



IRVIN D. PARKER  
ADMINISTRATOR  
AND  
CONSUMER ADVOCATE

# The State of South Carolina

## Department of Consumer Affairs

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

May 7, 1980

Administrative Interpretation No. 5.111-8004

ALTHOUGH SECTION 5.111 DOES NOT REQUIRE CREDITOR TO WAIT TEN DAYS BEFORE PROCEEDING AGAINST A CONSUMER OR GOODS THAT ARE COLLATERAL IN CONNECTION WITH SUBSEQUENT DEFAULTS ON THE SAME OBLIGATION, OTHER CONSIDERATIONS MAY.

You have asked whether Consumer Protection Code Section 5.111 [S.C. Code Ann. §37-5-111 (Cum. Supp. 1979)] requires a creditor who has once given notice of the right to cure in accordance with Section 5.110 [S.C. Code Ann. §37-5-110 (Cum. Supp. 1979)] to wait ten days before proceeding against the consumer or goods that are collateral when the consumer defaults again on the same obligation by failing to make a payment as required by agreement.

Section 5.110 provides in pertinent part in subsection (1):

With respect to a consumer credit transaction, after a consumer has been in default for ten days for failure to make a required payment and has not voluntarily surrendered possession of goods that are collateral, a creditor may give the consumer the notice described in this section... (Emphasis added)

When the only default of the consumer on a consumer credit transaction is failure to pay on time, Section 5.111 prohibits a creditor from either accelerating maturity of the unpaid balance or enforcing a security interest in goods that are collateral until at least twenty days after giving notice of the consumer's right to cure. Subsection (2) of that section concerns subsequent defaults:

With respect to defaults on the same obligation and subject to subsection (1), after a creditor has once given a notice of consumer's right to cure (§37-5-110), this section gives the consumer no right to cure and imposes no limitation on the creditor's right to proceed against the consumer or goods that are collateral.... (Emphasis added)

Your question arises because when a consumer is late in making his payments and the creditor wishes to send a notice of the consumer's right to cure under Section 5.110 to meet the requirements of Section 5.111, the creditor must wait ten days

COMMISSIONERS  
JOHN T. CAMPBELL  
CHAIRMAN  
ROBERT E. HUDSON  
COLUMBIA  
EMIL W. WALD  
ROCK HILL  
ELLEN H. SMITH  
SPARTANBURG  
LEHMAN A. MOSELEY, JR.  
GREENVILLE  
RALPH K. ANDERSON, JR.  
FLORENCE  
T. DEWEY WISE  
CHARLESTON  
THOMAS N. MCLEAN  
COLUMBIA  
NELL STEWART  
GREENVILLE  
HUGH LEATHERMAN  
FLORENCE  
LONNIE RANDOLPH, JR.  
COLUMBIA

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

after the instalment due date before sending the notice. But when a consumer is again late making a payment, does the Consumer Protection Code require a creditor to wait ten days before proceeding against either the consumer or the collateral? You explained that many consumers and some attorneys view the delinquency charge sections as modifying the payment due date in the written agreement between the parties by providing a ten day so-called "grace period." CPC §§2.203, 3.203 [S.C. Code Ann. §§37-2-203 (1976), 37-3-203 (Cum. Supp. 1979)]. Instead, those sections only give the parties the opportunity to agree that a delinquency charge of not more than a given amount may be charged in connection with a precomputed consumer credit transaction if the consumer has not paid an instalment in full within ten days after its due date. A delinquency charge is thus a matter of agreement and without such an agreement, no delinquency charge may be imposed regardless of how late a payment on a precomputed transaction may be.

Likewise, default is a matter of agreement between the parties with its enforceability restricted to the two events listed in Section 5.109: (1) failure to make a payment as required by agreement and (2) significant impairment of the prospect of payment, performance, or realization of collateral. When the default is failure to make a payment as required by agreement, there is no general requirement in the Consumer Protection Code that the creditor wait ten days before exercising his rights upon default. If the parties have so agreed, default occurs when a payment is not made by or on the instalment due date. A delinquency charge, however, cannot be imposed until the payment has been in default for at least ten days after the instalment due date in a precomputed transaction. Although default and delinquency are interrelated, they are two separate concepts. For instance, there can be a default without a delinquency (e.g., a consumer is about to flee the state with collateral with the intention to avoid his creditor) and there can be a default for late payment without incurring a delinquency charge (e.g., a consumer fails to pay his minimum payment on time in connection with a lender credit card account).

The ten day waiting period prior to the time notice of the right to cure may be sent in the event of a late payment is included in the cure provisions to coincide with the ten day period before the expiration of which a delinquency charge may not be imposed in connection with precomputed consumer credit transactions. No doubt a large percentage of defaults prompting creditors to send notice of the right to cure involves precomputed consumer credit transactions. The drafters realized this and required the ten day period to pass before notice is sent, to give the parties the opportunity to abide by their

delinquency charge agreement that an instalment is not "delinquent" for delinquency charge purposes until at least ten days after its due date. See official comment (1) to §5.110 of the Official 1974 Text of the Uniform Consumer Credit Code on which CPC §5.110 is based.

Subsection (2) of Section 5.111 quoted earlier specifically says that the section imposes no limitation on the creditor's right to proceed against the consumer or the goods that are collateral in subsequent defaults. It is the opinion of this Department that a creditor, although limited by Consumer Protection Code Section 5.109 [S.C. Code Ann. §37-5-109 (Cum. Supp. 1979)] on default, Section 5.112 [S.C. Code Ann. §37-5-112 (Cum. Supp. 1979)] on creditor's right to take possession after default, the written agreement between the creditor and the consumer, the requirement of good faith and concepts of course of dealing, usage of trade and course of performance when appropriate as set forth in the Uniform Commercial Code [S.C. Code Ann. §§36-1-203, 36-1-205, 36-2-208 (1976)] in proceeding against the consumer or collateral in the event of a subsequent default, he need not observe a ten day waiting period under Section 5.111. However, while there is no specific requirement of the Consumer Protection Code that a creditor wait ten days after a subsequent default for failure to make a payment on time before accelerating the unpaid balance or repossessing or otherwise proceeding against the collateral, other factors may make the ten day delay prudent and even necessary.

For example, if payments had been consistently accepted within the ten day period in a precomputed consumer credit transaction but one payment had not been received within the ten day period prompting a notice of the right to cure and a subsequent cure, a creditor's later failure to wait ten days for the consumer to pay or refusal to accept a payment tendered within the ten day period would certainly not be in good faith and might also be unconscionable conduct under Consumer Protection Code Section 6.111 [S.C. Code Ann. §37-6-111 (Cum. Supp. 1979)]. Additionally, if the customary practice in the consumer credit industry or a segment of it is to accept payments tendered within the ten day period in accordance with the delinquency charge agreement and to wait at least ten days after the due date before acceleration or repossession, creating a reasonable expectation of consumers that it is permissible to wait up to ten days after an instalment is due before paying it, contrary action by a creditor may result in unfair surprise.

In summary, there is no general requirement in the Consumer Protection Code that a creditor wait ten days after an in-

May 7, 1980

Page 4

stalment due date before proceeding against a consumer or collateral when a notice of the right to cure has been sent with respect to a previous default. However, without unusual circumstances justifying quick action by the creditor, failure to wait ten days before proceeding when the only default is failure to make a timely payment may result in a finding of lack of good faith or unconscionability on the creditor's part by a court or the Administrator because of the creditor's hasty action.

Irvin D. Parker  
Administrator

By Kathleen Goodpasture Smith  
Kathleen Goodpasture Smith  
Counsel to the Administrator

sbb