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The State of South Carolina

Department of Consumer Affairs

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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]

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758-3017

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758-2040
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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)

Both the Consumer Protection Code and the Consumer Finance Law permit the passing on of attorney's fees to the consumer in certain circumstances. While the Consumer Finance Law permits "actual and reasonable attorney fees" to be paid by the consumer, the Consumer Protection Code limits the amount of "reasonable attorney's fees" that may be passed on to the consumer to not more than 15% of the unpaid debt after default. In both laws a consumer in no case may be required to pay more than a reasonable attorney's fee which in both instances will be determined by a court. The Consumer Protection Code has a further restriction to not more than 15% of the unpaid debt after default regardless of how high a reasonable attorney's fee might be in the specific case.

In construing a statute, the intention of the legislature is the primary guideline to be used. Adams v. Clarendon County School District No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978). The General Assembly expressed its intention to preserve the applicability of the provisions of the Consumer Finance Law relating to charges that may be made in connection with a restricted loan in Consumer Protection Code Section 1.202(7) quoted earlier. Although a higher attorney's fee may ultimately be passed on to the consumer in connection with a restricted loan than that same consumer might have had to pay in connection with a consumer loan other than a restricted loan, the legislature apparently intended such a result. The Consumer Finance Law also permits restricted lenders to make higher charges in general on certain small loans but the penalties for failure to comply with that law's restrictions are more severe than those in the Consumer Protection Code. Compare §34-29-240(e) quoted above with CPC §37-5-202(1), (3), and (4). The legislature apparently balanced the higher rates and charges in the Consumer Finance Law with stricter penalties for violations. But ultimately a court will determine what is a "reasonable" attorney's fee and may allow no more than 15% of the unpaid debt after default even for a restricted loan if that is reasonable in the court's judgment.

We realize that Consumer Protection Code Section 3.404 concerning attorney's fees is placed in Part 4 captioned "Limitations on Agreements" in Chapter 3 on loans rather than in Part 2 captioned "Maximum Charges." Had the section on attorney's fees appeared in Part 2, the answer to your question would have been more readily apparent because Section 3.200 [S.C. Code Ann. §37-3-200 (Cum. Supp. 1979)] provides that "This Part does not apply to restricted loans or restricted lenders." Both Sections 3.404 on attorney's fees and 3.405 captioned "charges as a result of default prohibited except as authorized by title" appear in the Part on limitations on agreements in the Official 1968 Text of the UCCC as well as the Consumer Protection Code. However, in the Official 1974 Text of the UCCC, on which certain Consumer Protection Code sections were based including those on additional charges [CPC §§2.202 and 3.202], the section on attorney's fees similar to Consumer Protection Code Section 3.404 was placed in the part on "other charges and modifications" along with the sections on

additional charges, delinquency charges, and deferral charges reflecting a decision to group certain charge-related provisions in the same part of the revised UCCC.

We believe that our interpretation of the Consumer Protection Code which excludes attorney's fees charged in connection with restricted loans from the 15% restriction contained in Section 3.404 is consistent with legislative intent concerning construction of these two laws as expressed in Consumer Protection Code Section 37-1-106 (Cum. Supp. 1979) which provides:

Except for §37-3-512 and except where Chapter 29 of Title 34 [the Consumer Finance Law, Act 988 of 1966] is amended by specific reference thereto, insofar as restricted lenders and restricted loans are concerned any inconsistency or conflict between any provision of this Title and Chapter 29 of Title 34 shall be resolved in favor of Chapter 29 of Title 34, but Chapter 29 of Title 34 shall apply only to restricted loans and restricted lenders.

Although Consumer Protection Code Section 3.102 [S.C. Code Ann. §37-3-102 (Cum. Supp. 1979)] provides "This chapter applies to consumer loans, including supervised loans and, except as provided in §§37-3-200 and 37-3-500, restricted loans . . .", reading together all sections of the Consumer Protection Code which refer to the Consumer Finance Law, in our opinion the legislature intended the Consumer Finance Law provision on the charge for attorney's fees that may be passed on to a consumer to prevail. In summary, it is the opinion of this Department that a restricted lender who complies with Section 34-29-140(e) with regard to the charge for attorney's fees is not in violation of Consumer Protection Code Section 3.404's restriction on reasonable attorney's fees to not more than 15% of the unpaid debt after default.

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