

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2018-CP-18-00729
Appellate Case No. 2023-001601

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S.C. SUPREME COURT

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.

BRIEF OF THE PETITIONER

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STATEMENT OF ISSUES ON APPEAL

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

On January 4, 2017, the petitioner, Portfolio Recovery Associates, LLC ("PRA"), sued Jennifer Campney ("Campney") to collect on an account stated arising from a charged off credit card balance that it had purchased from the original creditor and credit card issuer, Synchrony

Bank. (App. pp. 88–106). The original creditor, Synchrony Bank, is a national bank.¹ PRA is a debt buyer. (App. p. 115, ¶ 42). Campney filed a *pro se* Answer on February 8, 2017. (App. p. 107). On March 13, 2018, Campney, through counsel, filed her First Amended Answer and Counterclaims.² (App. pp. 108–118). Those counterclaims include the claim at issue here (the “First Counterclaim”), which alleges PRA violated the South Carolina Consumer Protection Code (the “SCCPC”) because PRA did not send a notice of right to cure³ to Campney before accelerating the debt and filing suit. (App. pp. 111–112).

On October 23, 2019, a bench trial was held and judgment was entered in favor of PRA on all issues. (App. pp. 14–24). The relevant testimony and evidence presented at trial demonstrated that Campney had an HH Gregg credit card issued by Synchrony Bank. (App. p. 15; App. p. 255, lines 8–14). At trial, the circuit court found that Synchrony Bank sent monthly billing statements to Campney with a specified due date and Campney made “payments on the account without disputing any charges found on the billing statement.” (App. p. 15). Copies of those periodic statements for the period beginning May 23, 2014 through May 16, 2015 were entered into evidence. (App. p. 14; *see also* App. pp. 327–375). Campney testified that she “believe[d]” she received billing statements on the account. (App. p. 255, lines 8–10; *but see* App. p. 256, lines 10–18 (on redirect, Campney could not recall the specifics of which statements she received)).

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>.

² Additionally, Campney brought third party claims against PRA’s then counsel of record, Cooling & Winter, LLC. Those claims were resolved in favor of the third-party defendant by the trial court and were not appealed. (App. p. 20).

³ PRA refers to sections 37-5-109 through 37-5-111 of the SCCPC collectively as the right to cure provisions, as they govern default, notice of right to cure upon default, and the opportunity to cure default, respectively.

The monthly statements entered into evidence additionally indicated that the last payment was made on the account on October 15, 2014. (App. p. 157, lines 20–23; *see also* App. pp. 353–355). On May 22, 2015, Synchrony charged off the account. (App. p. 187, lines 18–21). On June 20, 2015, PRA purchased Campney’s charged-off account balance from Synchrony Bank. (App. pp. 142, lines 5–13; 324, 390).

Based upon the evidence presented, the circuit court found in favor of PRA on all claims. (App. pp. 14–24). Judgment was entered in favor of PRA on its account stated claim for \$4,236.78 and filing fees totaling \$80.00 for a total judgment of \$4,316.78. (App. p. 20). In doing so, the trial court concluded that “an account stated cause of action was established by the Plaintiff (or Plaintiff’s assignor) by mailing monthly billing statements with a specified due date, and the Defendant making payments on the account without disputing any charges found on the billing statement.” (App. p. 15).

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 constituted a violation of 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. (App. pp. 17–18). Secondly, PRA was not a creditor for purposes of the right to cure provisions. (App. p. 18). 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.*). On December 23, 2019, Campney filed motions to alter or amend the judgment, which were denied on May 26, 2020. (App. pp. 79–86). Campney appealed the circuit court’s Trial Order dated December 11, 2019 (App. pp. 14–24) and Rule 59 Order dated May 26, 2020 (App.

pp. 79–80).⁴ See also *Portfolio Recovery Assocs., LLC v. Campney*, 441 S.C. 36, 45–46, 892 S.E.2d 321, 326 (Ct. App. 2023) (reciting procedural posture of case on appeal).

The case was heard on oral argument May 1, 2023 and an order was entered August 23, 2023. *Portfolio Recovery Assocs., LLC v. Campney*, 441 S.C. 36, 892 S.E.2d 321 (Ct. App. 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 federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (the “FDCPA”), the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-110 *et seq.* (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” (the “First Counterclaim”) and remanded that claim to the circuit court “to determine the amount of set-off⁵ and attorney’s fees, if any Campney is entitled.” *Id.* at 53, 892 S.E.2d at 330.

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. Code. Ann. § 37-5-110 under the facts presented in this matter. (App. pp. 582–596). 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. (App. pp. 583–584); See also S.C. Code Ann. § 37-5-109(2). PRA additionally contends that the Court of Appeals

⁴ As noted previously, Campney’s third-party claims were not appealed.

⁵ 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 Ann. § 37-5-205. *Id.* at 53, 892 S.E.2d at 330.

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. (App. p. 584). On September 15, 2023, the Court of Appeals denied the Petition for Rehearing. (App. pp. 599–600).

On October 12, 2023, Petitioner timely filed its Petition for Discretionary Review, seeking review of the Court of Appeals decision as to the First Counterclaim and presenting five issues for the court’s consideration. The Petition was allowed by Order entered on October 3, 2024. *Portfolio Recovery Assocs., LLC v. Campney*, S.C. Sup. Ct. Order dated Oct. 3, 2024. The Order did not set forth any limitations on the questions to be considered by the Court, and therefore, all five issues remain before the court for consideration. *See* Rule 242(i), SCACR.

STANDARD OF REVIEW

This matter presents novel issues of law which are subject to review 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, each of the five questions presented concern issues of statutory interpretation which are questions of law subject to de novo review by this Court. *Coastal Fed. Credit Union v. Brown*, 417 S.C. 544, 548, 790 S.E.2d 417, 419 (Ct. App. 2019) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008)). Accordingly, all issues before the court are subject to being reviewed de novo.

ARGUMENT

As acknowledged by the Court of Appeals, 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. *Portfolio Recovery Assocs., LLC*, 441 S.C. at 46-47, 892 S.E.2d

at 326. 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, the Court of Appeals erroneously 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 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*, 441 S.C. at 52, 892 S.E.2d at 330. Not so. The Court of Appeals failed 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 and the right to call a loan due and payable. Moreover, the Court of Appeals failed to give plain meaning to the provisions of the 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 reverse the Court of Appeals and find that PRA was not required to send a right to cure notice under the facts presented in this case. By erroneously 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 failed to consider longstanding precedent from the United States Supreme Court and federal laws

which unequivocally hold that where, as here, the creditor is a national bank, state laws which interfere with the terms of credit are preempted by federal law. The Court of Appeals likewise erred by imposing obligations on PRA which arose, if at all, prior to PRA's purchase of the account. Additionally, the Court of Appeals erred by failing to consider whether a federally mandated charge off⁶ 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), the Court of Appeals erred in failing to consider whether the periodic statements sent by the original creditor met the requirements of S.C. Code Ann. § 37-5-110 such that no further right to cure was required.

I. THE COURT OF APPEALS ERRED BY CONCLUDING THAT PRA WAS REQUIRED TO COMPLY WITH SOUTH CAROLINA'S RIGHT TO CURE PROVISIONS WHERE, AS HERE, THE ORIGINAL 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 Act⁷ 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 necessarily begins with whether its assignor, a nonparty and national bank, was required to comply with the same. For the reasons set forth below, neither PRA nor its assignor were required to send a right to cure notice as the South Carolina right to cure

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).

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)).

provisions are preempted by federal law.

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 national 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 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). The NBA “expressly affords national banks the powers that they need to organize and operate . . . provides national banks with banking-specific powers . . . [and] expressly authorizes national banks to exercise ‘all such incidental powers as shall be necessary to carry on the business of banking.’” *Cantero v. Bank of Am.*, 602 U.S. 205, 210 (2024) (internal citations omitted). 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); *see also Cantero v. Bank of Am.*, 602 U.S. 205 (2024). Since then, Congress has

codified this preemption standard. 12 U.S.C. § 25b. Congress likewise has expressly empowered the Office of the Comptroller of the Currency (the “OCC”) to preempt state laws which prevent or significantly interfere with the exercise by a national bank of its powers. *See* 12 U.S.C. §§ 25b and 43; *see also Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 321 (2d Cir. 2005).

To further clarify the obligations of national banks in the wake of *Barnett Bank*, the OCC⁹ 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.*

Pertinent to this case, 12 C.F.R. § 7.4008(d) preempts state laws which interfere with 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 the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or 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).

When read in conjunction with *Barnett Bank*, state laws which impact when a loan may be called due and payable upon the passage of time or a specified event external to the loan apply

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. § 25b(b)(3); 12 U.S.C. § 93a; 12 U.S.C. § 371.

only where they do not “interfere with, or impair [national banks’] efficiency in performing the functions by which they are designed to serve [the Federal] Government.” Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910 n.48 (Jan. 13, 2004). “By vesting national banks . . . with this authority, the NBA ‘facilitates [their] ability to operate lending programs on a nationwide basis, a characteristic fundamental to national banks since their inception[.]’” *Cohen v. Capital One Funding, LLC*, 489 F. Supp. 3d 33, 48 (E.D.N.Y. 2020). The Court of Appeals’ decision conflicts with governing federal law and established United States Supreme Court precedent and should be reversed.

A. The National Bank Act Preempts Application of the South Carolina Right to Cure Provisions Where the Credit Card Was Issued by a National Bank.

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 a national bank’s exercise of its powers, including its right to call a loan due, are preempted. 12 U.S.C. § 25b(b)(1)(B). *See also Barnett Bank*, 517 U.S. at 33 (1996); 12 C.F.R. § 7.4008(d)(4).

As a national bank, 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 37-5-111(1) of the SCCPC prohibits a creditor from “*accelerat[ing] maturity of the unpaid balance of the obligation . . . until twenty days after*

¹⁰ *See supra* note 1.

[providing a notice of right to cure]” and gives the consumer an opportunity to cure its default “by tendering the 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 notice of right to cure provisions set forth in Section 37-5-111 are designed to maintain or reinstate the ongoing credit relationship between the creditor and the consumer by providing the consumer with notice of what must be done to restore the credit relationship. Section 37-5-111, therefore, expressly prohibits a national bank from accelerating the maturity of the consumer credit transaction without first providing the consumer with notice of its right to cure. Moreover, once cure is provided the creditor is *required* to reinstate the account as if no default had occurred.

Put another way, if not preempted, the South Carolina right to cure provisions would force national banks to extend credit to consumers who have not proven themselves to be creditworthy and would force the bank to reinstate the consumer’s charging privileges as if no default had occurred. Doing so significantly interferes with a bank’s underwriting standards, its obligations of safety and soundness, and its 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).

In *Lako*, the consumer opened an account with the same national bank as here and, between May and June of 2017, incurred over \$2,600 in charges on his account, *but failed to make any payments*. *Lako*, 2021 U.S. Dist. LEXIS 145776, at *2. After charging off the account, Synchrony sold the account to PRA. *Lako* sued PRA, making the same arguments as have been made here –

that PRA failed to comply with the right to cure provisions and therefore was barred from accelerating the debt. *Id.* at *12. The court correctly rejected that argument, finding that the right to cure provisions were preempted by the National Bank Act. *Id.* at *13. In doing so, the *Lako* court recognized that Wisconsin’s right to cure provisions went beyond a simple notice requirement and “affect[ed] the terms of credit itself” and the bank’s lending powers. *Id.* at 19.¹¹

As in *Lako*, requiring a notice of right to cure here would allow a consumer to cure a multi-month payment default, restore their charging privileges as if no default had occurred, and provide a consumer who does not meet the lender’s standard of creditworthiness with access to additional credit. To that point, consider the result a contrary decision in *Lako* would have brought: a consumer who incurred \$2,600 in charges without making a single payment within 180 days would be allowed to cure its default and resume incurring charges on the account regardless of their creditworthiness, the bank’s underwriting standards and without regard for the bank’s safety and soundness. Unquestionably, this interferes with the bank’s ability to set terms of credit, including when a loan may be called due.

Both the OCC and other courts agree. In a 2003 Preemption Determination and Order, the OCC similarly found that right to cure provisions under the Georgia Fair Lending Act were preempted when applied to national banks. 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

¹¹ Likewise, this interference becomes readily apparent when considering a national bank’s charge off requirements. 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 directly conflict with Synchrony Bank’s obligations of charge off.

C.F.R. § 34.4(a)(4)).¹² Like the court in *Lako*, the OCC concluded that the Georgia’s statute’s right to cure provision was preempted as applied to national banks because it “requires the original term of the loan to be reinstated upon curing a default, notwithstanding the possibility that prudent underwriting would suggest a modification of terms (including maturity).” *Id.* at 46,277; *see also 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)); *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.*, 441 S.C. at 52, 892 S.E.2d at 329–30. 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

¹² 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).

change in his financial circumstances,”¹³ 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 provide the same information as the notice of right to cure and more. *Compare* 12 C.F.R. § 1026.7(b) *with* S.C. Code Ann. §37-5-110(2). 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 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. PRA, as the Assignee of a National Bank, Was Not 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,¹⁴ neither was PRA. As the assignee of Synchrony Bank, PRA “stands in the shoes of its assignor.” *Portfolio Recovery Assocs.*, 441 S.C. at 49, 892 S.E.2d at 328; *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

¹³ Kathleen Goodpasture Smith, *The South Carolina Consumer Protection Code: Text with Comments* 306, cmt. 2 (4th ed. 2001).

¹⁴ The circuit court specifically found that “no [notice of] right to cure letter was required to be sent prior to commencement of this action.” (App. p. 15).

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 charge off on PRA's obligation to send a notice of right to cure. In doing so, the court suggested 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.

Portfolio Recovery Assocs., 441 S.C. at 52, 892 S.E.2d at 330. 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.

A. The Court of Appeals Erred by Casting Aside Portions of the Definition of a Creditor Set Forth in S.C. Code Ann. § 37-1-301(13).

The Court of Appeals erred by casting aside portions of the definition of "creditor" set forth in Section 37-1-301 and in doing so, failed to consider the timing of the assignment to PRA. It is undisputed that PRA is a debt buyer (App. p. 115, ¶ 42) and purchased a charged off debt. As such, PRA is the assignee of the creditor's right to payment and not a granter of credit. 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 added). 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 statutory obligation arose matters. Particularly, the comments to the SCCPC (which mirror those found in the Uniform Act¹⁵) 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 which makes it clear: timing matters **unless** the SCCPC expressly provides otherwise. *See, e.g., Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.”). 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

¹⁵ Unif. Consumer Credit Code, § 1.301(18), cmt. 18 (1974).

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 account¹⁶ to PRA. (App. p. 78). 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 cannot be subjected to the obligations of its assignor. S.C. Code Ann. § 37-1-301(13). 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 (and no such language is present here) *or* when the obligation to send a right to cure notice occurs after 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 Failed to Consider the Timing and Impact of Federally Mandated Charge Off Requirements on the Obligation to Provide the Right to Cure Notice.

In concluding 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 the assignment, but also the *impact* of charge off on the underlying obligation. National banks, like PRA’s assignor,

¹⁶ 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.”).

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.* And once charged off, the account is closed to future charges. *Am. Express Nat’l Bank v. Altayev*, 194 N.Y.S.3d 463, 2023 N.Y. Misc. LEXIS 4383, at *3 n.2 (N.Y. Sup. Ct. 2023)(unpublished table opinion).

Charge off is a critical component of a national bank’s legal requirement to implement and observe safety and soundness requirements.¹⁷ These requirements,¹⁸ which include risk management and underwriting, are deemed necessary to maintain the stability of the national 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.

¹⁷ *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); 12 CFR Part 354, Part B (setting forth interagency guidelines for establishing standards for safety and soundness).

¹⁸ “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.

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). Therefore, to the extent the right to cure provisions and their reinstatement requirements interfere with the operations of a national bank, they are preempted.

Here, Synchrony Bank was required to charge off the account after it became 180 days delinquent. Charge off was mandated by the FFIEC Rule. The net effect of the charge off was the account was closed and became a receivable balance. The charged off account balance was then sold to PRA, a non-lender. (App. p. 15). At that point, there was no longer a continuing contractual relationship. (*Id.*). Recognizing that timing matters, the South Carolina legislature defined creditor in a manner which takes this into account and provides 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).

The NBA and its implementing regulations, including 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 and specifically, its federal obligations as to safety and soundness, including charge-off. 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 of “Creditor” Cannot Be Reconciled with the Cure Provisions of S.C. Code Ann. § 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, *prior* to the sale of the account to PRA, the account was closed and the balance was charged off. (App. p. 78). By disregarding *when* the obligation to provide any right to cure notice may have arisen, the Court of Appeals created an impossibility for purchasers of charged off credit card balances as the account is closed and 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 because there is no *continuing contractual relationship*. In fact, to send such a notice where the credit card has been closed and charged off would be misleading to the consumer because “[c]ure [necessarily] restores the consumer to his rights under the agreement as though the defaults had not occurred,” S.C. Code

Ann. § 37-5-111(1), and that cannot be done in this instance.

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 (App. p. 18) and restoring Campney's rights under the revolving credit agreement necessarily would have required PRA, a non-lender, to reinstate the credit card and issue credit to Campney which it cannot do. 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). The Court of Appeals decision, therefore, should be reversed.

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 of Appeals 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 the account's charge off significantly impaired the prospect of payment and/or performance.

PRA's position is supported by the circuit court's findings. Particularly, the circuit court

found that:

The last payment on the account at issue in this case was made on October 15, 2014. The account was not an open account nor were monthly payments being made on the account. The account was assigned/sold to PRA in an attempt to collect on a charged off account. Therefore neither the assignor nor the assignee had any expectation that payments were being made or would be made on the account.

(App. p. 18).

Section 37-5-111(1) does not require a right to cure notice where, as here, the prospect of payment, performance, or realization of collateral is significantly impaired. *See* S.C. Code. Ann. § 37-5-109(2). The SCCPC recognizes two types of default: a failure “to make a payment as required by the agreement” and a more serious default in which “the prospect of payment . . . is significantly impaired.” S.C. Code Ann. § 37-5-109(1) and (2). The two are significant in their differences. A single payment default¹⁹ “is susceptible of being cured by the consumer *without impairing a continuing contractual relationship*.” Kathleen Goodpasture Smith, *South Carolina Consumer Protection Code: Text with Comments*, p. 303, cmt. 2 (4th ed. 2001) (emphasis added).²⁰ A significant impairment default, on the other hand, “relates to behavior of the consumer which *endangers the prospect of a continuing relationship*.” *Id.* (emphasis added). Because of this difference and the unlikelihood of salvaging the contractual relationship in the latter instance, no right to cure is required when there is a significant impairment of the prospect of payment. *See* Kathleen Goodpasture Smith, *South Carolina Consumer Protection Code: Text with Comments*, p. 309, cmt. 1 (4th ed. 2001) (recognizing that no notice of right to cure under S.C. Code Ann.

¹⁹ The failure to make a payment is couched in the singular, not the plural and therefore, giving the statute its plain meaning, it contemplates a single payment default.

²⁰ Both the language of the statute and the language of the comments define this payment default in terms of the singular. *See* S.C. Code. Ann. §37-5-109(1); Kathleen Goodpasture Smith, *South Carolina Consumer Protection Code: Text with Comments*, p. 303, cmt 2, p. 309.

§ 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).²¹ Put another way, 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).

The circuit court correctly recognized this as part of its rationale for dismissing Campney's counterclaim. (App. p. 18). Here, Synchrony Bank sent Campney no less than six (6) monthly periodic statements informing her of her past due balance (which increased on a monthly basis as the account fell further into default) and the amount necessary to restore her account to good standing. (App. pp. 327–52). When Campney failed to cure her default and the account became 180 days past due, Synchrony Bank charged off the account and closed it (App. p. 158, lines 2–4), as it was required to do under controlling federal law. 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, there was no longer a continuing contractual relationship and the prospect of a continuing relationship between the consumer and original creditor became significantly and irreparably impaired—a condition no notice of right to cure sent by PRA could fix.

²¹ 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.

The circuit court, therefore, correctly found 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 at the time of the assignment. (App. p. 18). The 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, Synchrony Bank's post-default periodic statements provided Campney with notice of her right to cure her default. Because those periodic statements contained the requisite statutory information and Campney failed to cure her default, no further right to cure was required of its assignee, PRA. Section 37-5-110(2) requires that a Notice of Right to Cure be in writing and conspicuously state "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." S.C. Code Ann. §37-5-110(2). Synchrony Bank's periodic statements did just that.²²

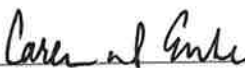
²² The fact that controlling federal law governing national banks (like Synchrony Bank) already requires the provision of periodic monthly statements for open-end consumer credit accounts, which serve substantially the same purpose as the notice of right to cure under the SCCPC, reinforces the conclusion that the notice of right to cure provisions of the SCCPC are preempted as to national banks as "unduly burdensome and duplicative state regulation." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).

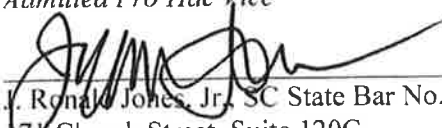
The right to cure provisions do not mandate a specific form. *Id.* Campney last made a payment on the Synchrony Bank account on October 15, 2014. (App. p. 157, lines 20–23; pp. 327–375). After that, Synchrony Bank sent Campney six (6) periodic statements, each of which contained the “the name, address 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.” (App. pp. 327–352). *Compare* S.C. Code Ann. § 37-5-110(2) *with* 12 C.F.R. § 1026.7. And, each statement provided Campney with 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). Because each of the periodic statements sent by Synchrony Bank satisfied the statutory requirements and provided Campney with notice as to how she could cure her default and restore her rights under the parties’ credit card agreement, Synchrony Bank complied with the right to cure provisions. No subsequent right to cure notice, then, was required by PRA. Accordingly, the Court of Appeals’ decision should be reversed and the circuit court’s finding affirmed.

CONCLUSION

The petitioner Portfolio Recovery Associates LLC respectfully requests the Court reverse the Court of Appeals’ holding and affirm the circuit court’s dismissal of Campney’s First Counterclaim for the following reasons: First, under the facts presented, the obligation to provide any such right to cure notice in this matter was preempted by federal law where, as here, the credit card provider was a national bank and providing such a notice would significantly interfere with the exercise of the credit card provider’s powers to establish terms of credit, including the circumstances under which the loan can be called due. Second, under the facts presented, any

obligation to provide a notice of right to cure arose prior to the assignment of the account to PRA. Because Petitioner was not a creditor, as defined under S.C. Code § 37-1-301(13), it was not obligated to provide a right to cure notice. Third, under the facts presented, the failure of Campney to make payments over the course of six months despite receipt of monthly statements apprising her of her ongoing default and the steps necessary to cure that default, significantly impaired the prospect of a continuing relationship between the parties, resulting in a charge off of the account. Because the prospect of payment was significantly impaired, no right to cure was required. Fourth, and finally, to the extent such a right to cure notice was required, the post delinquency statements provided to Campney complied with the requirements of S.C. Code Ann. § 37-5-110 and no further notice was required from PRA. Accordingly, the decision of the Court of Appeals should be reversed.


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