

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2020-000935

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

SC Court of Appeals

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

Case No. 2018-CP-18-00729

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

v.

Jennifer Campney, Defendant

and

Jennifer Campney, Third-party Plaintiff,

v.

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

RESPONDENT PORTFOLIO RECOVERY ASSOCIATES, LLC ASSIGNEE OF
SYNCHRONY BANK/HH GREGG'S RESPONSE TO BRIEF OF AMICUS CURIAE SOUTH
CAROLINA DEPARTMENT OF CONSUMER AFFAIRS

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

Respondent Portfolio Recovery Associates, LLC as Assignee of Synchrony Bank/HH Gregg (“PRA”) incorporates by reference the statement of the case set forth in its Final Brief.

STANDARD OF REVIEW

Whether the South Carolina Consumer Protection Code (“SCCPC”) applies to a particular transaction is a matter of statutory interpretation and is therefore a question of law. “Determining the proper interpretation of a statute is a question of law, and this court reviews questions of law de novo.” *Coastal Fed. Credit Union v. Brown*, 417 S.C. 544, 548, 790 S.E.2d 417, 419 (Ct. App. 2016) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008)). This Court may decide questions of law with “no particular deference to the lower court.” *Osprey, Inc. v. Cabana Ltd. P’ship*, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (citing S.C. Const. art. V, §§ 5 and 9).

ARGUMENTS

I. CONSUMER DEBT INCURRED USING A LENDER CREDIT CARD IS NOT SUBJECT TO THE SOUTH CAROLINA CONSUMER PROTECTION CODE WHEN THE LENDER IS A NATIONAL BANK

The South Carolina Department of Consumer Affairs (“Department”) argues that Appellant’s HH Gregg credit card, issued by Synchrony Bank, was a “consumer credit transaction” subject to the SCCPC, and that accordingly, “a notice of right to cure was required before acceleration of the debt.” (Amicus Br. p. 4). PRA respectfully disagrees where, as here, the creditor is a federally chartered bank. In such instances, the provisions of the SCCPC which are at issue in this matter are preempted by federal law.

Federally chartered banking institutions, including Synchrony Bank,¹ are governed by the National Bank Act, 12 U.S.C. § 1 *et seq.* (“NBA”), and its implementing regulations.² *See, e.g., Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995); *see also Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (holding that federal regulations, including those promulgated by the OCC pursuant to the NBA, “have no less preemptive effect than federal statutes.”). The NBA and its regulations are generally presumed to preempt state law. *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996).

The Supreme Court has “repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation.” *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) (citations omitted). Consistent with that, and to provide further clarity, the OCC regulations describe the circumstances under which a state law is (and is not) preempted by the NBA. *See* 12 C.F.R. 7.4008(d) and (e). Specifically, 12 C.F.R. 7.4008(d) provides the preemption provisions and 12 C.F.R. 7.4008(e) provides the savings clause.

The preemption provisions include the terms of credit, including the right to call a loan due. Specifically, national banks may “make non-real estate loans *without regard to state law limitations* concerning,” among other things “the terms of credit, including . . . term to maturity of the loan, including the circumstances under which a loan may be called due and payable” 12 C.F.R. § 7.4008(d)(4) (emphasis added). The savings provision, on the other hand, includes state laws regarding the right to collect debts. *See* 12 C.F.R. § 7.4008(e)(4).

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

² Congress authorized the Office of the Comptroller of the Currency (“OCC”) to promulgate regulations implementing the National Banking Act. 12 U.S.C. § 93a.

Because the SCCPC’s notice of right to cure provisions³ are an attempt to regulate a term of credit and not a condition precedent to suit, they are preempted as they apply to federally chartered banks, including the original creditor here, Synchrony Bank. The SCCPC provides that a creditor is restricted from “*accelerat[ing] maturity of the unpaid balance of the obligation . . . until twenty days after [providing a notice of right to cure],*” S.C. Code Ann. § 37-5-111(1) (emphasis added). By doing so, the notice of right to cure provisions of the SCCPC attempt to regulate and limit a creditor’s right and ability to accelerate its loan, striking at the very heart of the lending relationship between the creditor and its customer. As such, the right to cure provisions, as they apply to federally chartered banks, are preempted by 12 C.F.R. §74008(d)(4). *See, e.g.*, Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,276–77 (Aug. 5, 2003) (right to cure requirement in Georgia law preempted by 12 C.F.R. § 34.4(a)(4));⁴ *George v. Stonebridge Mortg. Co.*, 988 F. Supp. 2d 142, 147–48 (D. Mass. 2013) (finding Massachusetts law conditioning bank’s ability to accelerate mortgage loan on provision of written notice to cure preempted by 12 C.F.R. § 34.4(a)(4)); *Lako v. Portfolio Recovery Assocs.*, No. 20-cv-355-wmc, Dkt. No. 39, 2021 U.S. Dist. LEXIS 145776 (W.D. Wis. Aug. 4, 2021), *appeal filed*, Nos. 21-2470, 21-8025 (7th Cir. Aug. 11, 2021) (holding that notice of right to cure provisions in Wisconsin Consumer Act are preempted by 12 C.F.R. § 7.4008(d)(4) as to national banks). *But see Boerner v. LVNV Funding LLC*, 358 F. Supp. 3d 767 (E.D. Wis. 2019).

³ PRA refers to sections 5-109, 5-110, and 5-111 of the SCCPC as the notice of right to cure provisions, as they govern default, notice of right to cure upon default, and the opportunity to cure default, respectively.

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

Contrary to the views of Appellant and the Department, there is not a significant area of consumer lending that is unregulated in the State of South Carolina. (Amicus Br. p. 2). On the contrary, federally chartered banks, including their lending activities, are regulated by federal laws which preempt contrary state laws. *See, e.g.*, 12 C.F.R. § 7.4007 (power to take deposits without regard to certain state laws); 12 C.F.R. § 7.4008 (power to make unsecured loans without regard to certain state laws); 12 C.F.R. § 34.4 (power to make real estate loans without regard to certain state laws). Therefore, the “severe restrictions on the Department’s mission to administer and enforce the SCCPC” (Amicus Br. p. 3) arise not from any interpretation of the SCCPC by this Court, but rather from Congress’ view that the OCC should “oversee[] the operations of national banks and their interactions with customers.” *Watters*, 550 U.S. at 6. And while it is true that the SCCPC was enacted to protect consumers, “the relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.” *Fid. Fed. Sav. & Loan Ass’n*, 458 U.S. at 153 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

Accordingly, even if Appellant’s HH Gregg credit card constituted a “consumer loan” and therefore a “consumer credit transaction” under the SCCPC, Synchrony Bank, as a federally chartered bank, was not required to send any notice of right to cure prior to accelerating the debt.⁵ As the assignee of Synchrony Bank, PRA “stands in the shoes of the assignor.” *Twelfth RMA Partners, L.P. v. Nat’l Safe Corp.*, 335 S.C. 635, 639–40, 518 S.E.2d 44, 46 (1999) (quoting

⁵ The trial court specifically found that “no notice of right to cure letter was required to be sent prior to commencement of this action.” (R. p. 15). Although the trial court was not presented with a preemption argument, this Court may nevertheless affirm the trial court’s judgment for any reason appearing in the record on appeal, and that judgment “may be affirmed upon a ground not taken in the Circuit Court.” *Ketchin v. McCarley*, 26 S.C. 1, 7, 11 S.E. 1099, 1100 (1886).

Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct. App. 1994)).

Accordingly, PRA was similarly not required to send a notice of right to cure to Appellant.⁶

II. NOTWITHSTANDING THE PREEMPTIVE EFFECT OF THE NATIONAL BANK ACT, THE NOTICE AND RIGHT TO CURE REQUIREMENTS OF THE SOUTH CAROLINA CONSUMER PROTECTION CODE DO NOT APPLY TO AN ASSIGNEE OF A CREDIT CARD ACCOUNT WHICH HAS BEEN CHARGED OFF BY THE LENDER

A. A LENDER IS NOT REQUIRED TO SEND A NOTICE OF RIGHT TO CURE WHERE THE CONSUMER'S ONGOING FAILURE TO PAY SIGNIFICANTLY IMPAIRS THE LENDER'S PROSPECT OF PAYMENT

Requiring a notice of right to cure after a consumer's credit card account has been charged off is contrary to the text and purpose of the SCCPC. The SCCPC recognizes two types of default: a simple payment default and a more serious default in which the prospect of payment is significantly impaired. The two are significant in their differences. A simple payment default "is susceptible of being cured by the consumer *without impairing a continuing contractual relationship.*" Kathleen Goodpasture Smith, *South Carolina Consumer Protection Code: Text with Comments*, p. 303, cmt. 2 (4th ed. 2001) (emphasis added). A significant impairment default, on the other hand, "relates to behavior of the consumer which *endangers the prospect of a continuing relationship.*" *Id.* (emphasis added). Because of this difference and the unlikelihood of salvaging the contractual relationship in the latter instance, no right to cure is required when there is a significant impairment of the prospect of payment. *See* Kathleen Goodpasture Smith, *South Carolina Consumer Protection Code: Text with Comments*, p. 309, cmt. 1 (4th ed. 2001) (recognizing that no notice of right to cure under S.C. Code Ann. § 37-5-111(1) is required prior

⁶ Even if the SCCPC is not preempted by federal law, the trial court's finding that it did not apply to PRA is harmless error, because as explained below, PRA was not required to send a notice of right to cure to Appellant in any event, and thus her counterclaims, predicated on a notice of right to cure, necessarily fail. *See Gen. Motors Acceptance Corp. v. Herlong*, 248 S.C. 55, 63, 149 S.E.2d 51, 55 (1966).

to acceleration where the default arises under S.C. Code Ann. § 37-5-109(2)); S.C. Dep't of Consumer Affairs Administrative Interpretation No. 5.109-7913, at 3 (July 9, 1979) (same).

Federally regulated banks, like Synchrony Bank, are required to charge off credit card accounts when they become 180 days past due. Unif. Retail Credit Classification & Acct. Mgmt. Policy, 65 Fed. Reg. 36,903, 36,904 (June 12, 2000). *See also Anderson v. Credit One Bank (In re Anderson)*, 884 F.3d 382, 386 n.2 (2d Cir. 2018). Charge off reflects a federally-mandated determination that an account “is considered uncollectible, and of such little value that its continuance on the books is not warranted.” Unif. Retail Credit Classification & Acct. Mgmt. Policy, 65 Fed. Reg. 36,903, 36,904 n.1 (June 12, 2000). The account is thereafter treated as “an essentially worthless asset.” *Id.*

Charge off is a critical component of a federally chartered bank's legal requirement to implement and observe safety and soundness requirements.⁷ These requirements⁸ are deemed necessary to maintain the stability of the banking system by ensuring the entity does not engage in risky practices which may mask the performance or quality of its portfolio. As such, upon charge off, the financial institution's prospect of payment becomes significantly impaired.

Here, Synchrony Bank sent Appellant no less than six (6) monthly periodic statements informing her of her past due balance and the amount necessary to restore her account to good

⁷ *See* 12 U.S.C. § 1831p-1 (requiring each federal banking agency to prescribe, enforce, and oversee the implementation of standards designed to ensure the safety and soundness of the banks governed by each such agency); 12 C.F.R. § 30.1 *et seq.* (setting forth OCC safety and soundness requirements applicable to national banks and federal savings associations).

⁸ “Safety and soundness concerns arise when prolonged negative amortization, inappropriate fees, and other practices inordinately compound or protract consumer debt or mask portfolio performance and quality.” FDIC Credit Card Activities Manual, Chapter IX (Portfolio Management), https://www.fdic.gov/regulations/examinations/credit_card/ch9.html.

standing. (R. pp. 324–357).⁹ When Appellant failed to cure her default and the account became 180 days past due, Synchrony Bank charged off the account and closed it, as it was required to do. (R. p. 155, lines 2–4). At that point, the prospect of a continuing relationship between the consumer and creditor became significantly impaired.

Treating the charge off of a credit card account as a significant impairment of the creditor’s prospect of payment also makes sense from a policy perspective. The purpose of the notice of right to cure is to give consumers a reasonable opportunity to address the default:

This provision prevents the practice of some unscrupulous creditors who repossess collateral when a payment is only a day or two late. It also gives 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.

Unif. Consumer Credit Code § 5.110 cmt. 3 (Nat’l Conference of Comm’rs on Unif. State Laws 1974). *See also* S.C. Code §37-5-111(1) (which notes that “[c]ure restores the consumer to his rights under the agreement as though the defaults had not occurred”). This opportunity is no longer present once an open-ended credit card account is charged off. At that point, there is no prospect of a continuing relationship with the consumer. Instead, the account is closed, treated as a loss, and the consumer loses his or her right to reinstate.¹⁰ Because of the charge off, a notice of right

⁹ Moreover, even if Synchrony Bank was required to provide Appellant a notice of right to cure, it did so through the six (6) periodic monthly statements it sent, each of which contained all of the requisite elements of information mandated by S.C. Code Ann. § 37-5-111(1). (R. pp. 324–372). These statements each provided Appellant sufficient information “to understand h[er] predicament and to encourage h[er] to take appropriate steps to alleviate it.” Kathleen Goodpasture Smith, *South Carolina Consumer Protection Code: Text with Comments*, p. 306, cmt. 1 (4th ed. 2001).

¹⁰ The Iowa legislature has recognized that once a lender closes a consumer credit card account, the debtor loses any right to reinstate the account through a cure of default and has amended its version of the Uniform Consumer Credit Code to reflect this reality. *See* Iowa Code § 537.5110(4)(c) (“However, where the obligation in default is a credit card account that has been closed, the act of curing a default **does not restore to the consumer the consumer’s rights under the agreement as though no default had occurred.**”) (emphasis added).

to cure serves no purpose, because the consumer is no longer entitled to be restored to his or her “rights under the agreement as though the defaults had not occurred.” S.C. Code Ann. § 37-5-111(1).

B. THE SOUTH CAROLINA CONSUMER PROTECTION CODE DOES NOT IMPOSE UPON AN ASSIGNEE THE OBLIGATIONS OF ITS ASSIGNOR WHICH AROSE PRIOR TO ASSIGNMENT

The SCCPC does not require an assignee to provide a notice of right to cure on a debt which was previously charged off by the creditor. While the SCCPC defines a “creditor,” to include “an assignee of a creditor’s right to payment,” the statute clarifies that “*use of the term does not in itself impose on an assignee any obligation of his assignor.*” S.C. Code Ann. § 37-1-301(13) (emphasis added).

The Department argues that the right to cure provisions of the SCCPC, without qualification, apply equally to assignees and creditors. (Amicus Br. p. 15). Doing so, however, renders the clarifying language emphasized above as surplusage and it is well established that “[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *State v. Smith (In re Decker)*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted).

Additionally, the Department’s reliance on the Wisconsin version of the Uniform Consumer Credit Code is misplaced because Wisconsin’s version of the Uniform Consumer Credit Code is materially different from the SCCPC in two key respects. First, in Wisconsin, the notice of right to cure statute¹¹ applies to all “merchants,” which is defined to include “a seller, lessor, manufacturer, creditor, arranger of credit and *any assignee of or successor to such person.*” Wis. Stat. § 421.301(25) (emphasis added). Unlike South Carolina, Wisconsin does not limit or qualify

¹¹ See Wis. Stat. §§ 425.104(1), 425.105(1).

the extent to which an assignee is bound to perform the obligations of its assignor—both are simply included in the definition of a “merchant.” *Compare* Wis. Stat. § 425.301(25) *with* S.C. Code Ann. § 37-1-301(13). Thus, there is no statutory basis in Wisconsin for concluding that the notice of right to cure obligation does not extend to an assignee. Second, Wisconsin’s notice of right to cure statute requires notice to be given as a condition precedent to filing suit, not just as a precondition to accelerating the debt or repossessing collateral. *Compare* Wis. Stat. § 425.105(1) *with* S.C. Code Ann. § 37-5-111(1). Accordingly, even an assignee must send a notice of right to cure in Wisconsin if it wishes to sue on the debt.

Unlike Wisconsin, South Carolina’s version of the Uniform Consumer Credit Code contains qualifying language which must be given its plain meaning. That language—*use of the term does not in itself impose on an assignee any obligation of his assignor*—suggests that, without more, an assignee cannot be subjected to the obligations of its assignor. The most logical reading of the statute is to impute obligations of the creditor on its assignee only where expressly provided for in the statute. Where, as here, any obligation to provide notice occurred prior to charge-off and prior to the assignment, absent an express provision imputing that obligation to PRA, none existed. For the reasons previously stated in PRA’s Final Brief and in Section IIA of this Brief in Response to the Amicus Curiae, PRA was not required to send a notice of right to cure.

CONCLUSION

For the reasons set forth herein, this Court should affirm the judgment of the trial court granting judgment in favor of PRA on the claim set forth in the Complaint and dismissing Appellant’s Counterclaims.

Respectfully submitted,

August 25, 2021

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

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

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Jennifer Campney, Defendant

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Jennifer Campney, Third-party Plaintiff,

v.

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

CERTIFICATE OF SERVICE

I certify that I have on this day served a copy of the foregoing **RESPONDENT PORTFOLIO RECOVERY ASSOCIATES, LLC ASSIGNEE OF SYNCHRONY BANK/HH GREGG'S RESPONSE TO BRIEF OF AMICUS CURIAE SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS** upon all parties to this action by email at the following addresses:

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