



The State of South Carolina

Department of Consumer Affairs

2221 DEVINE STREET
P.O. BOX 5757
COLUMBIA, S.C. 29250-5757

December 13, 1982

STEVEN W. HAMM
ADMINISTRATOR
AND
CONSUMER ADVOCATE

COMMISSIONERS
EMIL W. WALD
CHAIRMAN
ROCK HILL
LEHMAN A. MOSELEY, JR.
VICE CHAIRMAN
GREENVILLE
THOMAS N. MCLEAN
COLUMBIA
NELL W. STEWART
GREENVILLE
LONNIE RANDOLPH, JR.
COLUMBIA
JOHN T. CAMPBELL
COLUMBIA
BOBBY T. JONES
CAMDEN
VIRGINIA L. CROCKER
CLINTON
WILBUR LEE JEFFCOAT
SWANSEA
THOMAS L. MOORE
CLEARWATER
W. LEWIS BURKE
COLUMBIA

Administrative Interpretation No. 3.203-8204

A CREDITOR MAY NOT COUNT A CURED DEFAULT AS ONE OF THE TWO DEFAULTS
AUTHORIZING CONVERSION TO INTEREST BEARING ACCOUNT UNDER SECTION
37-3-203(4).

You asked whether a lender has an absolute right to convert a precomputed consumer loan to one in which the loan finance charge is based on the unpaid balances after any two installments or parts thereof are in default for ten days or more, or alternatively, whether the creditor's right to convert might be effected by the cure provisions of Sections 37-5-110 and 37-5-111.

South Carolina Code Ann. § 37-3-203(4) (1976 as amended) provides, in part:
"If two installments or parts thereof of a precomputed loan are in default for ten days or more, the lender may elect to convert the loan from a precomputed loan to one in which the loan finance charge is based on unpaid balances"

Section 37-5-110, in conjunction with Section 37-5-111, however, provide a consumer with an opportunity to cure a default consisting only of failure to make a payment or payments as required by the agreement. According to § 37-5-111(1), "[c]ure restores the consumer to his rights under the agreement as though the default had not occurred." The question, therefore, is whether the avoidance of the conversion provided for in Section 37-3-203(4) is a "right" within the meaning of 37-5-111(1). This Department believes it is.

You argue that conversion does not truly affect the "rights" of the debtor. The debtor, after conversion, may still cure and restore his loan under the agreement as though the default had not occurred. You state also that the consumer may actually benefit from the conversion if the consumer makes payments early.

The term "right" is an abstract one, not defined in the Consumer Protection Code. A generally accepted definition of the term "right" is "a legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act." Black's Law Dictionary, 1189 (5th ed. 1979) (quoting Restatement of Property § 1.) Clearly, under the framework of the South Carolina Consumer Protection Code, rights include not only those things which a party affirmatively may do, but also restrictions on actions of other parties. For example, a debtor does not have an affirmative right to make late payments in violation of his contract with a consumer lender, but he may have a right to avoid a contractual late payment charge in excess of 5% of the installment [§ 37-3-203(1)] and a right to avoid acceleration of the maturity of the obligation if the default consist only of the failure to make a payment as required by the agreement [§§ 37-5-110 and 37-5-111].

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
758-8996

We are unconvinced by the argument that the avoidance of conversion is not a right contemplated by § 37-5-111(1). Whether a conversion will work to the consumer's benefit or detriment clearly depends on the payment habits of the particular individual. Whether the consumer and the lender will initially enter into a precomputed consumer loan or one in which the finance charge is based on unpaid balances is a matter to be resolved by the parties on a contractual basis, with both parties ostensibly taking into consideration what both think the debtor's paying habits are most likely to be.

Although in an interest bearing transaction a debtor may reduce the amount of interest to be paid by making a monthly payment five days early, that debtor could also increase the amount of interest to be paid by making a monthly payment five days late. This differs significantly from the rights of a debtor in a precomputed consumer loan, wherein no delinquency charge would accrue for payment five days late, and even if a payment were more than ten days late, the charge would be limited to a specified amount not to exceed \$8.00 or 5% of the installment, payment whichever is less.

The cure provisions allow the debtor one opportunity to "wipe the slate clean" if the default consist only of a failure to make a payment or payments. If the default actually endangers the continuing contractual relationship, or if the consumer fails to make a payment as agreed after the initial cure period, the Code allows a wider range of remedies, such as acceleration or repossession.

The Official Comment 1 to the 1974 Draft of the UCCC Section 5.110 states:

Section 5.109 delineates the legal criteria for default and recognizes that a default consisting of the failure to make a payment as required by the agreement is susceptible of being cured by the consumer without impairing a continuing contractual relationship 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 The notice is calculated to give the consumer enough information to understand his predicament and encourage him to take appropriate steps to alleviate it. [1976] 1 Cons. Cred. Guide (CCH) ¶6260.

Thus, the creditor's right to assess a delinquency charge in a precomputed transaction, the creditor's right to send a notice of right to cure and the creditor's right to convert to an interest bearing account are all triggered by essentially the same occurrence: the debtor's default by failure to make required payments for a specified period of time.

The consumer could not effect a cure under the terms of the cure notice which "restores the consumer to his rights under the agreement as though the defaults had not occurred" if the creditor could simultaneously convert the account to one in which the consumer could pay more interest charges than would be allowed in the precomputed transaction, depending upon the consumer's paying habits. Nor would it be proper to count a cured default as one default

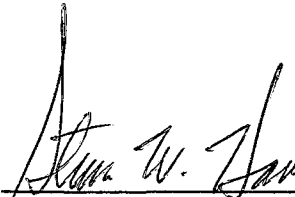
Administrative Interpretation No. 3.203-8204

December 13, 1982

Page Three

and a subsequent default as triggering the conversion rights set forth in Section 37-3-203(4). Once a creditor sends a cure notice pursuant to Sections 37-5-110 and 37-5-111, and the debtor, pursuant to the terms of the notice, cures the payment default, it is as if the default were obliterated. Legally, the default no longer exists except that it has "spent" the consumer's only cure opportunity with regard to that transaction.

In summary, it is the opinion of the Department that if a consumer defaults in making a payment or payments on a precomputed consumer loan, the lender subsequently sends a cure notice pursuant to Sections 37-5-110 and 37-5-111, and the consumer cures that default, then that default may not be considered as one of the two installments in default authorizing a lender to convert the loan from a precomputed loan to one in which loan finance charge is based on unpaid balances.



Steven W. Hamm
Administrator

SWH/pcb