, realizing that consumers seldom are aware of the meaning of such terms of an agreement and that even if they were aware of their meaning, would unlikely be in a position to bargain for their deletion from the agreement.

This section currently gives the consumer a defense to or set-off against a claim by an assignee and not a right to initiate a suit against an assignee. However, the 1976 amendments to the Consumer Protection Code, effective September 29, 1976, substantially change Section 2.404 to read in pertinent part:

- (1) With respect to a consumer credit sale . . . an assignee of the rights of the seller . . . is subject to all claims and defenses of the consumer against the seller . . . arising from the sale . . .
- (2) A claim or defense of a consumer specified in subsection (1) may be asserted against the assignee under this section only if the consumer has made a good faith attempt to obtain satisfaction from the seller . . . with respect to the claim or defense and then only to the extent of the amount owing to the assignee with respect to the sale . . . of the property or services as to which the claim or defense arose at the time the assignee has written notice of the claim or defense. . .

There is thus no limitation in amended Section 2.404 with regard to the manner in which a claim or defense may be asserted by the consumer provided the good faith attempt to obtain satisfaction

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from the seller has been made and the assignee has written notice of the claim or defense. As before, the claim or defense is limited to the amount owing with respect to the sale giving rise to the claim or defense.

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