The State of South Carolina

Department of Consumer Affairs

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December 13, 1982

Administrative Interpretation No. 3.203-8203

SECTION 37-1-109 DOES NOT ALLOW AUTOMATIC ESCALATION OF DELINQUENCY CHARGES ON EXISTING LOAN AGREEMENTS; SUPERVISED LENDER MAY NOT CONTRACT FOR A DELINQUENCY CHARGE WHICH INCREASES OR DECREASES FROM TIME TO TIME BASED ON DOLLAR AMOUNT ADJUSTMENTS OF SECTION 37-1-109.

You have asked whether a supervised lender may begin charging the maximum dollar amount of delinquency charge on precomputed consumer loans, when applicable, effective on the date of the adoption by the Administrator of the regulation adjusting the maximum dollar amounts designated by Section 37-1-109. If the answer to this question is negative, you further asked whether a supervised lender could legally provide in a promissory note that the borrower will pay a maximum delinquency charge of up to "$8.00 or such other maximum dollar amount as may be from time to time established by the South Carolina Department of Consumer Affairs pursuant to S.C. Code Ann. § 37-1-109 (1976 as amended)." In the opinion of this Department the answer to both questions is "no."

Initially, the Department wishes to make clear that it interprets Section 37-1-109 to effect changes in dollar amounts automatically at designated times. Subsection (1) of that section states "From time to time the dollar amounts in this title shall change, as provided in this section . . . ." (Emphasis added). Subsection (2) goes on to state "The designated dollar amounts shall change on July 1st of each even numbered year . . . ." (Emphasis added). Rather than stating that the Administrator's regulation implements the change or that the Administrator must act in order for the changes to take place, subsection (4) simply requires the Administrator to announce the changes. This Department considers the dollar amount changes to occur by operation of law regardless of the existence of the regulation or the Legislature's final action to approve a regulation pursuant to the South Carolina Administrative Procedures Act.

Your first question seems to ask whether each future dollar amount change can be "read into" contracts previously consummated with regard to delinquency charges. For example, if a supervised lender contracted with a borrower on January 1, 1978 for a then existing maximum of a $5.00 delinquency charge on a 120-month loan, might the lender have simply assessed a $6.50 delinquency charge for delinquencies occuring after July 1, 1980 and an $8.00 delinquency charge for delinquencies occuring after July 1, 1982, and so on?

It is well settled law in South Carolina that laws are presumed not to operate retrospectively unless the intent of the Legislature to make the statute retrospective is expressly declared or necessarily implied from the language

used. Hercules, Inc. v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E.2d 45 (1980); Independence Ins. Co. v. Independent Life & Acc. Ins. Co., 218 S.C. 22, 61 S.E.2d 399 (1950). With the exception of S.C. Code Ann. § 37-9-101(3) and (4) (1976 as amended), there is no language in the Consumer Protection Code expressly or impliedly giving its provisions retrospective effect.

In addition, both the South Carolina Constitution [S.C. Const., art. I, § 4] and the United States Constitution [U.S. Const., art. I, § 10] prohibit the state from passing a law impairing the obligations on a contract. Even if § 37-1-109 purported to authorize such automatic adjustments of the dollar amounts, such a construction would effect changes in contract terms and be prohibited. See Henry v. Alexander, 186 S.C. 17, 194 S.E. 649 (1937).

Regarding the second question (whether the lender may contractually provide the dollar amount to be adjusted from time to time) we believe such an arrangement is prohibited by the specific wording of Section 37-3-203(1): "Parties may contract for a delinquency charge . . . in an amount not exceeding $5.00 which is not more than 5% of the unpaid amount of the installment . . . ." (Emphasis added). While Section 37-1-109(6) designates Section 37-3-203(1) as a section subject to dollar amount change, and while at any particular time the actual dollar amount to be read into the section may be higher than $5.00, the section contemplates a specific dollar amount. The notion that Section 37-1-109 read in conjunction with Section 37-3-203 authorizes future dollar amount changes based on yet unknown dollar amounts is simply more than the Sections were intended to achieve.

Further, such a provision could run afoul of the Truth in Lending Simplification and Reform Act [15 U.S.C. § 1601 et seq. (1980)]. Revised Regulation Z [12 C.F.R. § 226 (1981)], the implementing regulation to the Truth in Lending Simplification and Reform Act, provides at § 226.18(l) that in a closed end consumer credit transaction, the creditor shall disclose "any dollar or percentage that may be imposed before the maturity date due to a late payment, other than a deferral or extension charge." Although the section mentions a "dollar or percentage" the Official Staff Commentary on Regulation Z at § 226.18(l)2 indicates that a statement that the creditor will assess the lesser of a dollar amount or a percentage would be permissible. Nevertheless, we do not believe that a statement that the delinquency charge would be the "lesser of 5% of the unpaid balance or $8.00 or such other maximum delinquency charge as may from time to time be established . . ." would comply with the late payment disclosure requirements of 12 C.F.R. § 226.18(l), nor would it comply generally with the requirement of 12 C.F.R. § 226.17(a) that disclosures be made clearly. See Smith v. Chapman, 614 F.2d. 968 (5th Cir. 1980). We also believe that such a vague disclosure would conflict with the purpose of Revised Regulation Z to "promote the informed use of credit by requiring disclosures about its terms and costs." 12 C.F.R. § 226.1(b) (1981); see also 15 U.S.C. § 1602 (1980); S. C. Code Ann. § 37-1-102(2)(c) (1976 as amended).

This Administrative Interpretation is in accordance with Maine Bureau of Consumer Protection, Advisory Ruling No. 46 (July 7, 1980) on a similar question. See S.C. Code Ann. § 37-1-102(3) (1976 as amended).

In summary, it is the opinion of this Department that a supervised lender may not automatically escalate delinquency charge dollar amounts pursuant to changes in dollar amounts mandated in Section 37-1-109 from time to time. Nor may a supervised lender contract with a consumer for a future escalation of such dollar amounts without violating the provisions of Section 37-3-203 and the federal Truth in Lending Act.

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Administrator

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