THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2018-CP-18-00729
Appellate Case No. 2020-000935

Portfolio Recovery Associates, LLC Assignee of
Synchrony Bank/HH Gregg, Petitioner,

v.

Jennifer Campney, Respondent,

and

Jennifer Campney, Third-party Plaintiff,

v.

Cooling & Winter, LLC, Third-party Defendant,
of whom Jennifer Campney is the Respondent.

PETITIONER PORTFOLIO RECOVERY ASSOCIATES, LLC'S PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION BY COUNSEL

Pursuant to South Carolina Appellate Court Rule 242(d)(1), the undersigned counsel for the petitioner, Portfolio Recovery Associates, LLC, certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on September 15, 2023.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in reversing the circuit court's finding that Petitioner was not required to provide a Notice of Right to Cure where, as here, the Petitioner is the assignee of a national bank?

II. Whether the Court of Appeals erred in concluding that Petitioner was required to provide a Notice of Right to Cure where, as here, the Petitioner's assignor's obligations to provide the same were preempted by the National Bank Act and its implementing regulations?

III. Whether the Court of Appeals erred in reversing the circuit court's finding that Petitioner was not a creditor for purposes of a Notice of Right to Cure where, as here, any obligation to provide a notice of right to cure arose prior to the assignment?

IV. Whether the Court of Appeals erred in reversing the circuit court's finding that Petitioner was not required to provide a Notice of Right to Cure where, as here, the consumer's ongoing failure to pay, coupled with the federally mandated charge off of the debt, significantly impaired payment and/or performance?

V. Whether the Court of Appeals erred in finding that Petitioner was required to provide a Notice of Right to Cure where, as here, the Petitioner's assignor had sent six months of periodic statements which substantially complied with the requirements of S.C. Code Ann. § 37-5-110 prior to charge off?

STATEMENT OF THE CASE

In January of 2017, the petitioner, Portfolio Recovery Associates, LLC ("PRA"), sued Jennifer Campney ("Campney") to collect on a charged off credit card account balance that it purchased from the original credit card issuer, Synchrony Bank. (R. pp. 84–103). Synchrony Bank is a national bank.[1] Campney responded by contesting PRA's right to proceed on an account stated cause of action and by filing four counterclaims and a third party complaint against PRA's

[1] *See* FDIC BankFind, Synchrony Bank (disclosing that Synchrony Bank is a federally-chartered savings bank whose primary federal regulator is the OCC), https://banks.data.fdic.gov/bankfind-suite/bankfind/details/27314.

then counsel of record. (R. pp. 104–05). Those counterclaims include the claim at issue here, which alleges PRA violated the South Carolina Consumer Protection Code (the "SCCPC") because PRA did not send a notice of right to cure[2] to Campney before filing suit. (R. pp. 108-109).

After a one-day bench trial, judgment was entered in favor of PRA on all issues. The relevant testimony and evidence presented demonstrated that Campney had an HH Gregg credit card issued by Synchrony Bank. (R. pp. 12, 252, lines 8–14). Prior to charging off Campney's account, Synchrony sent periodic monthly statements to Campney. (R. pp. 324–71). Copies of those periodic statements for the period beginning May 23, 2014 through May 16, 2015 were entered into evidence. (*Id.*). Campney testified that she "believe[d]" she received billing statements on the account. (R. p. 252, lines 8–10; *but see* R. p. 259, lines 10–18 (on redirect, Campney could not recall the specifics of which statements she received)). Those monthly statements indicated that the last date of payment was October 15, 2014. (R. p. 154, lines 20–23; pp. 324–71). On May 22, 2015, Synchrony charged off the account. (R. p. 184, lines 18–21). On June 20, 2015, PRA purchased Campney's charged-off account balance from Synchrony Bank. (R. pp. 139, lines 5–13; 146, lines 20–25; 321, 387).

Based upon the evidence presented, the circuit court found in favor of PRA on all claims. (R. p. 11–21). Judgment was entered in favor of PRA on its account stated claim for $4,236.78. (R. p. 17). The circuit court additionally dismissed all of Campney's counterclaims and third party claims. (*Id.*). Regarding Campney's contention that PRA's failure to send a right to cure notice

[2] PRA refers to sections S.C. Code Ann. §§ 37-5-109 through 37-5-111 of the SCCPC as the right to cure provisions, as they govern default, notice of right to cure upon default, and the opportunity to cure default, respectively.

violated the SCCPC, the circuit court dismissed Campney's claim for three reasons. First, the SCCPC's right to cure provisions were not applicable to the debt at issue. (R. pp. 14–15). Secondly, PRA was not a creditor for purposes of the right to cure provisions. (R. p. 15). And finally, due to the age of the account and its status as a charged off debt, neither PRA nor its assignor had any expectation that payments were being made or would be made on the account. (*Id.*). Campney filed motions to alter or amend the judgment which were denied (R. pp. 78–83). Campney appealed the circuit court's Trial Order dated December 11, 2019 (R. pp. 11–21) and Rule 59 Order dated May 26, 2020 (R. pp. 76–77).[3]

The case was heard on oral argument May 1, 2023 and an order was entered August 23, 2023. *Portfolio Recovery Assocs., LLC v. Campney*, Op. No. 6019, 2023 WL 5419615, 2023 S.C. App. LEXIS 98 (S.C. Ct. App. Aug. 23, 2023). The Court of Appeals affirmed the judgment in favor of PRA on its account stated claim and affirmed dismissal of Campney's counterclaims related to the FDCPA, the SCUTPA, and negligence per se. *Id.* The Court of Appeals, however, reversed the circuit court's "determination in favor of PRA on the dismissal of Campney's counterclaim related to the SCCPC's right to cure notification" and remanded that claim to the circuit court "to determine the amount of set-off[4] and attorney's fees, if any Campney is entitled." *Id.* at *23.

On September 6, 2023, PRA timely filed its Petition for Rehearing seeking rehearing as to whether PRA was required to provide the consumer with a notice of right to cure pursuant to S.C.

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[3] Campney's third party claims were not appealed.

[4] The Court of Appeals determined that any claim for affirmative relief under the SCCPC's right to cure provision was foreclosed by the statute of limitations, but a right to set off survived pursuant to S.C. Code § 37-5-205. *Id.* at *22.

Code. Ann. § 37-3-510 under the facts presented in this matter. PRA contends that the Court of Appeals failed to consider: (a) whether the assignor's obligation to provide a notice of right to cure (and therefore, PRA's obligation) was preempted by federal law; and (b) whether the obligation to send a notice of right to cure exists where the consumer's ongoing failure to pay significantly impairs the prospect of payment or performance. *See* S.C. Code Ann. § 37-5-109(2). PRA additionally contends that the Court of Appeals erred by imposing obligations on an assignee that arose prior to assignment in contravention of the plain meaning of S.C. Code Ann. § 37-1-301(13) and by overlooking PRA's alternative argument that the periodic statements sent by Synchrony Bank met the right to cure requirements set forth in S.C. Code Ann. § 37-5-110. On September 15, 2023, the Court of Appeals denied the Petition for Rehearing.

ARGUMENT

As acknowledged by the Court of Appeals,[5] this matter presents novel questions of law, including whether an assignee of a national bank is required to send a notice of right to cure on a charged off credit card account. That question has never been answered by the South Carolina courts and has only been addressed once by a federal district court sitting in South Carolina—a decision which is in direct conflict with that of the Court of Appeals in this matter. *See Bracken v. Simmons First Nat'l Bank*, No. 6:13-1377-TMC-KFM, 2014 U.S. Dist. LEXIS 78974, at *12–13 (D.S.C. May 6, 2014), *adopted in full*, 2014 U.S. Dist. LEXIS 78025, at *2 (D.S.C. June 9, 2014) (concluding that a consumer credit card is not subject to the SCCPC).

In determining that PRA was required to provide a notice of right to cure before suing, the Court of Appeals held that adopting PRA's reading of the SCCPC would produce an absurd result—that "no creditor, initial or assignee, would be held liable for violation of the SCCPC's

[5] *Portfolio Recovery Assocs., LLC*, 2023 S.C. App. LEXIS 98, at *12.

right to cure notice requirement whenever a charged off debt was assigned because an initial creditor would argue it would have no obligation once all their claims to a debtor's account were assigned and an assignee would raise the argument PRA raises." *Portfolio Recovery Assocs., LLC*, 2023 S.C. App. LEXIS 98, at *21. Not so. The Court of Appeals decision fails to consider that national banks (such as the issuing creditor here) are not subject to state consumer laws which prevent or significantly interfere with the exercise of the national bank's lending powers, including those which concern terms of credit. Moreover, the decision fails to fully consider and give plain meaning to the provisions of SCCPC regarding the obligations of a creditor and, specifically, *when* and *if* a notice of right to cure is required.

PRA asks this Court to review the decision of the Court of Appeals. By interpreting Section 37-5-110 of the SCCPC to require that all creditors and their assignees must send a notice of right to cure before accelerating the balance owed on a consumer debt, the Court of Appeals has created conflict with long standing precedent from the United States Supreme Court and federal laws—that where, as here, the creditor is a national bank, state laws which impact terms of credit are preempted by federal law. The matter additionally presents novel issues of law regarding the definition of creditor (S.C. Code Ann. § 37-1-301(13)), whether a federally mandated charge off[6] creates a significant impairment to the prospect of future performance by the consumer such that no notice of right to cure is required and, to the extent that a notice of right to cure was required (S.C. Code Ann. §§ 37-5-109 through 37-5-111), whether the periodic statements sent by the original creditor met the requirements of S.C. Code Ann. § 37-5-110.

[6] To "charge off" a loan means "[t]o treat (an account receivable) as a loss or expense because payment is unlikely." *Charge Off*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Because these are novel issues of law, the Court may review the same *de novo*. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718–19 (2000). Moreover, whether the SCCPC applies to a particular transaction is a matter of statutory interpretation and, therefore, a question or law. Questions of law likewise are reviewed *de novo*. *Coastal Fed. Credit Union v. Brown,* 417 S.C. 544, 548, 790 S.E.2d 417 (Ct. App. 2019) (quoting *Town of Summerville v. City of N. Charleston,* 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008)).

I. THE COURT OF APPEALS ERRED BY CONCLUDING SOUTH CAROLINA'S RIGHT TO CURE PROVISIONS APPLY WHERE, AS HERE, THE CREDIT CARD ISSUER IS A NATIONAL BANK.

The Court of Appeals erred in finding that PRA was required to provide a notice of right to cure where, as here, PRA's assignor was a national bank whose obligations to provide the same were preempted by the National Bank Act[7] and its implementing regulations. Because PRA "stands in the shoes of its assignor,"[8] any analysis of PRA's obligation to comply with South Carolina's right to cure provisions must necessarily begin with whether its assignor, a nonparty and national bank, was required to comply with the same.

Since its earliest days, the United States Supreme Court has held that states "have no power . . . to retard, impede, burden, or in any manner control" the activities of national banks. *McCulloch v. Maryland,* 17 U.S. 316, 436 (1819). In 1864, Congress enacted the National Bank Act, 12 U.S.C. § 21 *et seq.* (the "NBA") "for the purpose of establishing a new banking system that would operate distinctly and separately from the existing system of state banks." Bank Activities and Operations, 69 Fed. Reg. 1895, 1898 (Jan. 13, 2004); *see also* Bank Activities and

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[7] 12 U.S.C. § 21 *et seq.*

[8] *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999) (quoting *Singletary v. Aetna Cas. & Sur. Co.,* 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct. App. 1994)).

Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1907–08 (Jan. 13, 2004) (detailing the significance and importance of national banks being able to conduct banking business pursuant to a consistent, national standard and the potential risks and costs to consumers if national banks are unable to operate under uniform, consistent, and predictable standards). Since enactment of the NBA, the Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007); *see also Kennedy v. City First Bank of D.C., N.A.,* 88 A.3d 142, 145 (D.C. 2014) (the intent of the NBA is to relieve national banks from having to meet varying and potentially divergent state law requirements in fifty states).

In 1996, the Supreme Court reaffirmed that the NBA preempts state laws that prevent or "significantly interfere" with a national bank's powers. *Barnett Bank, N.A. v. Nelson,* 517 U.S. 25, 33 (1996). To further clarify the obligations of national banks, the Office of the Comptroller of the Currency ("OCC")[9] then issued a regulation, 12 C.F.R. § 7.4008, that clarifies the applicability of state laws to national banks' operations. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1904–05 (Jan. 13, 2004). The OCC regulation identifies "the types of state laws that are preempted, as well as the types of state laws that generally are not preempted, in the context of national bank lending, deposit-taking, and other Federally authorized activities." *Id.*. OCC regulations have the same preemptive effect as the NBA. 12 U.S.C. § 43; *Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 321 (2nd Cir. 2005).

[9] Federal law authorizes the OCC to issue rules that preempt state law in furtherance of its responsibility "to ensure that national banks are able to operate to the full extent authorized under Federal law, notwithstanding inconsistent state restrictions, and in furtherance of their safe and sound operations." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1907 (Jan. 13, 2004) ; *See also* 12 U.S.C. § 93a; 12 U.S.C. § 371.

Pertinent to this case, 12 C.F.R. § 7.4008(d) preempts state laws which concern the terms of credit. Specifically, national banks may "make non-real estate loans ***without regard to state law limitations*** concerning," among other things "[t]he terms of credit, including . . . term to maturity of the loan, ***including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan.***" 12 C.F.R. § 7.4008(d)(4) (emphases added). The Court of Appeals' decision conflicts with governing federal law and established United States Supreme Court precedent and should be reversed.

A. The Court of Appeals Erred by Failing to Consider Whether PRA's Assignor, Synchrony Bank, Was Required to Provide Campney with a Notice of Right to Cure When To Do So Would Interfere with its Right to Call the Loan Due.

PRA's assignor, Synchrony Bank is a national bank.[10] As such, Synchrony Bank is governed by the NBA and the OCC regulations described above. *See, e.g., Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256–57 (1995); *see also Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153 (1982) (holding that federal regulations, including those promulgated by the OCC pursuant to the NBA, "have no less pre-emptive effect than federal statutes."). State consumer laws which prevent or significantly interfere with the exercise of its powers, including its right to call a loan due, therefore, are preempted. *Barnett Bank,* 517 U.S. at 33 (1996); *see also* 12 C.F.R. § 7.4008(d)(4).

Synchrony Bank was not required to provide a notice of right to cure because the SCCPC's notice of right to cure provisions are *exactly* the type of state law which the NBA and 12 C.F.R. § 7.4008 preempt. Section 5-111(1) of the SCCPC prohibits a creditor from "***accelerat[ing] maturity of the unpaid balance of the obligation*** . . . until twenty days after [providing a notice of right to cure]" and gives the consumer an opportunity to cure its default "by tendering the

[10] *See supra* note 1.

amount of all unpaid sums due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges. ***Cure restores the consumer to his rights under the agreement as though the defaults had not occurred.***" S.C. Code Ann. § 37-5-111(1) (emphases added).

The right to cure provisions obstruct and impair a fundamental term of credit—the right to call a loan due—going "beyond a simple notice requirement and reach[ing] into the relationship between a lender and a borrower, affecting the terms of credit itself." *Lako v. Portfolio Recovery Assocs.*, No. 20-cv-355-wmc, 2021 WL 3403632, 2021 U.S. Dist. LEXIS 145776, at *19 (W.D. Wis. Aug. 4, 2021). National banks are required to charge off revolving credit accounts, like Campney's, once they become 180 days past due. OCC Bulletin 2000-20, Uniform Retail Credit Classification and Account Management Policy: Policy Implementation (June 20, 2000) (citing Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36903 (June 12, 2000)). By requiring reinstatement of such loans, the SCCPC right to cure provisions necessarily interfere with and conflict with Synchrony Bank's lending powers.

Both the OCC and other courts agree and have held that similar state law right to cure provisions are preempted by federal law. *See, e.g.*, Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,276–77 (Aug. 5, 2003) (right to cure requirement in Georgia law preempted by 12 C.F.R. § 34.4(a)(4));[11] *George v. Stonebridge Mortg. Co.*, 988 F. Supp. 2d 142, 147–48 (D. Mass. 2013) (finding Massachusetts law conditioning bank's ability to accelerate mortgage loan on provision of written notice to cure preempted by 12 C.F.R. § 34.4(a)(4)); *Lako*, 2021 U.S. Dist.

[11] 12 C.F.R. § 34.4 sets forth extremely similar preemption standards for national banks making real estate loans (as opposed to non-real estate loans), including an identical restriction on state statutes purporting to affect the "term to maturity of the loan," and both have nearly identical savings clauses that include statutes governing the right to collect debts. *Compare* 12 C.F.R. § 34.4(a)(4), (b)(5) *with* 12 C.F.R. § 7.4008(d)(4), (e)(4).

LEXIS 145776, at *19 (holding that notice of right to cure provisions in Wisconsin Consumer Act are preempted by 12 C.F.R. § 7.4008(d)(4) as to national banks). *But see Boerner v. LVNV Funding LLC*, 358 F. Supp. 3d 767 (E.D. Wis. 2019). This is not to say that the right to cure provisions have no import in South Carolina—they do, just not as to national banks and their assignees. Simply put, the Court of Appeals' opinion paints with too broad a brush by failing to recognize that the issuing creditor's obligation to send a right to cure notice was preempted by federal law where, as here, the issuing creditor (Synchrony Bank) is a national bank.

Nor are consumers left unprotected as suggested by the Court of Appeals. *See Portfolio Recovery Assocs. v. Campney,* 2023 S.C. App. LEXIS 98, at *21. Indeed, national banks are heavily regulated. And while the notice of right to cure provisions at issue here are designed to give "the average consumer the opportunity to rehabilitate his account, to bring a billing error to the attention of . . . the creditor, or to negotiate a refinancing or deferral arrangement that may be required by a change in his financial circumstances,"[12] federal law offers similar protections. For example, the Truth in Lending Act, 15 U.S.C. § 1601 *et seq*. ("TILA") and its implementing regulations require periodic statements be sent to the consumer which require the same information as the notice of right to cure and more. *See* 12 C.F.R. § 1026.7(b). Similarly, the Fair Credit Billing Act (which amended the TILA) requires prompt written acknowledgment of consumer billing complaints and investigation of billing errors by creditors, prohibits creditors from taking actions to adversely affect a consumer's credit standing until an investigation is completed, and affords other protections to consumers during the resolution of such disputes. *See* 15 U.S.C. § 1666. These and other federal laws ensure that national banks are subject to consistent and

[12] Kathleen Goodpasture Smith, *The South Carolina Consumer Protection Code: Text with Comments* 306, cmt. 2 (4th ed. 2001).

uniform Federal standards, administered and enforced by federal banking regulators and the OCC, that provide strong and extensive customer protections and appropriate safety and soundness-based criteria for their lending activities.

B. The Court of Appeals Erred by Concluding that PRA, as the Assignee of a National Bank, Was Required To Provide a Notice Of Right To Cure.

Because Synchrony Bank was not required to provide a notice of right to cure prior to accelerating the debt,[13] neither was PRA. As the assignee of Synchrony Bank, PRA "stands in the shoes of its assignor." *Portfolio Recovery Associates,* 2023 S.C. App. LEXIS 98 at * 12; *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct. App. 1999) (quoting *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct. App. 1994)). Accordingly, the Court of Appeals erred in holding that PRA was required to send a notice of right to cure to Campney.

II. THE COURT OF APPEALS ERRED BY OVERLOOKING THE TIMING AND IMPACT OF THE ACCOUNT'S CHARGE OFF ON PRA'S OBLIGATION TO COMPLY WITH THE RIGHT TO CURE PROVISIONS.

The Court of Appeals erred in overlooking the timing and impact of the account's charge off on PRA's obligation to send a notice of right to cure. In doing so, the Court suggests that adopting PRA's argument that it is not a creditor for purposes of right to cure is without merit:

> [N]o creditor, initial or assignee, would be held liable for violation of the SCCPC's right to cure notice requirement whenever a charged off debt was assigned because an initial creditor would argue it would have no obligation once all their claims to a debtor's account were assigned and an assignee would raise the argument PRA raises. Additionally, such a scenario would frustrate the General Assembly's intent and purpose in enacting the SCCPC.

[13] The circuit court specifically found that "no [notice of] right to cure letter was required to be sent prior to commencement of this action." (R. p. 15).

Portfolio Recovery Assocs., 2023 S.C. App. LEXIS 98, at *21. Not so. Instead, the court's decision fails to give plain meaning to S.C. Code Ann. § 37-1-301(13) by casting aside the qualifying language contained in the definition of creditor and by failing to acknowledge the legislative intent plainly stated in the comments to the section. The court's decision further ignores the timing and impact of charge off where, as here, the original creditor is a national bank. And finally, the court's decision, when followed to its logical conclusion, creates an impossibility for purchasers of charged off debt which cannot be reconciled with the cure provisions of S.C. Code Ann. § 37-5-111. Each of these are novel issues of significant public importance which are ripe for decision by this Court and support reversal of the Court of Appeals' decision.

A. The Court of Appeals Erred by Casting Aside Portions of the Definition of a Creditor Set Forth in Section 37-1-301.

Section 37-1-301(13) of the SCCPC defines a "creditor" as being "the person who grants credit in a credit transaction or, except as otherwise provided, an assignee of a creditor's right to payment, ***but use of the term does not in itself impose on an assignee any obligation of his assignor.***" S.C. Code Ann. § 37-1-301(13) (emphasis supplied). The Court of Appeals erred by failing to consider the import of the qualifying clause. In doing so, the court effectively read the emphasized qualifying clause out of the statute. It is well established that "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *State v. Smith (In re Decker)*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted).

While the Court of Appeals chose to look past this qualifying clause, the South Carolina legislature did not—making it clear that *timing* of when the obligation arose matters. Particularly,

the comments to the SCCPC (which mirror those found in the Uniform Act[14]) make clear that assignees are only responsible for obligations imposed on creditors which arose "***after*** their assignment unless the SCCPC provides otherwise . . . ." Kathleen Goodpasture Smith, *The South Carolina Consumer Protection Code: Text with Comments* 65, cmt. subsection 13 (4th ed. 2001) (emphasis added).

A proper reading of Section 37-1-301(13) must give effect to the legislative intent (*Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)) which makes it clear: timing matters ***unless*** the SCCPC expressly provides otherwise. A closer look at the language of the statute reveals no express language in Section 37-5-110 or elsewhere within the right to cure provisions which imposes on assignees, such as PRA, an obligation to send a notice of right to cure. To the contrary, any obligation to send a notice of right to cure (if any existed and PRA contends none did), arose ***prior to*** the assignment. Here, the balance was charged off and accelerated ***prior*** to the sale of the account[15] to PRA. (R. p. 75). Rather than producing an absurd result, PRA's proposed construction is consistent with the plain and unambiguous language of the statute and the legislature's intent: unless the obligation to send a notice of right to cure arose ***after*** PRA purchased the account, PRA was not obligated to provide a notice of right to cure.

South Carolina's version of the Uniform Consumer Credit Code contains qualifying language which must be given its plain meaning. That language—*use of the term does not in itself impose on an assignee any obligation of his assignor*—suggests that, without more, an assignee

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[14] Unif. Consumer Credit Code, § 1.301(18), cmt. 18 (1974).

[15] Because charge off mandates a closing of the account, it has the practical implication of accelerating the account balance. *See, e.g.,* 12 C.F.R. § 1026.58(b)(6) (defining an "open" account in terms of being one that has not been charged off); 12 C.F.R. § 1026.7(b)(11)(ii)(B) (noting that certain disclosures are inapplicable to periodic statements provided for a charged-off account where "payment of the entire account balance is due immediately.").

cannot be subjected to the obligations of its assignor. The most logical reading of the statute is to impute obligations of the creditor on its assignee only where expressly provided for in the statute or when they arise post assignment. Where, as here, any obligation to provide notice arose prior to the assignment, absent an express provision in the SCCPC imputing that obligation to PRA, none existed and the decision of the Court of Appeals should be reversed.

B. The Court of Appeals Erred by Failing to Consider the Impact of Federally Mandated Charge Off Requirements on the Assignor's Obligation to Provide the Right to Cure Notice.

In holding that PRA was required to send a notice of right to cure ***prior*** to accelerating the amount due, the Court of Appeals overlooked not only the ***timing*** of charge off on the underlying obligation, but also its ***impact***. National banks, like Respondent's assignor, Synchrony Bank, are required to charge off credit card accounts when they become 180 days past due and to classify them as a loss. Unif. Retail Credit Classification & Acct. Mgmt. Policy, 65 Fed. Reg. 36,903, 36,904 (June 12, 2000) (the "FFIEC Rule"). *See also* OCC Bulletin 2000-20 (Jul. 20, 2000) (adopting the FFIEC Rule and applying it to all national banks and their operating subsidiaries). Charge off reflects a federally mandated determination that an account "is considered uncollectible, and of such little value that its continuance on the books is not warranted." Unif. Retail Credit Classification & Acct. Mgmt. Policy, 65 Fed. Reg. 36,903, 36,904 n.1. The account is thereafter treated as "an essentially worthless asset." *Id.*

Charge off is a critical component of a national bank's legal requirement to implement and

observe safety and soundness requirements.[16] These requirements[17] are deemed necessary to maintain the stability of the banking system by ensuring the entity does not engage in risky practices which may mask the performance or quality of its portfolio. They are just one way in which federal law provides safety and soundness guardrails to national banks. And, to be clear, charge-off is "not a voluntary action of the creditor" but is required to maintain the safety and soundness of federal banking institutions. *Bunce v. Portfolio Recovery Assocs., LLC*, No. 14-2149-JTM, 2014 WL 5849252, 2014 U.S. Dist. LEXIS 159679, at *4 (D. Kan. Nov. 12, 2014); *see also New Century Fin. Servs., Inc. v. Oughla*, 437 N.J. Super. 299, 312, 98 A.3d 583, 590 (N.J. Super. Ct. App. Div. 2014) (citing FFIEC Rule).

The Court of Appeals overlooked the preemptive effect of the FFIEC Rule on the right to cure provisions, particularly regarding the reinstatement provisions found in S.C. Code. Ann. § 37-5-111(1) ("Cure restores the consumer to his rights under the agreement as though the defaults had not occurred"). Regulations of the OCC, including the FFIEC Rule, which interpret and apply the NBA have the same preemptive effect as the NBA itself. *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (holding that the NBA and its implementing regulations are generally presumed to preempt state law).

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[16] *See* 12 U.S.C. § 1831p-1 (requiring each federal banking agency to prescribe, enforce, and oversee the implementation of standards designed to ensure the safety and soundness of the banks governed by each such agency); 12 C.F.R. § 30.1 *et seq.* (setting forth OCC safety and soundness requirements applicable to national banks and federal savings associations).

[17] "Safety and soundness concerns arise when prolonged negative amortization, inappropriate fees, and other practices inordinately compound or protract consumer debt or mask portfolio performance and quality." FDIC Credit Card Activities Manual, Chapter IX (Portfolio Management), https://www.fdic.gov/regulations/examinations/credit_card/ch9.html.

The NBA and its implementing regulations, like the FFIEC Rule, preempt state law where, as here, the state law would significantly impair the operations of national banks with respect to defaulted accounts. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007). Requiring national banks to reinstate accounts and "restore[] the consumer to his rights under the agreement" (i.e., allow the consumer new charging privileges) after the consumer has become significantly delinquent directly conflicts with a national bank's operations in South Carolina and specifically, its right to call the loan due. Because South Carolina's right to cure provisions were preempted by federal law, neither Synchrony Bank nor its assignee, PRA, were required to provide a notice of right to cure.

C. When Followed to its Logical Conclusion, the Court of Appeals' Interpretation Cannot Be Reconciled with the Cure Provisions of Section § 37-5-111.

In holding that PRA was required to send a notice of right to cure ***prior*** to accelerating the amount due, the Court of Appeals overlooked the ***impact*** and ***timing*** of charge off on the underlying obligation. Here, the balance was charged off and accelerated ***prior*** to the sale of the account to PRA. (R. p. 75). By disregarding ***when*** the obligation to provide the right to cure notice arose, the Court of Appeals has created an impossibility for purchasers of charged off credit card debt as the balance is both charged off and accelerated before the assignee purchases the account.

Only those loans which are susceptible to being cured by the consumer without impairing a ***continuing*** contractual relationship require a notice of right to cure. *See* Kathleen Goodpasture Smith, *South Carolina Consumer Protection Code: Text with Comments* 306, cmt. 1 (4th ed. 2001). Where, as here, the credit card has been charged off, a fact which is not in dispute, and was ***then*** sold to a debt buyer, there is no ability to cure and reinstate the loan. In fact, to send such a notice where the credit card balance has been charged off would be misleading to the consumer because "[c]ure restores the consumer to his rights under the agreement as though the defaults had not

occurred." S.C. Code Ann. § 37-5-111(1).

Following the Court of Appeals' holding to its logical conclusion and requiring purchasers of charged off obligations to send a notice of right to cure under the facts presented here, therefore, creates an impossibility which cannot be reconciled with the language of Section 37-5-111 of the SCCPC. Had PRA sent a notice of right to cure and had Campney exercised that right to cure, PRA could not restore Campney with the rights under her revolving credit agreement. Why? Because PRA is not a lender or a credit card issuer (R. p. 15) and restoring Campney's rights under the revolving credit agreement would have required PRA, a non-lender, to issue credit to Campney. Here, a notice of right to cure serves no purpose because the consumer cannot be restored to his or her "rights under the agreement as though the defaults had not occurred." S.C. Code Ann. § 37-5-111(1). This makes sense because where federal law ***mandates*** that a national bank treat an account as uncollectible, the "prospect of payment" on the account should be deemed "significantly impaired" as a matter of law. S.C. Code Ann. § 37-5-109(2).

III. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S FINDING THAT THE PROSPECT OF PAYMENT AND/OR PERFORMANCE WAS SIGNIFICANTLY IMPAIRED.

Even absent preemption, the Court erred in holding that PRA was required to provide a notice of right to cure under the facts presented. In doing so, the court overlooked PRA's argument that charge off significantly impaired the prospect of payment and/or performance. Section 37-5-111(1) does not require a right to cure notice where the prospect of payment, performance, or realization of collateral is significantly impaired. *See* S.C. Code. Ann. § 37-5-109(2). A significant impairment default "relates to behavior of the consumer which ***endangers the prospect of a continuing relationship***." Kathleen Goodpasture Smith, *South Carolina Consumer Protection Code: Text with Comments* 303, cmt. 2 (4th ed. 2001) (emphasis added). Because of this difference

and the unlikelihood of salvaging the contractual relationship in the latter instance, no right to cure notice is required when there is a significant impairment of the prospect of payment. *Id.* at 309, cmt. 1 (recognizing that no notice of right to cure under S.C. Code Ann. § 37-5-111(1) is required prior to acceleration where the default arises under S.C. Code Ann. § 37-5-109(2)); S.C. Dep't of Consumer Affairs Administrative Interpretation No. 5.109-7913, at 3 (July 9, 1979) (same).[18]

The circuit court correctly recognized this as part of its rationale for dismissing Campney's counterclaim. (R. p. 15). Here, Synchrony Bank sent Campney no less than six (6) monthly periodic statements informing her of her past due balance and the amount necessary to restore her account to good standing. (R. pp. 324–49). When Campney failed to cure her default and the account became 180 days past due, Synchrony Bank charged off the account and closed it as it was required to do under controlling federal law. (R. p. 155, lines 2–4); *see, e.g.,* 12 C.F.R. § 1026.58(b)(6) (defining an "open" account in terms of being one that has not been charged off); 12 C.F.R. 1026.7(b)(11)(ii)(B) (noting that certain disclosures are inapplicable to the periodic statement provided for a charged-off account where payment of the entire account balance is due immediately). At that point, the prospect of a continuing relationship between the consumer and original creditor became significantly impaired, a condition no notice of right to cure sent by PRA could fix.

The circuit court, therefore, correctly found that based upon the evidence presented, that the account had been charged off by the original creditor, that the last payment on the account was made on October 15, 2014 and that neither the assignor (Synchrony Bank) nor the assignee (PRA) had any expectation that payments were made or would be made on the account. (R. p. 15). The

[18] Prior to this matter, neither of this state's appellate courts has considered the issue presented here—whether the federally mandated charge off of a revolving credit account creates a significant impairment of the right to payment such that no right to cure notice is required.

prospect of payment, therefore, was significantly impaired and PRA met its burden of proof regarding that issue. As such, no notice of right to cure was required and the Court of Appeals erred in reversing the findings of the circuit court.

IV. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S FINDING THAT PRA WAS NOT REQUIRED TO PROVIDE A NOTICE OF RIGHT TO CURE WHERE, AS HERE, PRA'S ASSIGNOR HAD SENT SIX MONTHS OF PERIODIC STATEMENTS WHICH SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF S.C. CODE ANN. § 37-5-110.

Finally, the Court of Appeals overlooked PRA's alternative argument that even if, *arguendo*, a notice of right to cure was required in this case, Synchrony Bank's periodic statements nevertheless met those requirements. Synchrony Bank sent six (6) periodic monthly statements, each of which contained the requisite elements of information mandated by S.C. Code Ann. § 37-5-110(2). (R. pp. 324–49). Each statement contained: "the name, address and telephone number of the creditor to whom payment is to be made, a brief identification of the credit transaction, the consumer's right to cure the default, and the amount of payment and date by which payment must be made to cure the default." *Compare* S.C. Code Ann. § 37-5-110(2) *with* 12 C.F.R. § 1026.7.

No specific form is mandated by the right to cure provisions. *Id.* The statements provided to Campney contained sufficient information to enable her "to understand h[er] predicament and to encourage h[er] to take appropriate steps to alleviate it." Kathleen Goodpasture Smith, *The South Carolina Consumer Protection Code: Text with Comments* 306, cmt. 1 (4th ed. 2001). Therefore, to the extent a right to cure notice was required, the periodic statements sent by Synchrony Bank satisfied the requirement and the Court of Appeals' decision should be reversed.

CONCLUSION

For the foregoing reasons, the petitioner Portfolio Recovery Associates LLC respectfully requests the Court grant its petition for writ of certiorari because the Court of Appeals' Order in

this matter is inconsistent with controlling United States Supreme Court precedent and federal law and presents numerous novel issues. Petitioner requests this Court reverse the Court of Appeals' holding and affirm the circuit court's dismissal of Campney's First Counterclaim.

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