STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Home Benefits, Inc. and the American Traveler Motor Club, Inc.

Plaintiffs,

v.

South Carolina Department of Consumer Affairs,

Defendant.

Docket No.: 2012-CP-40-6341

ORDER GRANTING PLAINTIFFS' PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on October 15, 2013 by the motion of Plaintiffs Home Benefits, Inc. and the American Traveler Motor Club, Inc. ("Plaintiffs") for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on the grounds that there is no genuine issue of any material fact and that the core issue before the Court is a question of law. As discussed below, the Court has determined that the Plaintiffs are entitled to judgment (or partial judgment) on their claims and assertions for declaration and relief as fully stated and addressed in their pleadings. The Plaintiffs appeared through their attorneys, Steven W. Hamm, Esq. and C. Jo Anne Wessinger Hill, Esq., and Defendant appeared through its attorneys, Danny R. Collins, Esq. and Tiffany D. Gibson, Esq.

The Court has determined that there is no question of fact concerning the Motion for Summary Judgment, or in the alternative motion for partial summary judgment, that would prevent the Court from ruling on the motion before the Court. The core question before the Court requires review and application of common and statutory law to determine whether the South Carolina Department of Consumer Affairs acted in an arbitrary or capricious manner to

repeal a thirty-two year state law administrative interpretation and declaratory ruling when there has been no change by the General Assembly to the underlying statutory code section.

In addition to the Plaintiffs' Supporting Memorandum presented as part of its Motion, the Plaintiff provided three affidavits for consideration by the Court: (1) Affidavit of Steven Spiegel, (2) Affidavit of Irvin D. "Pete" Parker, and (3) Affidavit of Derial Ogburn. Originally, the Defendant objected to that certain portion of Mr. Parker's Affidavit related to any conversations with the members of the General Assembly in paragraph 11; however, the Plaintiffs clarified that they were not offering the affidavit concerning the truth of what the conference with members of the General Assembly was about, but to confirm that Mr. Parker, as the Administrator and Consumer Advocate for the Department, had first done his due diligence and research when he issued the 1976 Code Interpretation allowing the sale of such products in the offices of supervised lenders on October 1, 1976. The Department stated that it did not object to such offering and use of the Affidavit of Mr. Parker by the Court. Following oral arguments of counsel, and prior to the submission of the proposed Orders by the parties, the Plaintiffs submitted a supplemental affidavit of Derial Ogburn for consideration by the Court in its findings. There was no objection by the Department to such Affidavit or submission.

The Department submitted on the day of oral argument its Memorandum in Opposition as well as an Affidavit of the current Code Administrator, Ms. Lybarker, concerning the procedure followed by the Department. The Plaintiffs' claim and argue that the Department's sudden reversal of a thirty-two year old state law statutory construction, without any change by the General Assembly to the statutory section being interpreted, is an arbitrary, capricious act and such action constitutes an abuse of discretion by the Department. Plaintiffs argue that the

Department acted without any basis, justification, reason, finding, statutory change, or record required to support the repeal of the 1976 Declaratory Ruling and Administrative Interpretation over thirty years later. Plaintiffs' claim that the Department's sudden reversal of a thirty-two year old state agency construction of a state statute in 2008 serves to eliminate the ability of the Plaintiffs to do business in the State under their established and approved business model by the Department.

The Court notes that there is an existing Consent Order of Stay to maintain the status quo and to allow the Plaintiffs to continue to do business consistent with the 1976 Administrative Interpretation and with the 2005 state agency letter of instructions to the Plaintiffs in order to do business in South Carolina and comply with the South Carolina Consumer Protection Code. In addition, the Plaintiffs argue that the Department is usurping the power of the General Assembly to enact legislation by changing a thirty-two year old state agency construction of a statute that the General Assembly has taken no action to change or amend.

The body of the 1976 Declaratory Ruling and Administrative Interpretation issued by Mr. Parker on October 1, 1976 examines the basis in law for Interpretation. The Court was provided with no specific information or rulings that the Department considered in issuing the new interpretation on October 30, 2008. There is an inconsistency in the Department's Affidavit and its statements that the 1976 Ruling did not follow Federal law – none of which is mentioned or stated in its October 30, 2008 letter. The Plaintiffs' position for relief is further supported by the Official Comments of the Federal Reserve Board related to 12 C.F.R. §226.4 with regard to "comparable cash transactions." *Official Comment to Section 226.4 of Regulation Z, Federal Reserve Board, 12 C.F.R 226.4.* Charges in comparable cash transactions are excluded from the

finance charge. In discussing examples such excluded items, the Federal Reserve Board specifically *excludes: "charges for a service policy, auto club membership*, or policy of insurance against latent defects offered to or required of both cash and credit customers for the same price." *Id.* (emphasis added). The listed exceptions include products sold by the Plaintiffs. The Federal Reserve Board's comments make clear that such charges, like the Petitioner's home and auto security plan are not required to be part of the Finance Charge, nor are they required by the lender as a condition or incident to the extension of credit. Thus, the charges for Petitioner's home and auto security plan were specifically allowed under Federal law in June 2, 2005 when the Department issued its detailed letter opinion to the Plaintiffs.

OVERVIEW OF CASE

Plaintiffs first filed this action in the Administrative Law Court on January 20, 2009. Plaintiffs' filing followed the denial by the South Carolina Department of Consumer Affairs ("Department"), for the Department to reconsider its withdrawal and decision to rescind Declaratory Ruling No. 3.202-7608 by letter dated October 30, 2008. Declaratory Ruling No. 3.202-7608 has been in effect since October 1, 1976, a period of time now spanning thirty-seven years. *See, 1976 Declaratory Ruling and Administrative Interpretation, dated October 1, 1976.* The Plaintiffs assert that the Department failed to follow proper procedures in attempting to change a long settled statutory construction of the Code that Plaintiffs have relied upon regarding the 1976 Declaratory Ruling and those later opinions of the Department related to the 1976 ruling. Plaintiffs argue that the Department by its actions acted in an arbitrary and capricious manner as there has been no legislative change enacted by the South Carolina Legislature

amending to the underlying code section, S.C. Code §37-3-202, upon which the 1976 ruling was based.

Plaintiffs are corporations organized in the State of Delaware, are in good standing, and do business in the State of South Carolina. They offer their auto security and home security plans to consumers through South Carolina lenders through a separate transaction authorized by the Department, and not in connection with a loan transaction. The consumer has the sole and individual choice to purchase or not purchase the plan. In 2004-2005, the Plaintiffs through its representatives met multiple times with and discussed in detail with officials at the Department regarding the required lawful procedures that must be followed for the sale of its services and programs at the time a supervised loan was made. The Department identified specific procedures to be used for the selling of Plaintiffs' services and products at the time of the supervised loan. These procedures were outlined in the Department's detailed informal letter issued on June 2, 2005. *See, Department's letter dated June 2, 2005 to Plaintiffs.* The Department's 2005 letter also stated that "[t]here have been a number of changes in the law since 1987, but it is the opinion of the Department that the plans may be sold in offices of supervised lenders if the sale complies with both Declaratory Ruling No. 7608 [dated October 1, 1976] and the changes in the law since that time." The Plaintiffs have been operating in the State since 2005 in direct reliance with the terms and in accordance with the detailed procedures developed by the Department and contained in the Department's letter to Plaintiffs dated June 2, 2005.

Declaratory Ruling No. 3.202-7608 dated October 1, 1976 allows for the sale of non-credit insurance products from the offices of supervised lenders only if certain specific conditions are met. *See, 1976 Declaratory Ruling and Administrative Interpretation, dated*

October 1, 1976. The sudden withdrawal and rescinding of this now thirty-seven year precedent, if applied to Plaintiffs, has the direct effect of terminating the ability of the Plaintiffs to operate or offer their products in the State of South Carolina in accordance with the established and relied upon procedures developed with the Department in 2005. *Id.* As authorized by the Declaratory Ruling No. 3.202-7608 issued on October 1, 1976, the sudden reversal of a long term state law statutory construction is arbitrary and eliminates Plaintiffs' established business model and as well as its state authority to do business in the State. In addition, Plaintiffs argue the Department is usurping the power of the General Assembly by changing a long term construction of statute that the General Assembly has not changed in the intervening 37 years.

On October 30, 2008, the Department issued a letter withdrawing and rescinding the 1976 Declaratory Ruling, including any related letters or opinions in connection with such ruling. *See, Defendant's document October 30, 2008.* The June 2, 2005, letter issued to Plaintiffs was a related letter and opinion.

The first time that the Plaintiffs became aware of the Department's change of ruling was on November 4, 2008. The Plaintiffs and representatives of the Department met on November 20, 2008 to discuss their concerns. Plaintiffs claim the Department initially advised that it made the change in the Declaratory Ruling based upon changes in the law.

On November 21, 2008, the Plaintiffs made a formal written request for reconsideration to the Department to reconsider its ruling dated October 30, 2008. *See, Exhibit 4.* The Plaintiffs asserted that the impact of the recent ruling change by the Department was severe and had a substantial adverse financial impact to their detriment without the opportunity for a formal hearing or review.

The Department issued a letter denying the Plaintiffs' request for reconsideration dated December 17, 2008 and received on December 18, 2008. *See, Plaintiffs' letter dated December 17, 2008.*

The Plaintiffs timely filed an action in the Administrative Law Court on January 20, 2009. An Order staying enforcement and implementation of the Ruling as to Plaintiffs was entered into between the parties on March 25, 2009.

The Department made certain motions and related arguments concerning the Plaintiffs action before the Administrative Law Court including an argument that it should be maintained in the Fifth Judicial Circuit Court of Common Pleas as a declaratory judgment action.

On June 5, 2012, the parties stated on the record their agreement on certain issues, including jurisdiction, standing and statute of limitations so that the Plaintiffs could timely file or re-file their cause of action in the Court of Common Pleas for Fifth Judicial Circuit in Richland County. Furthermore, the Department stated that it would not object to standing of the parties, jurisdiction of the Court, or claim any expiration of any statute of limitation in Plaintiffs making their claims and challenge in the Court of Common Pleas related to the repeal by SCDCA of Declaratory Ruling No. 3.202-7608 dated October 1, 1976 on October 31, 2008. *See,* Administrative Law Court Consent Order dated July 31, 2012.

The Plaintiffs have been lawfully operating in the State of South Carolina since 2005 based on the specific requirements established by the Department in its June 2, 2005, letter ruling. The Department advised Plaintiff that it has not received any complaints about the products sold by the Plaintiffs. There is no dispute among the parties that Plaintiffs have complied with all guidelines and requirements that the Department developed and addressed in

its letter dated June 2, 2005. The Plaintiffs have invested substantial funds in training and marketing programs and materials for South Carolina that address the benefits of their products. *See, Affidavit of Steve Spiegel.* Currently, there is a stay of any enforcement, finalization, or implementation of the Declaratory Ruling No. 3.202-7608 dated October 31, 2008 so that the status quo will be maintained. As a result, the prior Declaratory Ruling No. 3.202-7608 remains in effect as specifically applied to the Plaintiffs until such time as a final resolution of these disputes can be established by a final ruling of Court.

The Court concludes that the Plaintiffs are entitled to judgment in their favor and for the relief sought with regard to the issues of law. A state agency cannot usurp the authority of the General Assembly where the General Assembly has made no subsequent change to §37-3-202 needed to support a new interpretation of a statute. The new code provisions for consumer loans were enacted in 1976 and became effective on September 30, 1976. The Department cannot lawfully repeal a formal state agency statutory interpretation of such long standing nature without probative and substantial evidence. Here, in the case at hand, the Department made no effort to conduct a public hearing, which is part of the Plaintiffs' argument and claims against the Department. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Inc. Co.* 463 U.S. 29, 103 S.Ct. 2856, 77 L.ed.2d. 443 (1983) (An agency changing its course by rescinding a long standing rule and construction of law is obliged to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance).

ARGUMENT

A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are "clearly erroneous in view of the reliable,

probative and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann.§1-23-380(5)(e), (f) (Supp.2003); *McCraw v. Mary Black Hosp.*, 350 S.C. 229, 565 S.E.2d 286 (2002); *Waters v. South Carolina Land Res. Conservation Comm'n,* 321 S.C. 219, 467 S.E.2d 913 (1996); *see also Etheredge v. Monsanto Co.,* 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002) (stating court may not substitute its judgment for that of agency as to weight of evidence on questions of fact unless agency's findings are clearly erroneous in view of reliable, probative, and substantial evidence on whole record).

Under Section 1-23-380(5), the Court can reverse or modify the decision of the agency if substantial rights of the aggrieved party have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(5). In the matter before the Court, the Petitioners contend that the Department has failed to comply with and has violated the APA.

The Court has not identified any enactments by the General Assembly that amend Section 37-3-202 of the South Carolina Code after the Department issued its opinion letter to the Plaintiffs dated June 2, 2005. The Department admits that there have been no statutory changes by the General Assembly to S.C. Code Section 37-3-202 on or after the issuance of its June 2,

2005 letter to the Plaintiffs. *See, paragraph 21 of the Complaint and paragraph 14 of the Answer.* That June 2, 2005 letter to Plaintiffs provided a detailed and extensive procedure for Plaintiffs to use in order to provide and lawfully sell their products/plans in accordance with state law. Suddenly, the Plaintiffs assert that the Department arbitrarily decided to change a then-existing thirty-two year precedent and ruling without any underlying formal change in the law. The Department admits that there was no underlying official change in the supporting statute or law. *See, paragraph 14 of the Department's Answer.*

The 1976 Declaratory Ruling, the very first interpretation issued by the Department after the General Assembly enacted Chapter 3 of Title 37, was an official state agency interpretation that a supervised lender may sell products/plans to the consumer consistent with the products and plans currently offered by the Plaintiffs and sold through supervised lenders to the consumer. *See, Affidavit of Irvin D. Parker, ¶5 regarding the 1976 Interpretation.* Mr. Parker clearly within the four corners of the 1976 Declaratory Ruling dated October 1, 1976 provides and sets forth the legal basis and rationale for the 1976 Declaratory Ruling which allows the continued practice for supervised lenders to sell products/plans; otherwise, the General Assembly would have specifically prohibited the selling of such items in Section 37-3-512. The 1976 Declaratory Ruling itself specifically states:

> "It seems equally clear that there was no intent to prohibit outright, 'the sale of non-credit insurance by supervised lenders. Prior to the adoption of the Code the sale of such insurance by licensed lenders in this State was a common practice. Had the legislature intended to abolish such business it would likely have so provided in Section 3.512 which was an amendment to the Uniform version of the Code to prohibit such lenders from selling "goods."
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> *See, 1976 Declaratory Ruling No. 3.202-7608.*

It is also fundamental that the Court may take judicial notice that the 1976 Declaratory Ruling was issued by Administrator Irvin D. Parker. *See, Affidavit of Irvin "Pete" Parker.* Mr. Parker was the first Department Consumer Protection Code Administrator. Just as important, he was assigned by the Attorney General to work with the General Assembly when the Consumer Protection Code was first enacted to include Section 37-3-202 and to create the Department of Consumer Affairs. Since that time period, the Department formally stated to the Plaintiffs that "it is the opinion of the Department that the plans may be sold in the offices of supervised lenders if the sale complies with both Declaratory Ruling No. 7608 and the changes in the law since that time."[1] *See, Department's Letter to Plaintiffs dated June 2, 2005.* The Department has conceded in its Answer that there have been no amendments to the Code by the General Assembly that mandate any changes to the long standing official state interpretation of the Code.

Since 1976, although there may have been changes in the law between 1987 and 2005, the Department clearly stated in its June 2, 2005 letter to the Plaintiffs that it was the law that **Plaintiffs' products and plans may be sold in the offices of supervised lenders in South Carolina under state law.** *See, Department's Letter to Plaintiffs dated June 2 2005* (emphasis

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[1]On page 3 of the June 2, 2005 letter (*See, Department's Letter to Plaintiffs dated June 2, 2005),* the Department describes the "changes in the law" since 1987. None of these changes are amendments to the S.C. Code Section 37-3-202 or 37-3-512, but reference the enactment of other acts related to the licensure or regulation of a specific product.

> "As Mr. Porter indicated, the Motor Club Services Act, *S.C. Code Ann.* §§39-61-10 *et. seq.*, has become law and governs the sale of motor club services in South Carolina. A law governing service contracts, *S.C. Code* §§38-78-10 *et. seq.*, and requiring registration and regulation of the sale of service contracts, was passed in 2000. Finally, a new law governing discount drug cards, *S.C. Code Ann.* 37-17-10, has passed and was transferred to this Department in 2001." Exhibit C of Complaint, Department Letter dated June 2, 2005, pp 3-4. *See, Department's Letter to Plaintiffs dated June 2, 2005.*

added). Moreover, such practice is clearly consistent with Federal law. There is nothing provided by the Department to address or explain what actually changed in the underlying law supporting the 1976 Declaratory Ruling though 2008 (i.e, when there has been no changes or enactments by the General Assembly) to suddenly prohibit the practice and sale of the Plaintiffs' products and plan. There is nothing at the Federal level to prevent the sale of Plaintiffs' plans or products by the lender. In fact, Section 226.4 of Regulation Z (12 C.F.R 226.4) provides that the "finance charge" includes any charge or item paid by the borrower directly or indirectly to the creditor which is a condition of the extension of credit. "It does not include any charge of a type payable in a comparable cash transaction." 12 C.F.R 224(a). The sale of the plans and products of the Plaintiffs are NOT in connection with the loan or required for purchase in order the consumer to secure the loan. Thus, the Plaintiffs' products and plans are lawfully allowed to be sold in the lender's office under federal law.

An agency changing its course by rescinding a long standing rule and construction of law is obliged to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Inc. Co.* 463 U.S. 29, 103 S.Ct. 2856, 77 L.ed.2d. 443 (1983). An agency acts arbitrarily and capriciously where it retroactively changes a longstanding policy with no basis in the administrative record for such agency action. Only if an agency explains its rationale for retroactively changing its prior practice can a reviewing court determine whether that decision is a product of rational analysis. *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737 (D.C. Cir. 1986). However, an agency's adoption of a new standard is not arbitrary, capricious, or an abuse of discretion if the change merely refines an existing procedural standard and no affected

party had detrimentally relied on the old test. *National Whistleblower Center v. Nuclear Regulatory Com'n*, 208 F.3d 256 (D.C. Cir. 2000). The Court concludes and finds that Plaintiffs have detrimentally relied on the 1976 official state interpretation of the law and the 2005 letter issued to the Plaintiffs on June 2, 2005, in taking steps to commence doing business in South Carolina.

Here, there is no question that the Plaintiffs have relied upon the prior ruling through the use and application of the detailed procedures specifically outlined by the Department in the Department's letter to Plaintiffs in 2005. The Department never raised any issues or complaints with the Plaintiffs. *See, Affidavit of Steven Spiegel.* It is well settled in South Carolina law that an agency acts "arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. State Bd. Of Desntistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985); *Converse Power Corp. v. South Carolina Dept. of Health and Environment Control*, 350 S.C. 39, 564 S.E.2d 341 (Ct. app. 2002). It also well settled that a state agency cannot cling to a claim of "regulatory agency discretion" without establishing any evidentiary basis for its decision. *Hamm v. S.C. Public Service Commission*, 295 S.C. 429, 368 S.E.2d 911 (1988); *Brown v. Johnson*, 276 S.C. 68, 275 S.E.2d 876 (1981) (Discretion cannot be exercised without a factual basis); *Parker v. S.C. Public Service Commission*, 280 S.C. 310, 313 S.E.2d 290 (1984). The action by the Department to arbitrarily revoke an over thirty year old official state law interpretation is an arbitrary and capricious action by a state agency that cannot be rescued by the Department claiming "regulatory discretion."

The Court has concluded that the Plaintiffs established practices and products are compliant with Federal law and procedure. Federal Regulation Z, 12 C.F.R §226 ("Regulation Z"), allows the sale of voluntary non-credit and ancillary products by Plaintiffs (1) that are not in connection with the loan, or (2) which are incidental to the loan. Products are deemed "incidental to the loan" or "not in connection with the loan" when:

(1) the loan is not required in order for the consumer to purchase the product;

(2) the benefits are not tied to the term of the loan;

(3) the benefits are received only by the consumer and not the lender;

(4) if not paid by cash or credit card, any check used to purchase the product/coverage is made out directly to the borrower;

(5) the product/coverage is not required by the lender as a condition of granting the extension of credit which is clearly disclosed in writing to the consumer by the lender;

(6) the price of the product/coverage is disclosed in writing to consumer; and

(7) the consumer acknowledges in writing their request for the product/coverage after receiving these disclosures.

The text of 1976 Declaratory Ruling dated October 1, 1976 issued by Administrator Parker remains today (and in 2005, 2006, 2007, 2008, and thereafter) consistent with the current provisions of Regulation Z and TILA **so that a lender is allowed to authorize a consumer to purchase products/services not** in connection with the loan or as a condition for the extension of credit. Regulation Z specifically excludes from the finance charge premiums for voluntary credit life, accident, health or loss-of-income insurance, voluntary credit property insurance, and

voluntary debt cancellation fees provided certain disclosures are made to the consumer evidencing that the sale of such insurance service is voluntary. 12 C.F.R 226.4(d).

The Official Comment to S.C. Code §37-3-109, which sets forth the statutory definition for "loan finance charge," discusses the absence of a definition of the term "interest" in the SC Consumer Protection Code. It notes that the definition of "finance charge" in Section 37-3-109 is roughly equivalent to the term "interest" and how the term "interest" will be used in usury statutes. *Comment 1 to S.C. Code Section 37-3-109; Smith, The South Carolina Consumer Protection Code: Text with Comments, (4th Ed.), p.190.* The Official Comment from the 1968 Text of the U3C states that "the definition of a loan finance charge is an all-inclusive one, and that every charge for the loan, *except those charges specifically excluded from this section*, must be included in the calculation of the loan finance charge for the loan in question." *Id.* (*emphasis added*). Before the Court can determine what the Official Comment is trying to explain, it must refer to the actual wording and language of the statute (§37-3-109) which has not been amended or modified by the General Assembly since 1988. Section 37-3-109(1)(a)[2] provides that:

> (1) "Loan finance charge" means the sum of -
>
> (a) ***all charges payable*** directly or indirectly ***by the debtor and imposed*** directly or indirectly ***by the lender as an incident to the extension of credit***, including any of the following types of charges which are applicable: interest or any amount payable under a point, discount or other system of charges, however denominated, premium or other charge for any guarantee or

[2] Subsection (1)(b) of the Section 37-3-109 excludes fees paid the registered mortgage loan brokers and the charges for investigating the credit worthiness of the debtor. Subsection (2) of Section 37-3-109 excludes the discount in the satisfaction of the debt purchased by the lender from the finance charge. Neither section particularly applies in this matter.

> insurance protecting the lender against the debtor's default or other credit loss; and, except as otherwise provided in this section;
>
> *S.C. Code Ann. §37-3-109(1)(a) (emphasis added).*

Similarly, the definition of finance charge found in Regulation Z and Section 37-3-109 specifically **excludes** any charges payable by the consumer which are NOT in connection with the loan or which are NOT a condition for the extension of credit. *S.C. Code Ann. §37-3-109(1)(a).* Thus, by federal law, the cost of the Plaintiffs' plans and products cannot be included in the loan finance charge. However, in the case at hand, it is the Department that is seeking to have such costs included as part of the finance charge by its new state law interpretation. This new statutory construction creates a significant problem for the Plaintiffs and the business model it employed to do business in South Carolina. *See, Affidavit of Steve Spiegel.*

Nothing from the Department explains or shows how the 1976 Declaratory Ruling, which existed for more than thirty-two years (1976 – 2008) and which is actually continuing in effect in 2013 solely due to the Order of Stay, is now somehow transformed into a provision of law that is suddenly inconsistent with the Federal law, state law and the purpose of Title 37. This is especially true since the law and undisputed facts show that the 1976 Declaratory Ruling is consistent with Federal law (Regulation Z and TILA) and is consistent with the Title 37 (Consumer Protection Code) as there had undisputedly been no underlying change in the statutory language of the Section 37-3-202 by the General Assembly. The Department does not show or state how its authority in Section 37-6-506(2) has been triggered to require it to repeal the 1976 Declaratory Ruling when the 1976 Declaratory Rule complies with existing Federal law and state law. The Department failed in its own duties to comply with the provisions of SC

Consumer Protection Code that require the Department to promote uniform application of laws among the other U3C states, S.C. Code Ann. §37-1-102(2)(g)[3], and:

> (3) **To keep the Administrator's rules in harmony with the Federal Consumer Credit Protection Act and the regulations prescribed from time to time pursuant to that Act by the Board of Governors of the Federal Reserve System and with the rules of administrators in other jurisdictions which enact the Uniform Consumer Credit Code.** The Administrator, so far as is consistent with the purposes, policies and provisions of this title, shall
>
> (a) Before adopting, amending, and repealing rules, advise and consult with administrators in other jurisdictions which enact the Uniform Consumer Credit Code; and
>
> (b) In adopting, amending, and repealing rules, take into consideration:
>
> (i) The regulations so prescribed by the Board of Governors of the Federal Reserve System; and
>
> (ii) The rules of administrators in other jurisdictions which enact the Uniform Consumer Credit Code.

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[3] **SECTION 37-1-102.** Purposes; rules of construction.

(1) This title shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this title are:

(a) To simplify, clarify and modernize the law governing retail installment sales, consumer credit and usury;

(b) To provide rate ceilings to assure an adequate supply of credit to consumers;

(c) To further consumer understanding of the terms of credit transactions and to foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost;

(d) To protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors;

(e) To permit and encourage the development of fair and economically sound consumer credit practices;

(f) To conform the regulation of consumer credit transactions to the policies of the Federal Consumer Credit Protection Act; and

(g) To make uniform the law, including administrative rules, among the various jurisdictions.

(3) A reference to a requirement imposed by this title includes reference to a related rule of the administrator adopted pursuant to this title.

S.C. Code Ann. §37-1-102 (emphasis added).

S.C. Code Ann. §37-6-104(3) (emphasis added)

The repeal and rescinding of the 1976 Declaratory Ruling does not "harmonize" or "make uniform" the Uniform Commercial Credit Code or with the Federal Consumer Credit Protection Act (i.e., TILA, Regulation Z, etc.). It is inconsistent with such laws, and in conflict with the specific requirements of the SCCPC. Thus, such action by the Department on or about October 30, 2008 to repeal the 1976 Declaratory Ruling establishes that the Department acted erroneously, in an arbitrary or capricious manner, abused its discretion.

In the case at hand, the Plaintiffs rely also on an examination of Regulation Z of the Federal Truth in Lending Act. Regulation Z specifically excludes from the Truth-in-Lending disclosed Finance Charge premiums for voluntary credit life, accident, health or loss-of-income insurance, voluntary credit property insurance, and voluntary debt cancellation fees provided certain disclosures are made to the consumer evidencing that the sale of such insurance service is, in fact, voluntary. 12 C.F.R 226.4(d). The Department does not argue that the sale of Plaintiffs' products and services are required to be purchased by a consumer borrower in order to secure a loan. These types of optional or voluntary insurance products benefit the consumer by protecting against certain losses and such products are clearly sold as an "incident to the extension of credit."

As provided in Sections 37-1-102 and 37-1-302, the policies of the South Carolina Department of Consumer Affairs must follow and conform to the policies of the Federal Consumer Protection Act which is defined in Section 37-1-302 as the Federal Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667(e), Regulation Z, 12 C.F.R §226, and other related regulations. The Federal Truth in Lending Act was enacted by Congress in 1968 and the Federal

Reserve followed by implementing regulations later in 1969. In fact, three years prior to the issuance of the underlying 1976 Declaratory Ruling No. 3.202-7608, the United States Supreme Court held that both TILA and Regulation Z were constitutional in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). Both TILA and Regulation Z restrict or limit as a matter of federal law certain additional charges by including any charge payable directly or indirectly by the consumer in connection with the loan as part of the finance charge. 12 C.F.R. §226.4. The Administrator of the Department is required to conform such policies with Regulation Z for the purpose of a uniform application of the law. S.C. Code §37-1-102(2)(f) & (g). The text and holding in 1976 Declaratory Ruling dated October 1, 1976 remain consistent with the provisions of Regulation Z and TILA so that a lender is allowed to authorize a consumer to purchase products/services that are not in connection with the loan or as a condition for the extension of credit. As a result of applicable federal law, such a purchase by a consumer would not make the purchase cost be an "additional charge" required to be included in the disclosed Finance Charge and disclosed in the APR. *See also, Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996) (the Court examined the distinction between the portion of an automobile purchase transaction where the cash price is negotiated versus the portion of the transaction which relates to the extension of credit regarding a charge to the consumer of a disclosed closing fee. Since the closing fee was charged to all of the dealer's customers as part of the price and the amount of the fee disclosed to the consumer prior to the execution of the transaction documents, the fee was **not** an "impermissible" additional charge prohibited by the SCCPC) or required to be included in the Finance Charge as now demanded by the Department.

The Court concludes that the action by the Department to repeal the longstanding 1976 Declaratory Ruling is "clearly erroneous in view of the reliable, probative and substantial evidence" without showing a core legislative change and legislative intent. The 1976 Declaratory Ruling explored existing law and opined its legal basis for the Ruling and its related requirement that the sale was "not in connection" with the loan. Moreover, this uncontroverted evidence demonstrates that the action taken by the Department to suddenly repeal and rescind an official Ruling that had stood since 1976 without any underlying change in underlying core statute is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. §1-23-380(5)(e), (f) (Supp.2003). For these reasons, I grant partial Summary Judgment in favor of the Plaintiffs on the issues of law and find that the Department failed in its duty and responsibility when attempting to rescind this thirty-plus year construction of law existing since October 1, 1976 without providing a reasoned analysis for the change beyond that which may be required when Department did not previously have such long-standing official state interpretation. I further find that the 1976 Declaratory Ruling and Administrative Interpretation shall continue to exist and is not repealed by the Department's action of issuing the October 30, 2008 and that such October 30, 2008 letter is without proper basis, procedure and without force of law.

With regard to the allegation by the Plaintiffs concerning a denied right to notice or proper notice to effectively participate or properly object to any change by the Department to withdraw or rescind this 1976 Declaratory Ruling, I find that Summary Judgment cannot be granted concerning notice as it is a contested question of fact. *See, Affidavit of Steven Spiegel; Complaint.* The Plaintiffs claim they did not have proper notice to alert them that the

Department was considering the possibility of a withdrawing or rescinding its long standing 1976 Declaratory Ruling that Plaintiffs expressly relied upon to do business in South Carolina. *See, Exhibit 7.* In making the withdrawal or rescission, the Department issued a letter dated October 30, 2008 and does not provide any record or notice of hearing for such action. *See, Plaintiffs letter dated November 21, 2008 to Department; and Two Affidavits of Steve Spiegel.* Therefore, on the issue of notice to the Plaintiff or adequacy of notice, I cannot find summary judgment for the Plaintiffs and deny their motion on that issue alone.

CONCLUSION AND FINDINGS

Therefore, I find that the Plaintiffs have shown that as a matter of law the Department has acted beyond its lawful powers, duties and abused its discretion in violation of the APA. I further find that:

(1) The Plaintiffs are entitled to judgment in their favor and for the relief sought with regard to the issues of law.

(2) A state agency cannot usurp the authority of the General Assembly where the General Assembly has made no subsequent change to §37-3-202.

(3) The Department cannot lawfully repeal a formal statutory interpretation of such long standing nature without probative and substantial evidence that there is an underlying, statutory basis for such change and repeal.

(4) The Department did not follow South Carolina law when seeking to repeal the 1976 Declaratory Ruling and did so without holding a hearing, establishing a record or presenting relevant evidence and legal basis for such change.

(5) It is undisputed that there has been no underlying statutory code change in the relevant law by the General Assembly in Section 37-3-202, which is the basis for the 1976 Declaratory Ruling.

(6) It is found the 1976 Declaratory Ruling is consistent with the provisions of the South Carolina Code of Laws and Title 37, including any related or applications rules or regulations.

(7) It is found the 1976 Declaratory Ruling is consistent with the provisions of Federal law including but not limited the findings and interpretations by the Federal Reserve in Regulation Z, Regulation Z and the Federal Truth in Lending Act (TILA).

(8) The Department's actions served to usurp and undermine the power of the General Assembly solely to enact legislation when the Department revoked and repealed a long standing administrative law interpretation of a statute that the General Assembly has not taken any action to challenge or change this long standing state law administrative interpretation.

(9) The 1976 Declaratory Ruling dated October 1, 1976 is consistent with the findings and interpretations by the Federal Reserve in Regulation Z per Section 37-1-102, which requires the Department to harmonize with the provisions of Regulation Z and that was accomplished with the existence of the 1976 Declaratory Ruling.

(10) The 1976 Declaratory Ruling provides that the sale of services or products is allowed if "not in connection with the loan" and that such voluntary non-credit and ancillary products are considered "incidental to the loan" because the sale of the product is not conditioned upon the extension of credit, the benefits are not tied to the

loan, the benefits from the products are received by the borrower only, and a separate check used to purchase the product is made to the borrower. If the Department seeks to take such action to repeal and revoke the 1976 Declaratory Ruling, then the Department must develop a record of relevant evidence and law prior to issuing any decision and ruling related to the withdrawal, repeal and rescinding of a more than thirty (30) year old, long standing, administrative law declaratory ruling on state law and its related letters and opinions.

(11) The Plaintiffs are entitled to the relief demanded herein in their Complaint for declaratory judgment (except for the issue of notice), and to require the Department to follow proper procedure under the law of South Carolina for rescinding a long standing administrative interpretation

(12) The Plaintiffs are entitled to the ongoing Order of Stay and the Order staying the enforcement shall continue in effect, as well as entitled any additional or other relief as the Court deems just and proper, including the consideration of attorney's fees and costs.

For the reasons stated herein, I grant partial Summary Judgment in favor of the Plaintiffs on the issues of law and find that the Department failed in its duty and responsibility to make uniform the law when attempting to rescind a long standing rule and construction of law existing since October 1, 1976 without providing a reasoned analysis for the change beyond that which may be required when Department did not previously have such long-standing interpretation. I further find that the 1976 Declaratory Ruling and Administrative Interpretation shall continue to

exist and is not repealed by the Department's action of issuing the October 30, 2008 and that such October 30, 2008 letter is without proper basis, procedure and without any force of law.

I find that Summary Judgment cannot be granted for the Plaintiffs concerning the issue of notice as it is a factual one that must be determined and therefore, I find for the Defendant on that issue alone.

The Court will entertain and hear any other petition or request for additional or other relief by the Plaintiffs, including attorney's fees and costs.

AND IT IS SO ORDERED.

DeAndrea G. Benjamin
Judge
Circuit Court, Fifth Judicial Circuit

April 29, 2014.
Columbia, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP406341

Home Benefits, Inc. and the American Traveler Motor Club, Inc.

PLAINTIFF(S)

South Carolina Department of Consumer Affairs

DEFENDANT(S)

Submitted by: _____ **Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED
2015 FEB 20 PM 4:59
RICHLAND COUNTY
C.C.P. & G.S.

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : The Defendant's motion to reconsider pursuant to Rule 59(e), SCRCP is granted in part and denied in part. As to the first seven grounds raised in the Defendant's Motion to Alter or Amend the Judgment, the Defendant's motion to alter or amend the judgment is DENIED. As to the seventh ground raised in the Defendant's Motion to Alter or Amend the Judgment, the Defendant's motion to alter or amend the judgment is GRANTED. Consequently, Plaintiffs will bear the cost for their own attorney's fees.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** 2161 **Date** 2-20-15

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 day of Feb, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

Steven W. Hamm and C. Jo Anne Wessinger Hill
ATTORNEY(S) FOR THE PLAINTIFF(S)

Danny R. Collins
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____ Clerk of Court Jeanette McBride