STEVEN W. HAMM
ADMINISTRATOR
AND
CONSUMER ADVOCATE

The State of South Carolina

Department of Consumer Affairs

2801 DEVINE STREET
P. O. BOX 5757
COLUMBIA, S.C. 29250-5757

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Administrative Interpretation No. 3.305-8601

A RESTRICTED LENDER THAT FAILS TO FILE A MAXIMUM RATE SCHEDULE AS REQUIRED BY § 37-3-305 IS LIMITED TO A MAXIMUM ANNUAL PERCENTAGE RATE OF 18%.

A restricted lender [S.C. Code Ann. § 37-3-501(4) (Law. Co-op. 1985)] has failed to file a Maximum Rate Schedule during fiscal year 1985. This lender wishes to know whether it can avoid readjustment to 18% APR of contracts entered into after July 1, 1985 by the assertion of a bona fide error defense under Section 37-5-202(7).

South Carolina Code Annotated Section 37-3-305(1) (Law. Co-op. 1985) provides:

> Every creditor [§ 37-1-301(13)], other than an assignee of a credit obligation, making supervised or restricted consumer loans (§ 37-3-104) in this State shall on or before the effective date of this section, and in case of a creditor not making supervised consumer loans in this State on that date, on or before the date the creditor begins to make such loans in this State, file with the Department of Consumer Affairs and, except as otherwise provided in this section, post in one conspicuous place in every place of business in this State in which offers to make consumer loans are extended, a certified maximum rate schedule meeting the requirements set forth in subsections (2), (3) and (4) of this section.

Section 37-3-305(8) further provides:

> (8) Every creditor must file at least one maximum rate schedule and pay at least one ten dollar filing fee during each state fiscal year disclosing that creditor's existing maximum rates. If this filing does not change any maximum rates previously filed, the creditor will not be required to alter posted maximum rates. If any creditor has not filed a maximum rate schedule with the Department of Consumer Affairs since the beginning of the previous state fiscal year then on July first of the following year the filing will no longer be effective and the maximum finance charge that the creditor may impose on any credit extended after that date may not exceed eighteen percent per annum until such time as the creditor files a revised maximum rate schedule that complies with this section.

A lender that is not a supervised lender is limited to a finance charge not exceeding eighteen percent per year [§ 37-3-201(1) and (2)]. Supervised lenders, including restricted lenders, may contract for a loan finance charge which does not exceed the greater of either the rate properly filed and posted pursuant to Section 37-3-305 or eighteen percent per year on the unpaid balances of the principal.

The decision to make a finance charge in excess of 18% APR is a voluntary one made by the supervised or restricted lender. The law does not require them to charge more than eighteen percent but allows them to do so if they comply with all of the provisions of Section 37-3-305. The onus of compliance is placed upon the supervised and restricted lenders with the South Carolina Department of Consumer Affairs responsibility limited to filing and certifying properly filed schedules [Section 37-3-305(6)]. As a courtesy to the credit granting community the Department notifies all persons who have previously filed a maximum rate schedule of the yearly filing requirements. Such courtesy notices are mailed during the month of May each year.

It has been suggested that a restricted lender that failed to file a maximum rate schedule by inadvertence or misapprehension of the Code's requirements might be excused from restructuring its contracts under the bona fide error defense of Section 37-5-202(7), which states:

> A creditor may not be held liable in an action brought under this section for a violation of this title if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

We disagree. Having failed to comply with Section 37-3-305, a lender charging in excess of 18% APR on a consumer loan makes an excess charge. In addition to penalties for noncompliance, Section 37-5-202(2) provides that "[a] consumer is not obligated to pay a charge in excess of that allowed by this title and has a right of refund of any excess charge paid." (emphasis added) When the charge allowed by the Consumer Protection Code is 18% APR it is obvious that all charges exceeding that rate must be refunded.

The suggestion that Section 37-5-202(7) excuses the assessment of excess charges implies that a creditor might retain illegal late charges, illegal attorney fees, illegal default charges, or finance charges in excess of those properly filed and posted, so long as the creditor can allege they were assessed by mistake. The General Assembly clearly intended no such result. See H. Haynsworth, The South Carolina Consumer Protection Code, § 5.202, Comment 3 (1982).

Even assuming arguendo that the bona fide error defense could apply, it does not help a lender that fails to file through inadvertence or misapprehension of the Code's requirements. Uniform Consumer Credit Code Section 5.202(7) (1974) [from which Section 37-5-202(7) was taken directly] tracks the language of Truth in Lending Act bona fide error clause Section 130(c); 15 U.S.C. § 1640(c) as amended to April 27, 1974]. The courts have generally held that this defense is available for clerical errors, and not to errors of law. See e.g. In Re Dickson, 432 F. Supp. 752 (D.C.N.C. 1977); Powers v. Sims & Levin Realtors, 396 F. Supp. 12 (E.D.Va. 1975) aff'd in part and rev'd in part on other grounds, 542 F.2d 1216 (4th Cir. 1975); Doggett v. Ritter Finance Co., 384 F.Supp. 150 (D.C.Va. 1974) aff'd in part and rev'd in part on other grounds, 528 F.2d 860 (4th Cir. 1975).

Even if such a lender were able to prove the error was unintentional and bona fide, the lender would still have to show the maintenance of procedures reasonably adapted to avoid the error. The maintenance of such procedures would almost certainly result in the proper filing under Section 37-3-305.

The Department provides notice to all persons who might have made excess charges because of failure to file a Maximum Rate Schedule, so that they may avail themselves of the "safe harbor" offered by Section 37-5-202(6). That section protects the creditor from penalties if it notifies the consumer of the violation, before the consumer has taken action under the section, and correct the violation within sixty days of the notification.

In summary, it is the opinion of this Department that the failure to timely and properly file a Maximum Rate Schedule limits the creditor to a maximum rate of 18% APR.

Steven W. Hamm
Administrator

By: _____
Phillip S. Porter
Counsel to the Administrator