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ADMINISTRATOR
AND
CONSUMER ADVOCATE

The State of South Carolina

Department of Consumer Affairs

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July 9, 1979

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Administrative Interpretation No. 5.109-7913

"PAYMENT AS REQUIRED BY AGREEMENT" FOR PURPOSES OF
DEFAULT IN §5.109(1) MEANS INSTALLMENT PAYMENT DUE
CREDITOR UNDER THE CONSUMER CREDIT TRANSACTION.

You have asked how the term "payment" is defined for purposes of determining when a consumer has defaulted on a consumer credit transaction under Subsection (1) of Section 5.109 of the Consumer Protection Code, S.C. Code Ann. §37-5-109 (Cum. Supp. 1978). The questioned language is:

An agreement of the parties to a consumer credit transaction with respect to default on the part of the consumer is enforceable only to the extent that:

- (1) the consumer fails to make a payment as required by agreement; ... (Emphasis added)

The documents you provided to illustrate your question evidence a second mortgage loan made under the Consumer Protection Code. Besides agreeing to make equal consecutive monthly installment payments, the consumer also agrees to make payments in relation to the property securing the transaction such as paying insurance premiums and taxes, and making payments imposed by any transaction involving a superior security interest in the same property. You asked if failure to make these auxiliary payments constitutes a default for failure to make a payment required by the agreement.

It is our opinion that the term "payment" in Section 5.109(1) means an installment payment required to be paid to the creditor under the terms of the agreement comprising the consumer credit transaction and not auxiliary amounts which the consumer may have agreed to pay to third parties under the terms of that same agreement.

That the term "payment...required by agreement" refers only to an installment payment rather than an auxiliary payment becomes clear when reading various sections of the Consumer Protection Code and the official Comments to those sections in conjunction with the language in Section 5.109(1). Official Comment (2) to Section 5.109 of the Official 1974 Text of the Uniform Consumer Credit Code, which is the same as Consumer Protection Code Section 5.109, states:

TELEPHONES [AREA CODE 803]

ADMINISTRATION
758-3017

CONSUMER COMPLAINTS
758-2040
WATS 1-800-922-1594

PUBLIC INFORMATION
758-7546

NOTIFICATION
758-8587

CONSUMER ADVOCACY
758-5864

The section recognizes that there are two entirely distinct sets of circumstances which might constitute default on an installment obligation. First, and most common is the failure to pay an installment as required. A default of this type is susceptible of being cured by the consumer without impairing a continuing contractual relationship... (Emphasis added)

Classifying the type of default as one of the two types which are enforceable under Section 5.109 is important for purposes of determining whether notice of the right to cure must be sent before enforcing that part of the agreement. Consumer Protection Code Section 5.110, S.C. Code Ann. §37-5-110 (Cum. Supp. 1978), provides in part:

...[A]fter a consumer has been in default for ten days for failure to make a required payment... a creditor may give the consumer the notice described in this Section...

(2) The notice shall...conspicuously state:

...the amount of payment and date by which payment must be made to cure the default...

[Part of suggested form of notice to comply:]

_____ is the LAST DAY FOR PAYMENT
(date)

_____ is the AMOUNT NOW DUE
(amount)

You are late in making your payment(s). If you pay the AMOUNT NOW DUE (above) by the LAST DAY FOR PAYMENT (above) you may continue with the contract as though you were not late... (Emphasis added)

Official Comment (1) to Section 5.110 of the Official 1974 Text of the Uniform Consumer Credit Code which is essentially the same as Consumer Protection Code Section 5.110 states in part:

...The notice may be given at any time after the payment is more than ten days late. This is the same point at which the creditor may be entitled to assess a delinquency charge under [Section 3.203]... (Emphasis added)

The provision concerning delinquency charges for consumer loans, Consumer Protection Code Section 3.203, S.C. Code Ann. §37-3-203 (Cum. Supp. 1978), provides in part:

(1) With respect to a precomputed consumer loan... the parties may contract for a delinquency charge on any

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installment not paid in full within ten days after its scheduled due date... (Emphasis added)

A creditor is authorized to make a delinquency charge only on those installment payments which are more than ten days past due. The creditor would have no authority to impose or accept a delinquency charge on an auxiliary payment to a third party such as a delinquent insurance premium due an insurer, delinquent taxes due a tax collector, or an overdue payment to a creditor holding a superior security interest on the same property.

The drafters apparently intended the term "payment" in Section 5.109(1) to be the same kind of payment referred to in the definition of "payable in installments" in Consumer Protection Code Section 1.301(12), S.C. Code Ann. §37-1-301 (1976), which reads in part:

"Payable in installments" means that payment is required or permitted by agreement to be made in ...
(c) two or more periodic payments with respect to a debt arising from a consumer loan...

If the transaction were a single payment transaction rather than one payable in installments, the single payment would be the "payment as required by agreement" for purposes of Section 5.109(1).

Our conclusion that the word "payment" for purposes of §5.109(1) does not include payments due a third party such as an insurer does not preclude a creditor from otherwise exercising his rights under the Consumer Protection Code. For example, Consumer Protection Code Section 3.208, S.C. Code Ann. §37-3-208 (Cum. Supp. 1978), provides that the parties may agree that the consumer will perform certain duties to insure or preserve the collateral and if he does not, the creditor will pay for performance of the duties and add the amounts paid to the debt. In that event, the creditor may make a finance charge on the amount advanced at a rate not exceeding that originally disclosed to the consumer. Additionally, Subsection (2) of Section 5.109 provides that significant impairment of the prospect of payment, performance, or realization of collateral may be an enforceable event of default under the agreement. Unlike Subsection (1) of Section 5.109, a Subsection (2) default does not require notice of the right to cure prior to a creditor's exercising his rights as a result of the default.

Based on the foregoing, it is the opinion of this Department that a required payment for purposes of default in Section 5.109(1) is the single payment or an installment payment which is required to be made to the creditor under the terms of the consumer credit transaction.

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Administrator

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