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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable DeAndrea G. Benjamin, Circuit Court Judge

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Circuit Court Case No. 2012-CP-40-6341  
Appellate Case No. 2015-000637

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Home Benefits, Inc. and the American Traveler Motor  
Club, Inc. . . . . **RESPONDENTS-APPELLANTS.**

v.

South Carolina Department of Consumer Affairs. . . . . **APPELLANT-RESPONDENT.**

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**INITIAL APPELLANTS' BRIEF  
OF RESPONDENTS-APPELLANTS**

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN FINDING THAT THE PLAINTIFFS RESPONDENTS-APPELLANTS) WERE NOT ALLOWED TO RECOVER ATTORNEY FEES AND COSTS AS PART OF DECLARATORY JUDGMENT IN GRANTED IN THEIR FAVOR WHEN THE CIRCUIT COURT DETERMINED THAT THE DEFENDANT'S ACTIONS TO REPEAL A LONG STANDING ADMINISTRATIVE INTERPRETATION AND RULE (1976 DECLARATORY RULING AND ADMINISTRATIVE RULING NO. 3.202-7608) WERE ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION WITHOUT PROBATIVE AND SUBSTANTIAL EVIDENCE WHEN THE 1976 RULE HAS BEEN IN EXISTENCE NOW FOR ALMOST 39-YEARS AND THERE HAS BEEN NO CHANGE BY THE GENERAL ASSEMBLY TO THE UNDERLYING STATUTORY PROVISION AND THE PLAINTIFFS' POSITION IS FURTHER SUPPORTED BY FEDERAL LAW?

## INTRODUCTION

This is an appeal concerning the decision and Order by the lower court wherein the lower court changed its original ruling awarding the Respondents-Appellants (Plaintiffs' Home Benefits, Inc. and the American Traveler Motor Club, Inc.) ("Plaintiffs") attorney's fees and costs. (R. at \_\_\_\_). The lower court held that the October 30, 2008 repeal of a long standing rule and construction in existence since October 1, 1976 (for more than thirty-two years) by the Appellant-Respondent (Defendant South Carolina Department of Consumer Affairs) ("Defendant") was unlawful. (R. at \_\_\_\_). The lower court heard opposing motions for summary judgment presented by both parties to the declaratory judgment action; however, the lower court found on April 30, 2014 for the Plaintiffs and granted summary judgment on all matters and questions of law except on the issue of "notice." (R. at \_\_\_\_). Thus, the lower court found summary judgment or partial summary judgment for the Plaintiffs. The lower court applied common and statutory law to determine that the Defendant was arbitrary and capricious when it repealed on October 30, 2008 a thirty-two year state law administrative interpretation and declaratory ruling while there has been no change by the South Carolina General Assembly to the underlying statutory code section, S.C. Code Ann. 37-3-202. (R. at \_\_\_\_). The lower court further held that based upon the applicable law and undisputed facts that such action constitutes an abuse of discretion by the Defendant. The Plaintiffs sought the recovery of attorney's fees and costs amount of the relief. (R. at \_\_\_\_). The lower court concluded that it would allow for the recovery of the Plaintiffs' attorney fees and costs. (R. at \_\_\_\_). The recovery of attorney's fee and costs are appropriate and an remedy that is allowed to the Plaintiff. S.C. Code Section 15-53-100. The record and the law clearly demonstrate that the Defendant acted arbitrarily to

revoke an official state law interpretation and that such arbitrary and capricious action by a state agency that cannot be rescued by the Department claiming “regulatory discretion.”

#### PROCEDURAL HISTORY AND FACTS OF CASE

The Plaintiffs originally filed this action in the Administrative Law Court on January 20, 2009 in accordance with the Administrative Procedures Act and applicable law following their request(s), which were denied 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. (R. at \_\_\_\_). Declaratory Ruling No. 3.202-7608 has been in effect since October 1, 1976, a period of time spanning 37 years. The Plaintiffs assert that the Department failed to follow proper procedures, that Plaintiffs have relied upon this Declaratory Ruling and those opinions of the Department related to this ruling, that the Department by its actions has acted in an arbitrary and capricious manner as there has been no legislative change enacted by the South Carolina Legislature to the underlying code section, S.C. Code §37-3-202, upon which the ruling is based.

Plaintiffs are corporations organized in the State of Delaware, are in good standing, and they do business in the State of South Carolina. They offer their auto security and home security plans to consumers through lenders through a separate transaction, not in connection with a loan transaction. The consumer has the sole and individual choice to 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 lawful procedures for the sale of its services not in connection with and at the time a supervised loan was made. The Plaintiffs worked with the Department to develop specific and lawful procedures to be used for the selling of its services and products at the time of the supervised loan. These procedures were sanctioned and outlined

in the Department's detailed informal letter issued on June 2, 2005. (R. at \_\_\_\_). This June 2, 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." (R. at \_\_\_\_). The Plaintiffs have been operating in the State since 2005 in reliance with the terms and in accordance with the detailed procedures developed by the Department.

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 if certain specific conditions are met. (R. at \_\_\_\_). The sudden withdrawal and rescinding of this 39-year precedent<sup>1</sup> 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. (R. at \_\_\_\_). As authorized by the Declaratory Ruling No. 3.202-7608 issued on October 1, 1976, the sudden reversal of a long term statutory construction is arbitrary and eliminates their ability to do business in the State. In addition, 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.

On October 30, 2008, the Department issued a letter withdrawing and rescinding this Declaratory Ruling, including any related letters or opinions in connection with such ruling. (R. at \_\_\_\_).

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<sup>1</sup> There has been a stay in effect since March 25, 2009 and such stay was continued on February 5, 2013. (R. at \_\_\_\_). Therefore, the Declaratory Ruling No. 3.202-7608 dated October 1, 1976 has been in effect for almost 39-years. However, on October 30, 2008 when the Department issued their repeal of this long standing construction of an unchanged statute, the 1976 Declaratory Ruling has been in existing for more than 32-years. (R. at \_\_\_\_).

The first time that the Plaintiffs became aware of the Department's change of ruling was on November 4, 2008. (R. at \_\_\_\_).

The Plaintiffs and the Department met on November 20, 2008 to discuss their concerns. 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 request for reconsideration to the Department to reconsider its ruling dated October 30, 2008. (R. at \_\_\_\_). The Plaintiffs asserted that the impact of the recent ruling change by the Department was severe and has 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. (R. at \_\_\_\_).

The Plaintiffs timely filed this 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. 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. See Administrative Law Court Consent Order dated July 31, 2012. (R. at \_\_\_\_).

Following the pretrial discovery, answers and motions, the parties each filed a Motion for Summary Judgment. (R. at \_\_\_\_). The parties submitted memorandums in support of their motions, as well as other supporting materials and affidavits. (R. at \_\_\_\_). On October 15, 2013, the lower court heard these counter motions for summary judgement and each party forwarded

proposed orders for review. (R. at \_\_\_\_). On April 29, 2014, Judge Benjamin issued an Order granting summary judgment or partial summary judgment in favor of the Plaintiffs. (R. at \_\_\_\_).

The Plaintiffs have been lawfully operating in the State of South Carolina since 2005. The Department has advised that it has not received any complaints about the products sold by the Plaintiffs. (R. at \_\_\_\_). The Plaintiffs have carefully complied with all guidelines and requirements that the Department developed and addressed in its letter dated June 2, 2005. (R. at \_\_\_\_). The Plaintiffs have invested substantial funds in training and marketing programs and materials for South Carolina that address the benefits of their products. Currently, there is a stay of any enforcement, finalization, or effective date so that the status quo will be maintained. (R. at \_\_\_\_). As a result, the prior Declaratory Ruling No. 3.202-7608 remains in effect as applied to the Plaintiffs until such time as a final resolution of these problems can be established.

The Plaintiffs have asserted and argued that the Department has usurped the authority of the General Assembly despite the fact that they General Assembly has made no change to the underlying statutory provision of the law (statute §37-3-202) used as the support for the 1976 Declaratory Ruling. The Plaintiffs further assert that the Department's actions to revoke this long standing rule of law is also contradictory to the federal provisions which the Consumer Protection Code must apply. The Declaratory Judgement Act allows the recovery of attorney fees and costs. The lower court found using the principles of law and review in the undisputed facts that the Department's repeal of a long standing rule and administrative interpretation after more than 32-years in 2008 was arbitrary, capricious and an abuse of discretion by the Department. As such, Plaintiffs are entitled to such relief since they have had to fight this battle since December 2008. Moreover, a typographical error was discovered prior to any appeal by either party in the Order issued by the court in response to the Department's motion for

reconsideration (Rule 59(e)). The corrective order by the lower court was dated the same date as when the Department filed its appeal on March 20, 2015. (R. at \_\_\_\_). The corrective Order enables the lower court's order to be clear and to make sense so that its ruling is clear. The lower court acted appropriately to correct the typographical error which directly related to the Department's motions containing nine (9) grounds for reconsideration. Thus, all parties will clearly know that the first seven grounds were denied; thus, upholding its ruling for the Plaintiff, and that the changes or reconsideration is related to grounds numbered eighth and ninth.

### ARGUMENT

- I. THE LOWER COURT ERRED IN DENYING THE PLAINTIFFS THE REMEDY OF ATTORNEYS' FEES AND COSTS FOLLOWING APPROXIMATELY SEVEN YEARS OF LITIGATION TO DEFEND AGAINST THE CAPRICIOUS, ARBITRARY AND ABUSE OF DISCRETION ACTIONS BY THE DEPARTMENT TO UNLAWFULLY REPEAL A LONG STANDING RULE OF LAW AND STATUTORY CONSTRUCTION EXISTING FOR OVER THIRTY-PLUS YEARS WHEN THERE HAS BEEN NO THE UNDERLYING STATUTORY CHANGE OF LAW ENACTED BY THE GENERAL ASSEMBLY.
  - a. THE GENERAL ASSEMBLY HAS NOT CHANGED OR AMENDED S.C. CODE SECTION 37-3-202, WHICH IS THE UNDERLYING CODE SECTION FOR THE 1976 DECLARATORY RULING No. 3.202-7608.

There have been virtually no enactments by the General Assembly amending Section 37-3-202 of the South Carolina Code since the Department issued its opinion letter dated June 2, 2005. (R. at \_\_\_\_). That 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 Department arbitrarily decided to change a 32-year precedent and ruling without any underlying official change in the law. The 1976 Declaratory Ruling, the first issued by the Department after the General Assembly enacted Chapter 3 of Title 37, is to provide an interpretation that a supervised lender may sell products/plans to the consumer similar to the

ones that are currently offered by the Plaintiffs and sold through supervised lenders to the consumer.

“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 should business it would likely have so provide in Section 3.512 which was an amendment to the Uniform version of the Code to prohibit such lenders from selling “goods.”

*See, 1976 Declaratory Ruling No. 3.202-7608. (R. at \_\_\_\_).*

It is also fundamental that the Court take judicial notice that the 1976 Declaratory Ruling was issued by Administrator Irvin D. Parker. (R. at \_\_\_\_). He 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 enacted to include Section 37-3-202 and to create the Department of Consumer Affairs. Since that time period, the Department stated 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.”<sup>2</sup> (R. at \_\_\_\_). The Department has conceded that there have been no amendments to the Code by the General Assembly that mandates any changes to the long standing official state interpretation of the Code.

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<sup>2</sup>On page 3 of the June 2, 2005 letter (R. at \_\_\_\_ ) 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 are 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. (R. at \_\_\_\_). .

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(A)(6)(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).

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). The Department did not provide such analysis or basis on October 30, 2008 when it issued its repeal. (R. at \_\_\_\_). Nor can the Department attempt retroactively correct its unlawful action. If so, the Department is once again continuing to abuse its discretion and to act in an arbitrary and capricious manner after “it got caught with its hand in the cookie jar.”

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). Plaintiffs have detrimentally relied on the 1976 official state interpretation of the law.

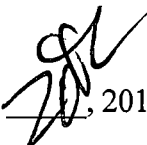
Here, there is no question that the Plaintiffs have relied upon the prior ruling through the use and application of the detailed procedures specifically outlined in the Department's letter to Plaintiffs in 2005. The Department never raised any issues or complaints with the Plaintiffs. (R. at \_\_\_\_). 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 Dentistry*, 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 is 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 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 ability for the Plaintiffs' to recover attorney's fees is appropriate and can be awarded. It is relief that is allowed and which was sought by the Plaintiffs. {CITE} In fact, S.C. Code of Law Section 15-53-100 provides that "In any proceeding under this chapter the

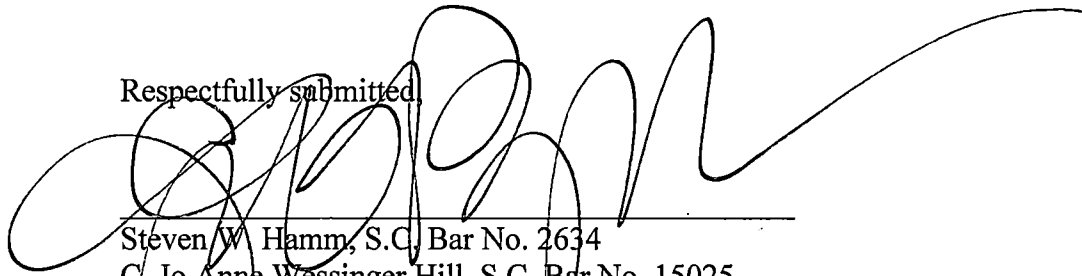
court may make such award of costs as may seem equitable and just.” Even the cases cited by the Department as authority deny this relief to the Plaintiffs do in fact allow for the recovery of attorney’s fees and costs when the agency or governmental entity does not act with reasonable basis in both the law and fact. The Department acted contrary to the underlying law, both state and federal, as well as in failing to uphold its duties and responsibilities provided by the Code. 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 than 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).

**CONCLUSION**

For the reasons set forth above, the Plaintiffs respectfully requests that this Court reverse the circuit court's Order and direct the circuit court to enter an order allowing the recovery of the attorney's fees and costs.

May , 2015

Respectfully submitted,



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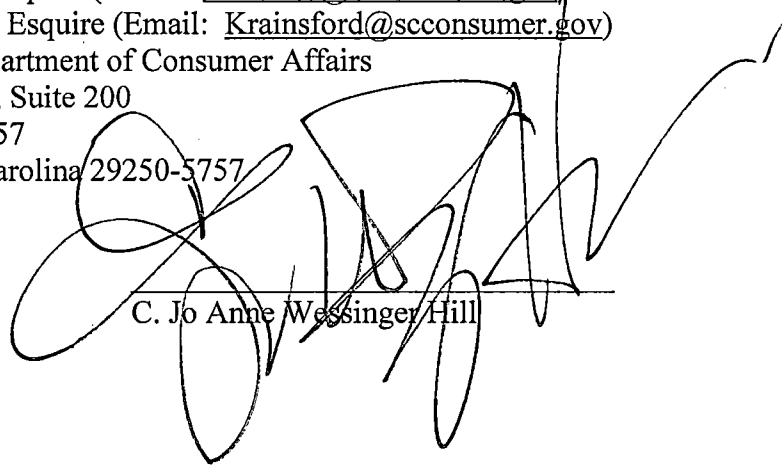
**PROOF OF SERVICE**

I, the undersigned employee with the firm of Richardson Plowden and Robinson, P. A., attorneys for the Appellants, do hereby certify that I have served upon the following the foregoing **Initial Appellants' Brief of Respondents-Appellants** as indicated below on May 20, 2015:

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