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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge, Dorchester County
Maite Murphy, Circuit Court Judge, Dorchester County

Appellate Case No. 2020-000935

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

v.

Jennifer Campney, ...Appellant,

and

Jennifer Campney, ...Third-party Plaintiff,

v.

Cooling & Winter, LLC, ... Third-party Defendant,

Of whom Jennifer Campney is the Appellant

BRIEF OF AMICUS CURIAE SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS

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STATEMENT OF THE CASE

On January 4, 2017, Portfolio Recovery Associates, LLC, as Assignee of Synchrony Bank/HH Gregg ("PRA") filed a Complaint against Jennifer Campney ("Campney") seeking to recover $4,236.78 owed on a credit card account. (R. pp. 84–103). On March 13, 2018, Campney filed her First Amended Answer and Counterclaims asserting the transaction is a consumer credit transaction governed by the South Carolina Consumer Protection Code. (R. pp. 105, 108–109). On October 23, 2019, a one-day bench trial was held. (R. p. 116). On December 11, 2019, the trial court entered judgment against Campney as to PRA's debt collection Complaint and as to Campney's counterclaims. (R. pp. 11–21). After the trial court denied Campney's post-trial motions, Campney timely filed a Notice of Appeal with this Court on June 25, 2020.

Amicus Curiae South Carolina Department of Consumer Affairs ("Department") filed a Petition and Motion for Leave to Appear as Amicus Curiae on March 29, 2021. By Order dated May 27, 2021, this Court granted the Department's Motion and ordered the brief to be filed within thirty days.

INTEREST OF AMICUS

The Department is the state's consumer protection agency. In 1974, the General Assembly enacted the South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 et seq., ("SCCPC") and created the Department. For more than forty-five years, the Department has regulated the consumer credit marketplace; helped to formulate and modify consumer laws,

policies, and regulations; resolved complaints arising out of the production, promotion, or sale of consumer goods or services in South Carolina, whether or not credit is involved; and promoted a healthy competitive business climate with mutual confidence between buyers and sellers. See S.C. Code Ann. §§ 37-1-102, 6-104, and 6-117 (2015). The Department is charged with administering and enforcing the SCCPC to promote its underlying purposes, which include: (1) to further consumer understanding of the terms of credit transactions; (2) to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of credit, having due regard for the interests of legitimate and scrupulous creditors; and (3) to permit and encourage the development of fair and economically sound credit practices. S.C. Code Ann. § 37-1-102(1) and (2)(c)–(e) (2015). Because the General Assembly adopted portions of the 1968 and 1974 Uniform Consumer Credit Code ("U.C.C.C."), the Department is required to keep its regulations in harmony with those of other U.C.C.C. states.[1] S.C. Code Ann. § 37-6-104(3) (2015).

In this brief, the Department seeks only to address certain arguments made in issue two as presented by both parties.[2] In particular, the Department will address the arguments concerning whether transactions associated with "lender credit cards" are "consumer credit transactions" subject to the SCCPC as well as whether the obligation of an original creditor to send a consumer a notice of a right to cure transfers from the original creditor to an assignee upon assignment.

Campney stated in her reply brief that the applicability of the SCCPC "may very well be the most important issue in this appeal, since if Respondent is correct that consumer credit cards are not regulated by the [SCCPC], then there is a very large area of consumer lending that is unregulated in this state." (App. Reply Br. p. 16). The Department agrees. If this Court were to

[1] The other U.C.C.C. states are Utah, Idaho, Iowa, Kansas, Maine, Wisconsin, Colorado, Indiana, Wyoming, and Oklahoma.

[2] The Department expresses no opinion on issues one and three.

rule that either (a) transactions associated with lender credit cards are not consumer credit transactions subject to the SCCPC or (b) obligations of an original creditor do not transfer to an assignee upon assignment, then this Court would be placing severe restrictions on the Department's mission to administer and enforce the SCCPC, ultimately to the detriment of South Carolina consumers. Such a decision also would create an unlevel playing field among creditors. Consequently, the Department has an interest in the outcome of this appeal as amicus curiae.

STANDARD OF REVIEW

The two specific findings of the trial court related to the South Carolina Consumer Protection Code were based on the trial court's interpretation of state statutes and are novel questions of law for determination by this Court. An appellate court may decide novel questions of law with "no particular deference to the lower court." Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 656 (2006); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). "Determining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); see also Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009) ("This Court reviews all questions of law de novo."). The appellate court is free to decide issues regarding the interpretation of statutes without any deference to the circuit court. See Sloan v. Greenville Cty., 380 S.C. 528, 534, 670 S.E.2d 663, 667 (Ct. App. 2009) (citation omitted) ("The issue of statutory interpretation is a question of law for the court. We are free to decide questions of law with no deference to the trial court.").

ARGUMENT

THE TRIAL COURT ERRED IN RULING THE SOUTH CAROLINA CONSUMER PROTECTION CODE DOES NOT APPLY TO AN ASSIGNEE'S COLLECTION ON A CONSUMER CREDIT CARD DEBT.

Statutory provisions of the South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 et seq. ("SCCPC") shall be liberally construed as well as applied to promote the Title's underlying purposes and policies. S.C. Code Ann. § 37-1-102(1) (2015); Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997). The primary purpose of the SCCPC is to protect consumers, as evidenced by its relief provisions. Camp v. Springs Mortg. Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993).

Upon reviewing the Record on Appeal as well as the briefs of both Campney and PRA, it appears undisputed that Campney had a credit card issued by Synchrony Bank to make purchases from HH Gregg and that said purchases were made for a consumer purpose. (R. p. 25, p. 252, ll. 8–14, p. 253, ll. 10–25, pp. 321–372; p. 194, ll. 4–10; Resp. Br. p. 3, p. 5 ("consumer credit card accounts")). Further, PRA purchased the debt in June 2015, sought to collect it from Campney, and ultimately filed a lawsuit against her. (R. pp. 85–93, 101–103). Based on the facts provided, it is the Department's position that such lender credit card transactions are consumer credit transactions subject to the SCCPC and, therefore, a notice of right to cure was required before acceleration of the debt.

I. CONSUMER DEBT INCURRED USING A LENDER CREDIT CARD IS A CONSUMER LOAN AND IS SUBJECT TO THE SOUTH CAROLINA CONSUMER PROTECTION CODE.

The consumer debt at issue in this appeal was created pursuant to a lender credit card and is a consumer credit transaction governed by the South Carolina Consumer Protection Code

("SCCPC"). The cardinal rule of statutory construction is to ascertain and effectuate the legislature's intent from the plain language of the statute. Burns v. State Farm Mut. Auto Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

The SCCPC defines a consumer credit transaction as "a consumer credit sale (Section 37-2-104) or consumer loan (Section 37-3-104) or a refinancing or consolidation thereof, a consumer lease (Section 37-2-106), or a consumer rental-purchase agreement (Section 37-2-701)." S.C. Code Ann. § 37-1-301(11) (2015). According to the SCCPC:

> Except as provided in Section 37-3-105, "consumer loan" is a loan made by a person regularly engaged in the business of making loans in which:
>
> (a) the debtor is a person other than an organization;
> (b) the debt is incurred primarily for a personal, family, or household purpose;
> (c) either the debt is payable in installments or a loan finance charge is made; and
> (d) either the principal does not exceed twenty-five thousand dollars[3] or the debt is secured by an interest in land.

S.C. Code Ann. § 37-3-104 (2015). The SCCPC defines a "loan" to include "the creation of debt pursuant to ***a lender credit card*** or similar arrangement." S.C. Code Ann. § 37-3-106(3) (2015) (emphasis added). Further, the SCCPC defines a lender credit card or similar arrangement to be "an open-end credit arrangement or loan agreement, other than a seller credit card, pursuant to which a lender gives a debtor the privilege of using a credit card . . . in transactions out of which

[3] While the statute reads "twenty-five thousand dollars," the amount is subject to adjustments based upon changes in the Consumer Price Index. See S.C. Code Ann. § 37-1-109 (2015). The current amount is $105,000. The dollar amounts are published in the State Register during even-numbered years and are available on the Department's website at https://consumer.sc.gov/business-resourceslaws/dollar-amount-adjustment (last visited June 16, 2021).

debt arises: . . . (b) by the lender's payment or agreement to pay the debtor's obligations." S.C. Code Ann. § 37-1-301(16) (2015).

In an Administrative Interpretation in 1989, the Department described how lender credit card transactions work. The Department explained:

> The essence of a credit card is that it requires three parties to be in agreement. The lender agrees to issue the device to the holder for the return of interest rates or other fees and to honor the drafts of, to pay the obligations of or to purchase the obligation of the holder made pursuant to the card. The holder, on the other hand, wishes to be able to make purchases of goods and services by presenting the device to persons honoring the card. The merchant honoring the card, through agreement with a lender/issuer agrees to allow such purchases to be made because it has agreed that the identifying device signals to it that the holder has credit with a lender/issuer. Often, the merchant agrees to make sales at certain dollar amounts merely by presentation of the device, or at other dollar amounts, through oral or electronic confirmation of the credit available. Often, the merchant posts the credit card logo at or near its entrance to indicate that it accepts the card.

S.C. Dep't of Consumer Affairs Administrative Interpretation No. 3.202-8901, at 4–5 (Apr. 29, 1989).[4]

Synchrony Bank issued a credit card to Campney, the card holder, so that she could make purchases from the merchant/seller HH Gregg. Synchrony Bank was the card issuer and the lender in this arrangement and agreed to pay HH Gregg for Campney's purchases with the understanding Campney would repay Synchrony Bank. Campney indeed used the Synchrony-issued credit card and created debt by making purchases from HH Gregg. As such, the credit card debt qualified as a loan made by Synchrony Bank to Campney. To complete the analysis of whether the transaction qualifies as a consumer loan pursuant to Section 37-3-104:

- Synchrony Bank regularly engages in the business of making loans;

[4] The Department's Administrative Interpretations can be found at https://consumer.sc.gov/business-resourceslaws/administrative-interpretations. The naming convention for the Administrative Interpretations can be best understood as chapter, section, year issued, and interpretation number for that year. For example, No. 3.202-8901 pertains to § 37-3-202 and was the first interpretation issued in 1989. All Administrative Interpretations cited in this brief are from Title 37.

- Campney is a person other than an organization;
- There is no dispute the debt was incurred for a personal, family, or household (i.e., consumer) purpose;
- The credit card statements reflect a loan finance charge of 29.99% Annual Percentage Rate (see S.C. Code Ann. § 37-3-109(1)(a); see, e.g., R. p. 326); and
- The total amount owed on the credit card account never exceeded the maximum dollar amount for a consumer loan.

Based on this analysis, Campney's debt incurred using the lender credit card issued by Synchrony Bank indeed is a consumer loan and is governed by the SCCPC.

If any doubt remains about whether the General Assembly expected lender credit cards to be subject to the SCCPC, one merely needs to review Chapter 3, which governs consumer loans:

- S.C. Code Ann. § 37-3-106(3) (2015) ("loan" includes "the creation of debt pursuant to a lender credit card or similar arrangement");
- S.C. Code Ann. § 37-3-109(2) (2015) ("If a lender makes a loan to a debtor by purchasing or satisfying obligations of the debtor pursuant to a lender credit card or similar arrangement, and the purchase or satisfaction is made at less than the face amount of the obligation, the discount is not part of the loan finance charge.");
- S.C. Code Ann. § 37-3-202(1)(c)(i) (2015) (iteration of additional charges that can be made in connection with a consumer loan including "annual charges, payable in advance, for the privilege of using the lender credit card or other credit arrangement");
- S.C. Code Ann. § 37-3-203(1) (2015) ("With respect to a consumer loan including an open-end consumer loan pursuant to a lender credit card or similar arrangement, . . . the parties may contract for a delinquency charge . . . .");

- S.C. Code Ann. § 37-3-305(1) (Supp. 2020) ("A creditor that has issued lender credit cards or similar arrangements (Section 37-1-301(16)) is not required to post a copy of the required rate schedule in any place of business which is authorized to honor such transactions . . . .");
- S.C. Code Ann. § 37-3-306(1)(a) (2015) ("Every creditor engaged in this State in making consumer loans pursuant to a lender credit card or similar arrangement shall" file disclosures with the Department every year);
- S.C. Code Ann. § 37-3-411(3) (2015) ("Except as otherwise provided in this section, a card issuer, including a lender credit card issuer, is subject to all claims and defenses of a cardholder against the seller or lessor arising from the sale or lease of property or services pursuant to the credit card: . . . .").

To hold that the use of lender credit cards does not constitute a consumer credit transaction would effectively make portions of these seven statutes null and void. See TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (citations omitted) ("In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something."). Further, "[i]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." Joiner v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

In addition to clear statutory language, for more than forty-five years, the Department has held the position that the use of lender credit cards constitutes consumer loans. The courts of this State have long recognized a state agency's ability to interpret the laws it enforces and administers

and has granted deference to such opinions and interpretations. Lexington Law Firm v. S.C. Dep't of Consumer Affairs, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009) ("[T]his Court should defer to the Department's findings where there is no compelling reason to reject it.") (citing Faile v. S.C. Emp. Sec. Comm'n, 267 S.C. 536, 540, 230 S.E.2d 219, 221–22 (1976) ("The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons.")).

The Department has issued four administrative interpretations, including the 1989 interpretation quoted above, in which the Department specified that transactions made pursuant to lender credit cards are consumer loans. In a 1976 interpretation, the Department explained there are several types of consumer loans and stated, "A lender credit card arrangement is a type of revolving loan account which in turn is a type of consumer loan." S.C. Dep't of Consumer Affairs Administrative Interpretation No. 3.303-7617, at 1 (Dec. 3, 1976). In a 1981 interpretation, the Department mentions "[a]lthough a lender credit card arrangement is a type of revolving loan account . . . , unlike other revolving loans, lender credit card consumer loans made by a supervised lender are subject to maximum finance charges." S.C. Dep't of Consumer Affairs Administrative Interpretation No. 3.201-8111, at 1 (Sept. 16, 1981). In another 1981 interpretation, the Department responded to a question by a national bank regarding whether the requirement of Section 37-3-408(1) applied to the bank's decision to eliminate its twenty-five-day "free ride" period for its lender credit card accounts. The Department concluded as a threshold matter that because a "lender credit card account is a type of revolving loan account," it "is subject to the requirements in Section 37-3-408(1) for written agreement or advance notice plus continued use of the account prior to making certain changes in terms of the account." S.C. Dep't of Consumer Affairs Administrative Interpretation No. 3.408-8114, at 1 (Nov. 13, 1981).

PRA and the trial court were misguided in relying on Bracken v. Simmons First National Bank, 2014 WL 2613175 (D.S.C. 2014) to conclude lender credit cards were not consumer credit transactions in South Carolina. When state law governs an issue, a court sitting in diversity must predict how that state's highest court would rule on the issue. Pennsylvania Glass Sand v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981). "Whether the district court correctly predicted how the [state's] Supreme Court would rule on this issue is a question of law subject to plenary review." Ragen Corp. v. Kearney & Trecker Corp., 912 F.2d 619, 623 (3d Cir. 1990) (citing Compagnie des Bauxites v. Insurance Co. of N. America, 724 F.2d 369, 371 (3d Cir. 1983)).

In Bracken, a federal magistrate judge held that the use of lender credit cards does not constitute a consumer credit sale and, thus, is not a consumer credit transaction because Section 37-2-104(2)(a) excludes the use of lender credit cards from the definition of a consumer credit sale. In a footnote, the judge stated, "[t]he transaction between the plaintiff and defendant does not meet the definitions of 'consumer loan,' 'consumer lease,' or 'consumer rental-purchase agreement.'" Bracken at *13, n.2. The judge, however, provided no legal analysis or explanation as to why debt incurred when using a lender credit card does not constitute a consumer loan.

During the trial in this case, PRA's attorney testified the lender credit card debt was not governed by the SCCPC based on the Bracken case. In PRA's brief filed here, PRA states, "[t]he remaining three transactions included within the definition of 'consumer credit transaction' are inapplicable here." (Resp. Br. p. 15, n.9). PRA, however, provided no legal analysis or explanation as to why the transactions are not consumer loans. In the trial court's decision in this case, the court mimicked the language from the Bracken decision. (R. pp. 14–15). Also, rather than addressing Campney's argument that lender credit cards fall within the definition of consumer

loans, the trial court did not provide any legal analysis of the applicable statutes and merely referenced that in footnote 2 of the Bracken decision, the judge found the transaction was not a consumer loan. (R. pp. 14–15).

The Department agrees that the statutory definition of a consumer credit sale specifically excludes purchases made pursuant to lender credit cards or similar arrangements. S.C. Code Ann. § 37-2-104(2) (2015). The analysis, however, does not stop there. As explained in detail above, debt incurred pursuant to a lender credit card clearly falls within the definition of a consumer loan. Indeed, purchases made using a seller credit card are credit sales while purchases made using a lender credit card are loans. Kathleen Goodpasture Smith, South Carolina Consumer Protection Code: Text with Comments p. 78 (comment 2) (4th ed. 2001) ("in a transaction involving a lender credit card the sale itself is a cash sale and the credit transaction should be governed by the loan provisions of this Code (Chapter 3) rather than the credit sales provisions" while "credit sales pursuant to a seller credit card, for example, a gasoline credit card, are governed by this Chapter [2]").

Furthermore, it is helpful to understand the difference between a credit sale and a loan in order to appreciate the distinction between a lender credit card and a seller credit card. In a consumer credit sale, the consumer receives a good or service from the seller. The consumer then makes installment payments to the seller or its assignee who financed the provision of the good or service. In a consumer loan, the consumer receives money which can be used to purchase a good or service. The consumer then makes installment payments to the lender or its assignee who provided the funding.

As an example, for years Belk issued its own credit card to customers to make purchases at Belk's stores. Because Belk was the card issuer and also the seller of goods, the Belk card was

a seller credit card. The consumer bought goods from Belk using the Belk credit card and paid the credit card payments to Belk. In the early 2000s, however, Belk stopped issuing its own credit card and contracted with Synchrony Bank to issue the credit card to Belk customers. Similar to the HH Gregg credit card involved in this case, Synchrony Bank is the card issuer and the lender when consumers make purchases using the Belk card. The Belk card issued today is a lender credit card.

Pursuant to the SCCPC, the credit card at issue in this case is a lender credit card and, thus, a consumer loan subject to its provisions. The Department asks this Court to reverse the trial court's finding and hold that debt incurred pursuant to a lender credit card is a credit transaction subject to and governed by the SCCPC.

II. THE NOTICE AND RIGHT TO CURE REQUIREMENTS OF THE SOUTH CAROLINA CONSUMER PROTECTION CODE APPLY TO ALL CREDITORS INCLUDING AN ASSIGNEE OF A CONSUMER CREDIT TRANSACTION.

As stated above, one of the purposes of the South Carolina Consumer Protection Code ("SCCPC") is to protect consumers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors. S.C. Code Ann. § 37-1-102(d) (2015). An important consumer protection provided in the SCCPC pertains to default, notice, and right to cure. The purpose of these provisions is best explained by the drafters of the 1974 Uniform Consumer Credit Code:

> One of the vital terms of every consumer credit agreement is that which sets forth the criteria which will constitute default. By its nature it is not a term that is agreed to by the parties but rather one that is dictated by the creditor. It is appropriate, therefore, that its content and implications be confined by the law so as to prevent abuse. This section is intended to accomplish that.

U.C.C.C. § 5.109 (comment 1) (Nat'l Conf. of Comm'rs on Unif. State L. 1974); see also Kathleen Goodpasture Smith, South Carolina Consumer Protection Code: Text with Comments p. 303 (comment 1) (4th ed. 2001).

The SCCPC establishes the steps that must be taken when a consumer defaults in a consumer credit transaction, which includes a consumer loan. S.C. Code Ann. § 37-1-301(11). In a consumer credit transaction, the only types of default that are enforceable are: (1) the consumer's failure to make a payment as required; or (2) the consumer's prospect of payment, performance, or realization of the collateral is significantly impaired. S.C. Code Ann. § 37-5-109 (2015). In the event of a default consisting only of the consumer's failure to make a required payment, a creditor may not accelerate maturity of the unpaid balance of the obligation or repossess the collateral without having first sent a notice of right to cure.[5] S.C. Code Ann. § 37-5-111(1) (2015). The statutes, therefore, establish the requirements for the content of a notice "to give the consumer enough information to understand his predicament and to encourage him to take appropriate steps to alleviate it." Smith, supra at 306 (comment 1); see S.C. Code Ann. § 37-5-110(2) (2015). The statutes further establish requirements for the timing of the notice and the minimum period during which the consumer can cure the default. S.C. Code Ann. §§ 37-5-110(1) and -111(1) (2015). The timing requirements in Section 37-5-111 are intended to "prevent[] the practice of some unscrupulous creditors who repossess collateral when a payment is only a day or two late." Smith, supra at 306 (comment 2).

The notice and right to cure requirements apply to all consumer credit transactions. Though the timing and content of the notice may vary depending on which type of credit transaction is

[5] In a secured transaction where the loan or credit sale is secured by collateral, the creditor likely will seek to take possession of the collateral. For a lender credit card account, which is usually unsecured, the creditor will seek to accelerate the maturity of the entire unpaid balance of the debt typically by filing a lawsuit.

involved, the requirement to provide notice and opportunity to cure applies, nonetheless. This is true regardless of whether the transaction is secured or unsecured. S.C. Code Ann. § 37-5-111(1) (2015). In this case, Campney's lender credit card account is a revolving loan account as defined in Section 37-3-108. As such, the creditor is required to issue a notice of right to cure before accelerating the debt as long as the creditor has not issued an effective notice of right to cure within the previous twelve months. S.C. Code Ann. § 37-5-111(2) (2015).

PRA argues the requirement to issue a notice of right to cure before suing Campney disappeared when PRA bought the debt from Synchrony Bank. The Department disagrees. The notice and right to cure statutes use the word "creditor" without any qualification or exception. S.C. Code Ann. §§ 37-5-110 and -111 (2015). The SCCPC defines creditor as "the person who grants credit in a credit transaction ***or, except as otherwise provided, an assignee of a creditor's right to payment,*** but the use of the term does not itself impose on an assignee any obligation of his assignor." S.C. Code Ann. § 37-1-301(13) (2015) (emphasis added). The General Assembly did not carve out assignees from the definition of creditor in the notice and right to cure statutes. In fact, as PRA argued, the General Assembly knew how to distinguish a creditor from an assignee and did so in several statutes:

- S.C. Code Ann. § 37-2-305(1) (credit sale assignee not required to file and post maximum rate schedule);
- S.C. Code Ann. § 37-2-408(2) (seller in cross-collateral transaction does not include an assignee not related to original seller);
- S.C. Code Ann. § 37-3-305(1) (loan assignee not required to file and post maximum rate schedule).

When reading the notice and right to cure statutes in conjunction with the definition of creditor, the General Assembly's intent is clear: a creditor, including an assignee, must provide notice of right to cure to the consumer. Statutes must be read as a whole and sections that are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992).

PRA focuses on the latter portion of the definition when it argues "even though the term 'creditor' includes a creditor's assignee unless expressly stated otherwise, the inclusion of assignees within the definition of creditor does not, ***without more***, impose any duty of a creditor on its assignee." (Resp. Br. p. 17) (emphasis in original). PRA argues that even though the General Assembly included assignees in the general definition of creditor and did not carve out assignees in the notice and right to cure statutes as it had done in other statutes, the General Assembly needed to add something more to make it clear the assignee was responsible for ensuring a notice of right to cure was issued before suing on the debt. This argument is unsupported by South Carolina law and would lead to an absurd result. See Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001) (quoting Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999) ("Statutes should not be construed so as to lead to an absurd result."); see also Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) ("If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect."); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (the court should reject a meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature). Moreover, in contractual matters, South Carolina law is clear that the assignee "stands in the shoes of the assignor." Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 639–640, 518 S.E.2d 44, 46 (1999) (quoting Singletary v. Aetna Cas. & Sur. Co.,

316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct. App. 1994)). The Department has consistently interpreted and enforced the SCCPC against creditors and assignees unless statutory provisions direct otherwise. See S.C. Dep't of Consumer Affairs Administrative Interpretation No. 7.108-1003 at 2–3 (Jun. 29, 2010) (assignee of credit counseling contract need not duplicate the efforts of the licensed assignor but merely ensure that the assignor's education program, budget analysis, and contract complied with the statutory requirements); see also S.C. Dep't of Consumer Affairs Administrative Interpretation No. 3.501,502-1501 at 2 (Jul. 27, 2015) (debt buyer who takes assignment of supervised loans is required to have a supervised lender license before attempting to collect the debt or enforce rights against the debtor).

The Department asks this Court to consider what often happens in the automotive finance industry. A consumer purchases a car from a dealership and gets approved for financing while at the dealership. The contract is immediately assigned to the financing company. Under PRA's theory, the financing company would have no obligation to send a notice of right to cure upon a consumer's default because that duty would not transfer upon assignment. This would mean a consumer's car could be repossessed after missing one payment without receiving the statutorily required notice of right to cure. This would effectively make Section 37-5-110 absolutely meaningless and would negate the whole purpose of including the default, notice, and right to cure statutes in the SCCPC. It is unimaginable the General Assembly envisioned a creditor could circumvent the requirement to give a consumer a notice of the right to cure simply by selling the debt to another party. It would be absurd that the car dealer would be required to issue a notice of right to cure but the financing company would not.

In an Administrative Interpretation in 1977, the Department discussed Official Comment 3 to Section 5.110 of the Uniform Consumer Credit Code when explaining the importance of the notice of right to cure provisions:

> Official Comment 3 goes on to explain that the cure provisions are intended to prevent creditors from repossessing collateral when a payment is only a few days late and to give "the average consumer the opportunity to rehabilitate his account, bring a billing error to the attention of or present a breach of warranty claim to the creditor, or negotiate a refinancing or deferral arrangement that may be required by a change in his financial circumstances." By reading [S.C. Code Ann. § 37-5-110] and [S.C. Code Ann. § 37-5-111] together, it is apparent that the drafters intended that the minimum twenty day period prior to which a creditor may not proceed against the collateral is also the minimum period of time during which the consumer may cure the default.

S.C. Dep't of Consumer Affairs Administrative Interpretation No. 5.110-7711, at 3 (Aug. 16, 1977). If this Court held that obligations of an original creditor, such as sending the notice of right to cure, do not transfer to the assignee upon assignment, then the consumer would be deprived of the opportunity to "rehabilitate his account," "bring a billing error to the attention of the creditor," or "negotiate a refinancing or deferral arrangement that may be required by a change in his financial circumstances" prior to being sued or having collateral repossessed.

Moreover, the Department is not aware of any public policy reason that would justify the disparate treatment of a consumer's right to cure a default based solely on whether the creditor is the consumer's original creditor or the subsequent assignee of the original creditor. This would especially be true given the nature of the relationship among the original creditor, the assignee, and the consumer. The consumer enters into a contract with the original creditor for a consumer loan, consumer credit sale, consumer lease, or consumer rental-purchase agreement. The consumer effectively gets to choose the original creditor with whom he will do business. After the consumer enters into the original contract with the original creditor, the original creditor and assignee enter into a separate contract. The consumer then has the obligation to pay the assignee

upon being notified of the assignment. See S.C. Code Ann. §§ 37-2-412; 2-711; and 3-406 (2015). The consumer is not a party to the contractual negotiations between the original creditor and the assignee, nor is the consumer even consulted about whether he would like to do business with the prospective assignee. Instead, he is merely told, after the fact, that an assignment has been made to the assignee. Even if the consumer had been a party to the contract between the original creditor and the assignee, the consumer would have been prohibited from waiving his rights established by the notice and right cure statutes. See S.C. Code Ann. § 37-1-107 (2015). Certainly, the General Assembly did not intend for a consumer to be deprived of his rights to cure a default by virtue of a transaction over which he had no control. This would be contrary to the purpose of the SCCPC to protect consumers against unfair practices by some suppliers of credit. S.C. Code Ann. § 37-1-102(2)(d) (2015). Moreover, this would result in the consumer effectively waiving his rights under the SCCPC where such a waiver is prohibited by the SCCPC. S.C. Code Ann. § 37-1-107 (2015).

Although our state courts have not had the opportunity to construe the novel issue of whether a debt collector is required to send a notice of right to cure before suing the consumer, there is persuasive authority from a fellow Uniform Consumer Credit Code state. See S.C. Code Ann. § 37-1-102(g) (2015) (underlying purpose and policy of Title 37 is "to make uniform the law, including administrative rules, among the various jurisdictions"); § 37-6-104(3) (2015) (requiring the Administrator to keep Department regulations in harmony with those of other Uniform Consumer Credit Code States). In Bahena v. Jefferson Capital Systems, L.L.C., 363 F. Supp. 3d 914 (W.D. Wis. 2019), Bahena defaulted on her Fingerhut consumer credit card account. Fingerhut eventually charged off her credit card account and sold it to Jefferson Capital, which is a debt buyer and debt collector. Bahena argued the debt collector violated the Fair Debt Collection Practices Act, in pertinent part, because she was entitled to a notice of right to cure pursuant to

Wisconsin state law prior to the debt collector filing suit and no notice of right to cure was provided. The court was persuaded by another Wisconsin decision, which provided "[c]onsumers should not lose their consumer rights based on a creditor's choice to sell or assign the debt." 363 F. Supp. 3d at 922 (quoting Johnson v. LVNV Funding, No. 13-c-1191, 2016 U.S. Dist. LEXIS 19651, 2016 WL 676401, at *15 (E.D. Wis. 2016)). The court reasoned:

> Eliminating the notice-of-right-to-cure requirement for debt buyers would allow creditors to skirt the notice-of-right-to-cure requirement entirely simply by selling their charged-off accounts to debt buyers. This would subvert the purpose of the [Wisconsin Consumer Act], which affords consumers a meaningful opportunity to cure default and requires right-to-cure notices except in specified circumstances.

363 F. Supp. 3d at 922. The court held, "A debtor's right to notice under the [Wisconsin Consumer Act] is not contingent on the owner of the debt. If a debt buyer wishes to enforce the debt in court, it must provide notice of right to cure or confirm that the creditor has done so." 363 F. Supp. 3d at 921. The Department agrees with this finding and urges this Court to adopt the same.

CONCLUSION

The South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 et seq. ("SCCPC") is required to be liberally construed to promote its underlying purposes and policies. S.C. Code Ann. § 37-1-102(1) (2015); Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997). Reading the SCCPC as a whole, consumers are entitled to notice and a right to cure a default before a creditor, which includes an assignee, accelerates the maturity of a lender credit card debt.

A consumer debt created pursuant to a lender credit card clearly falls within the definition of a loan and, therefore, the definition of a consumer loan. S.C. Code Ann. §§ 37-3-104 and -106(3) (2015). As such, lender credit card accounts are consumer credit transactions subject

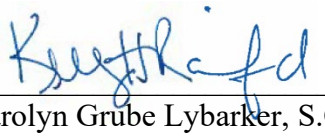
to and governed by the SCCPC. The Department has held the position that the use of lender credit cards constitutes consumer loans for more than forty-five years.

Further, the notice and right to cure requirements are an important consumer protection provided in the SCCPC. The General Assembly clearly provided that the notice and right to cure requirements apply to any creditor and did not carve out assignees in the right to cure statutes as it had done in other statutes. Thus, a debt buyer who intends to enforce the debt in court is required to provide notice of right to cure or confirm that the original creditor already did so.

As such, this Court should reverse the lower court's ruling as to the SCCPC and instead hold:

- Consumer debt incurred pursuant to a lender credit card is a consumer loan and, therefore, a consumer credit transaction subject to and governed by the SCCPC; and
- If an assignee wishes to enforce the consumer debt in court, it must provide notice of right to cure or confirm that the creditor has done so.

Respectfully submitted,



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June 24, 2021
Columbia, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge, Dorchester County
Maite Murphy, Circuit Court Judge, Dorchester County

Appellate Case No. 2020-000935

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

v.

Jennifer Campney, ...Appellant,

and

Jennifer Campney, ...Third-party Plaintiff,

v.

Cooling & Winter, LLC, ... Third-party Defendant,

Of whom Jennifer Campney is the Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies the Amicus Curiae Brief on behalf of the South Carolina Department of Consumer Affairs in this matter complies with Rule 211(b), SCACR.

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June 24, 2021
Columbia, South Carolina