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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2021-001375

South Carolina Department of Consumer Affairs, Respondent,

v.

Cash Central of South Carolina, LLC, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

COUNTER-QUESTIONS PRESENTED[1]

I. DID THE COURT OF APPEALS CORRECTLY APPLY THE DE NOVO STANDARD OF REVIEW WHEN REVIEWING THE QUESTIONS OF LAW IN THIS APPEAL?

II. DID THE COURT OF APPEALS CORRECTLY RULE AS A MATTER OF LAW THAT THE DEFENSE OF SUBSTANTIAL COMPLIANCE DOES NOT APPLY TO A FAILURE TO FILE A MAXIMUM RATE SCHEDULE?

III. DID THE COURT OF APPEALS CORRECTLY CONSIDER THE PURPOSES OF THE SOUTH CAROLINA CONSUMER PROTECTION CODE AND THE PURPOSES OF THE FILING AND POSTING REQUIREMENTS?

IV. DID THE COURT OF APPEALS CORRECTLY RULE AS A MATTER OF LAW THAT THE DEFENSE PROVIDED IN SECTION 37-5-202(7) DOES NOT EXCUSE CASH CENTRAL FROM REFUNDING EXCESS CHARGES?

V. DID THE COURT OF APPEALS CORRECTLY RULE AS A MATTER OF LAW THAT THE DEFENSE PROVIDED IN SECTION 37-3-201(6) DOES NOT EXCUSE CASH CENTRAL FROM REFUNDING EXCESS CHARGES?

COUNTER-STATEMENT OF THE CASE AND FACTS[2]

Cash Central of South Carolina, LLC ("Cash Central") is a consumer lender that makes triple-digit interest loans to South Carolinians via its website. (R. pp. 654–661). Cash Central does not have any employees, but instead utilizes those of its parent company Direct Financial Solutions, LLC ("DFS") and grandparent company Community Choice Financial, Inc. ("CCFI"). (R. p. 381, l. 16–25; pp. 285, l. 21–286, l. 1; pp. 494–495). CCFI was established in 2011, purchased DFS as its subsidiary in 2012, and launched Cash Central in 2013. (R. pp. 356, l. 16–357, l. 6; p. 285, l. 21–25; p. 287, l. 23–288, l. 3). Cash Central is one of approximately 100

[1] The Department has set forth the Counter-Questions Presented to mirror the five arguments contained in Cash Central's Petition for Writ of Certiorari. These arguments are incorporated in the three Questions Presented as set forth by Cash Central.

[2] To be concise, the Department has limited the Counter-Statement of the Case and Facts to those pertinent for this Court's consideration of the Petition for Writ of Certiorari. The Department, however, incorporates by reference its Statement of the Case and Facts as set forth in the Final Brief of Appellant at pages 1–8.

subsidiaries and South Carolina was one of at least twelve states DFS entered in a three-year timeframe using a self-described "sprint schedule." (R. pp. 352, l. 24–353, l. 1; p. 357, l. 1–3; pp. 277, l. 23–278, l. 3; p. 327, l. 9).

In February 2013, CCFI began preparations to offer high-interest consumer loans in South Carolina through its Cash Central subsidiary. (R. p. 287, l. 23–55). To prepare for operating in South Carolina, Rebecca Fox, Assistant General Counsel for CCFI, created a six-page statute summary of legal requirements. (R. p. 288, l. 8–13; pp. 552–557). As Ms. Fox's supervisor testified at trial, however, the statute summary was not thorough, not complete, and not detailed. (R. pp. 350, l. 25–351, l. 6.; p. 377, l. 1–3). Though the summary acknowledged the requirements to file and post a maximum rate schedule in order to contract for finance charge in excess of 18% Annual Percentage Rate ("APR") on consumer loans, it failed to reflect that the schedule must be filed with the South Carolina Department of Consumer Affairs ("the Department") rather than the State Board of Financial Institutions Consumer Finance Division ("BOFI"). Regardless, Cash Central failed to file the maximum rate schedule with either agency before it began operations in October 2013. In fact, Cash Central failed to file the maximum rate schedule for approximately eighteen months despite repeated instances that should have reminded compliance personnel of the requirements to file and post a maximum rate schedule in order to legally charge in excess of 18% APR on consumer loans. To wit:

- The October 2013 welcome letter from BOFI (R. p. 211, l. 13–17);
- Ms. Fox's realization during the first twelve days of operations that the website did not contain the statutorily-required 127-word disclosure or the maximum rate schedule even though it was specifically stated in her summary of South Carolina laws (R. pp. 310, l. 16–311, l. 2; p. 315, l. 5–24); and

- The April 2014 notice from BOFI (R. pp. 543–546; p. 380, l. 12–25).

On or about April 3, 2015, after a standard examination, BOFI required Cash Central to correct several deficiencies, including the failure to file a maximum rate schedule with the Department, and demanded, *inter alia*, that Cash Central recast all loans to 18% APR. (R. pp. 498–502; p. 212, l. 6–10; pp. 213, l. 2–214, l. 14; pp. 221, l. 9–222, l. 4). On April 10, 2015, Cash Central finally filed a maximum rate schedule with the Department. (R. pp. 508–514).

Between October 24, 2013, and April 10, 2015, thousands of South Carolina consumers borrowed money from Cash Central with finance charges between 146% APR and 246.6% APR. (R. p. 241, l. 9–17; 233, l. 14–18). To illustrate the impact on South Carolina consumers, for a twelve-month loan of $1,000.00 at a rate of 239.99% APR, a consumer would pay Cash Central $1,702.89 in interest rather than $100.16 at the legal rate of 18% APR. (R. pp. 654–661).

Despite multiple demands by BOFI and the Department, Cash Central refused to recast these consumer loans to 18% APR. On May 6, 2016, the Department filed its Complaint with the Court of Common Pleas for the Fifth Judicial Circuit. (R. pp. 35–47). The Department requested, in pertinent part, that the court order Cash Central to: (1) recast the finance charges of contracts entered into with South Carolina consumers from October 24, 2013, through April 10, 2015, to no more than 18% APR; and (2) refund any excess charges paid by South Carolina consumers for those loans. Cash Central filed its Answer and subsequent Amended Answers in which it pled the defenses of bona fide error pursuant to Section 37-5-202(7), bona fide error pursuant to Section 37-3-201(6), substantial compliance, setoff, right to recoupment and repayment, and statute of limitations. (R. pp. 157–159).

A trial was held on September 6 and 7, 2017, as to liability only. (R. pp. 197–491). On September 28, 2017, the circuit court issued its Final Order and Judgment in favor of Cash Central

as to the defenses of substantial compliance, Section 37-5-202(7) bona fide error, and Section 37-3-201(6) bona fide error, but ordered Cash Central to pay a civil penalty of $15,000.00 to the Department. (R. p. 5–29). On October 12, 2017, the Department filed a Motion to Alter or Amend the final judgment. (R. pp. 168–188). On November 28, 2017, the circuit court issued its Final Order denying the Department's Motion to Alter or Amend. (R. pp. 30–34). The Department timely served and filed its Notice of Appeal to the Court of Appeals on December 29, 2017.

On September 1, 2021, the Court of Appeals issued its Opinion reversing the circuit court decision. The Court correctly held that unless and until a supervised lender complies with all of the maximum rate schedule requirements, the lender is not authorized to contract for or receive finance charges in excess of 18% APR. The Court also held the statutory framework that allows supervised lenders to charge "such high rates" requires strict compliance, not substantial compliance. (Op. p. 9). Further, even if substantial compliance were permitted, Cash Central would be required to show it substantially complied with ***both*** the filing and posting requirements, which it could not do based on the undisputed facts in the case. The Court also held the Section 37-3-201(6) defense did not permit Cash Central to retain finance charges in excess of 18% APR rendering the defense useless under the circumstances. Finally, the Court held the specific defense in Section 37-3-201(6) prevails over the general defense found in Section 37-5-202(7). Even so, the Court held the Section 37-5-202(7) defense would never allow a lender to keep excess charges.

Cash Central filed a Petition for Rehearing, which the Court denied on October 26, 2021. Cash Central then filed this Petition for Writ of Certiorari on November 24, 2021.

ARGUMENTS

The purposes of the South Carolina Consumer Protection Code ("SCCPC") include: (1) to provide rate ceilings to assure an adequate supply of credit to consumers; (2) to further consumer understanding of the terms of credit transactions; (3) to foster competition among suppliers of consumer credit so consumers may obtain credit at a reasonable cost; and (4) to permit and encourage the development of fair and economically sound credit practices. S.C. Code Ann. § 37-1-102(2)(b)–(c), (e) (2002). To this end, the SCCPC delineates the fees and charges a creditor may impose in a consumer credit transaction and provides requirements and restrictions for persons engaging in those transactions with South Carolina consumers. S.C. Code Ann. § 37-1-100 *et seq*.

Absent a supervised lender license, Cash Central would have been limited to charging 12% APR on consumer loans. When Cash Central became licensed as a supervised lender, however, South Carolina law permitted Cash Central to contract for and receive a loan finance charge as follows:

1. On loans exceeding six hundred dollars ($600.00), any rate filed and posted pursuant to S.C. Code Ann. Section 37-3-305; or

2. On loans of any amount, up to 18% APR per year.

S.C. Code Ann. § 37-3-201(2)(b)–(c) (2002).[3] To legally charge more than 18% APR, Cash Central was required to file a maximum rate schedule with the Department on or before the date it began making supervised loans to South Carolina consumers and, thereafter, on or before January thirty-first of each year. S.C. Code Ann. § 37-3-305(1) (2002); S.C. Code Ann. Regs. 28-70 (2013). Cash Central admittedly ***did not file*** a maximum rate schedule with the Department prior

[3] Because Cash Central did not offer loans at amounts less than $750.00, the limitations of Section 37-3-201(a) did not apply.

to making its first loan or for the following eighteen months. (R. pp. 50–51; p. 203, l. 18–21; p. 205, l. 12–17; p. 206, l. 3–4; pp. 318, l. 24–319, l. 2; p. 330, l. 13–14; pp. 339, l. 24–341, l. 23; pp. 350, l. 17–352, l. 20; pp. 355, l. 25–356, l. 6; pp. 368, l. 22–369, l. 12).

Because Cash Central failed to file a maximum rate schedule prior to April 10, 2015, Cash Central ***could not legally*** offer and make loans to South Carolina consumers with finance charges exceeding 18% APR. Thus, any finance charges in excess of 18% APR collected from consumers on loans made during between October 24, 2013, and April 10, 2015, are excess charges paid by the consumers and must be refunded as a matter of law. See e.g., S.C. Code Ann. §§ 37-2-416(3); 37-3-408(3); 37-3-409; 37-3-509; 37-4-104(2); 37-5-202(2); 37-5-202(6).

Based on the statutory language and case law, the Court of Appeals correctly held as a matter of law that the maximum rate schedule statutory provisions require strict compliance before a lender can contract for and collect finance charges in excess of 18% APR. The Court also correctly applied the de novo standard when reviewing the questions of law in this appeal. Finally, the Court correctly held that the three defenses argued by Cash Central either were unavailable as a matter of law or did not provide the relief Cash Central was requesting.

I. The Court of Appeals correctly applied the de novo standard of review.

This case is about the interplay of Sections 37-3-201(2) and 37-3-305 and whether Cash Central can avail itself of certain statutory defenses found in Sections 37-3-201(6) and 37-5-202(7) or the defense of "substantial compliance" as outlined in Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 85–86, 484 S.E.2d 471, 472 (1997). As the Court of Appeals stated, "Statutory interpretation is a question of law subject to de novo review." (Op. p. 4–5) (quoting Barton v. S.C. Dep't of Prob. Parole & Pardon Servs., 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013)). Although

Cash Central would have this Court believe otherwise, the only real issues in this appeal are questions of law subject to a de novo standard of review. On each of these issues, the Court properly reversed the circuit court's decision based on that court's erroneous legal analysis.

The SCCPC specifically caps the loan finance charge a supervised lender may impose to the greater of ***either*** any rate ***filed and posted*** pursuant to Section 37-3-305 ***or*** eighteen percent per year on the unpaid balances of the principal. S.C. Code Ann. § 37-3-201(2)(b)–(c) (2002). At the core of Section 37-3-305 is the obligation to ***file and post*** a maximum rate schedule that meets the requirements of that section. S.C. Code Ann. § 37-3-305(1) (1982) (emphasis added) (sets forth the requirements to "***file*** with the Department of Consumer Affairs and, except as otherwise provided in this section, ***post*** . . . a certified maximum rate schedule"); § 37-3-305(2) (1982) (emphasis added) (refers to "The rate schedule required to be ***filed and posted*** by subsection (1)"); § 37-3-305(3) (1982) (emphasis added) ("The rate schedule that is ***filed*** by the creditor shall be ***reproduced*** in at least fourteen-point type for ***posting***"); § 37-3-305(4) (1982) (emphasis added) ("A rate schedule ***filed and posted*** as required by this section shall be effective until changed in accordance with this subsection.").

The threshold issue is whether Cash Central met the statutory requirements of Sections 37-3-201 and 37-3-305 before it started contracting for and collecting finance charges exceeding 18% APR. The circuit court found, "Cash Central does not dispute that it failed to file the required form with the Department between October 24, 2013, when it first began making loans in South Carolina, and April 10, 2015, when the Department first issued a Maximum Rate Schedule for Cash Central." (R. p. 7). This Court can and should rely on this single, undisputed fact to decide the threshold issue in this appeal. Cash Central ***failed to file*** a maximum rate schedule with the Department and, therefore, did not meet the statutory requirements before it started collecting

finance charges in excess of 18% APR. The Court of Appeals accurately concluded, as a matter of law, the plain language of Sections 37-3-201(2) and 37-3-305 dictates that unless and until a supervised lender complies with the requirements to file and post a maximum rate schedule, the lender is not authorized to contract for or receive finance charges in excess of 18% APR. (Op. p. 8). The Court considered the filing requirement, which was ignored in the circuit court's decision, and properly reversed the circuit court on this question of law. As such, this Court should deny Cash Central's Petition for Writ of Certiorari.

II. The Court of Appeals correctly ruled that the defense of substantial compliance does not apply in these circumstances.

The Court properly distinguished the Davis v. NationsCredit[4] case when ruling as a matter of law that the defense of substantial compliance does not apply to the statutory requirements of Sections 37-3-201 and 37-3-305. Cash Central argues liability should be excused "for non-compliance with technical elements of a statute that are not central to accomplishing the primary legislative intent." (Pet. p. 12–13). Cash Central further states, "South Carolina courts have never limited the scope of the substantial compliance doctrine to hold that it does not apply to a failure to meet a regulatory filing or posting requirement." (Pet. p. 13). This Court, however, ***has*** held the substantial compliance defense does not apply to a bright-line statutory timing requirement. King v. American General Finance, Inc., 386 S.C. 82, 90, 687 S.E.2d 321, 325 (2009) ("[t]he timing feature of section 37-10-102 imposes a bright-line approach which is manifestly at odds with the notion of substantial compliance" and "[t]o permit a construction of section 37-10-102 as sanctioning the lender's furnishing the borrower with the attorney preference disclosure after the application was completed would undermine the legislative purpose to protect borrowers").

[4] Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 484 S.E.2d 471 (1997).

The Davis case held that substantial compliance was an available defense when the form of the notice was challenged; the King case held that substantial compliance was ***not*** an available defense when the bright-line timing requirement for the same notice was challenged. The Court of Appeals Opinion is on point with both Davis and King. As the Court held in its Opinion, a supervised lender is required to file and post a maximum rate schedule ***first***. Specifically, the Court stated that "[u]nless and until it complies with this requirement, such lender is not authorized to contract for or receive finance charges in excess of 18% APR." (Op. p. 8). Similar to this Court's language in King, to sanction Cash Central's charging finance charges in excess of 18% APR without first filing a maximum rate schedule would undermine the legislative purpose of the filing requirement.

The Court of Appeals properly ruled as a matter of law that the defense of substantial compliance is not available in Cash Central's circumstances. This is the threshold issue that needed to be decided before ever considering Cash Central's facts and arguments about how it believed it had substantially complied. [5]

Furthermore, the Court properly held as a matter of law that the circuit court erred by determining Cash Central substantially complied with Sections 37-3-201 and 37-3-305. Specifically, the Court held, "Because the statute requires both filing and posting, Cash Central's compliance with only one of these requirements would have been insufficient to establish the defense." (Op. p. 9). The circuit court never found that Cash Central substantially complied with

[5] Cash Central's argument about what it did or did not post on its website is irrelevant to the undisputed fact that Cash Central did not comply with the filing requirement. It is notable, however, the highest APR Cash Central charged was 246.6493% for a $750.00 loan. (R. pp. 233, l. 14–234, l. 11). Cash Central's CEO Todd Jensen testified that the chart on the website was void of any rate information related to loans in the amount of $750.00 and confirmed that the maximum rate Cash Central actually charged was nowhere to be found on any of the webpages viewable by South Carolina consumers. (R. pp. 447, l. 16–450, l. 1). The same was also admitted by Cash Central's Assistant General Counsel at trial and recognized by the judge. (R. p. 337, l. 11–20).

the filing requirement but rather acknowledged repeatedly that it did not file. The circuit court instead focused its analysis on the posting requirement and determined Cash Central "did in fact comply or substantially comply with the relevant posting requirements." (R. p. 9). Neither the Court of Appeals nor this Court needs to overturn either of these circuit court factual findings to hold as a matter of law that Cash Central did not substantially comply with Sections 37-3-201 and 37-3-305, which require both filing and posting. The Court of Appeals correctly held as a matter of law that Cash Central did not substantially comply with Sections 37-3-201 and 37-3-305. Thus, this Court should deny Cash Central's Petition for Writ of Certiorari.

III. The Court of Appeals correctly considered the purposes of the SCCPC and the purposes of the filing and posting requirements.

In addition to acknowledging the plain language of the statutes, the Court's Opinion fully considered all relevant purposes of the SCCPC including the purposes of the filing and posting requirements. As the Court eloquently stated, "The purpose of filing a maximum rate schedule serves not only to inform consumers, it triggers the Department's oversight of the lender, which is critical to assuring the SCCPC's objectives of protecting consumers, providing rate ceilings, and fostering competition among suppliers of consumer credit." (Op. p. 9). In the absence of Cash Central filing a maximum rate schedule with the Department, it was impossible for this important regulatory purpose to be accomplished.

Once again, Cash Central fails to address or even acknowledge there is any purpose served by the filing requirement. (Pet. p. 15). Cash Central instead repeats its arguments already made to the circuit court and the Court of Appeals regarding the superiority of what it posted on its website and why that is better for everyone in the State of South Carolina—businesses and consumers alike—than what the General Assembly established in statute. Further, Cash Central

continues to minimize the role the Department has in overseeing the availability and the affordability of consumer credit in this state. (Pet. p. 13, n. 7). The Court fully acknowledged the Department's role and the purposes of both the filing and posting requirements and correctly ruled on this question of law.

Furthermore, throughout this case, Cash Central has focused on a portion of one purpose of the SCCPC "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." S.C. Code Ann. § 37-1-102(2)(d) (2002). Cash Central has asked the courts to recognize it as a legitimate and scrupulous creditor. Scrupulous is defined as "careful, thorough, and extremely attentive to details." Oxford English Dictionary, *available at* https://en.oxforddictionaries.com/definition/scrupulous (last visited December 1, 2021). Cash Central's failure to comply with South Carolina law on numerous occasions evidences it is not a scrupulous creditor whose interests should be considered above those of South Carolina consumers. In addition to the failure to file a maximum rate schedule with the Department during the first eighteen months it offered consumer loans in excess of 18% APR, Cash Central:

1. Failed to take its website offline for at least twelve days after its attorney, Rebecca Fox, realized it was not in compliance with South Carolina law (R. pp. 310, l. 4–316, l. 9; pp. 337, l. 7–339, l. 23);
2. Failed to renew its supervised lender license for the website until after it received a notice in March 2014 setting a revocation hearing (R. pp. 496–497; pp. 210, l. 2–211, l. 8;);

3. Failed to make the correction of posting the maximum rate filing on its website even after receiving two different notices from BOFI (October 2013 and April 2014) (R. p. 211, l. 13–17; p. 380, l. 12–25; p. 546); and
4. Failed to include the existence of two different state agencies with differing requirements in its statute summary—the very "procedures" Cash Central relied upon to comply with South Carolina law and now uses to justify its failure to comply. (R. pp. 552–557).

These are not examples of a lender who acts carefully, thoroughly, and extremely attentive to details. These are undisputed instances that occurred when Cash Central rushed to start doing business in South Carolina along with at least eleven other states during a three-year timeframe. (R. pp. 277, l. 23–278, l. 3; pp. 352, l. 24–353, l. 1; p. 357, l. 1–3; p. 327, l. 9). Furthermore, despite Cash Central's focus on the portion "having due regard for the interests of legitimate and scrupulous creditors," the main focus of this purpose is first "to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit." S.C. Code Ann. § 37-1-102(2)(d) (2002). Requiring creditors to comply with the SCCPC is a core consumer protection function.

There were more than 1,400 other supervised lender licensees operating in South Carolina during the relevant time period in this case (R. p. 215, l. 8–10; p. 216, l. 5–18). The supervised lenders who comply with the maximum rate law are disadvantaged by those who do not, which is one reason why the General Assembly imposes stiff penalties for noncompliance. The situation at hand is exactly what the General Assembly intended to deter by requiring a rollback for failing to comply with the maximum rate law prior to offering loans at rates exceeding 18% APR. Thus, this Court should deny Cash Central's Petition for Writ of Certiorari.

IV. The Court of Appeals correctly decided as a matter of law that the defense provided in Section 37-5-202(7) does not excuse Cash Central from refunding excess charges.

The Court correctly held that the specific defense provided in Section 37-3-201(6) prevails over the general defense of Section 37-5-202. "It 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). However, where two statutes are in conflict, the more recent and specific statute should prevail over the earlier, more general statute. Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). Furthermore, "[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010).

In 1989, in response to the Bell Finance case,[6] the General Assembly clearly intended to establish the only defense available to businesses that failed to comply with Sections 37-3-201(2) and 37-3-305. The General Assembly could have added to or modified language in Section 37-5-202(7) to make clear any intent for that defense to apply to a failure to file a maximum rate schedule. It didn't. Instead, the General Assembly created the defense of Section 37-3-201(6), establishing very specific circumstances under which a lender would be permitted to retain what would otherwise be deemed excess charges. As the Court of Appeals stated, "if the defense

[6] Bell Finance Co. v. S.C. Dep't of Consumer Affairs, 297 S.C. 111, 374 S.E.2d 918 (Ct. App. 1988), cert. denied, 298 S.C. 307, 380 S.E.2d 172 (1989). This is fully briefed in the Final Brief of Appellant at pages 25–28 and the Final Reply Brief of Appellant at page 8.

contained in 37-5-202 were available for the failure to file a maximum rate, section 37-3-201(6) would be superfluous." (Op. p. 12).

Moreover, the Department's longstanding Administrative Interpretation regarding the Bell Finance situation rejected the argument that the defense of Section 37-5-202(7) would allow a lender to retain excess charges when the lender failed to file a maximum rate schedule with the Department. *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 3.305-8601 (R. p. 724–726). The Department's interpretation specifically provided:

> Having failed to comply with Section 37-3-305, a lender charging in excess of 18% APR on a consumer loan makes an excess charge. . . . The suggestion that Section 37-5-202(7) excuses the assessment of excess charges implies that a creditor might retain illegal late charges, illegal attorney fees, illegal default charges, or finance charges in excess of those properly filed and posted, so long as the creditor can allege they were assessed by mistake. The General Assembly clearly intended no such result. See H. Haynsworth, The South Carolina Consumer Protection Code, § 5.202, Comment 3 (1982).

S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.305-8601 (R. p. 725). Furthermore, the Department stated:

> Even assuming arguendo that the bona fide error defense could apply, it does not help a lender that fails to file through inadvertence or misapprehension of the Code's requirements. . . . Even if such a lender were able to prove the error was unintentional and bona fide, the lender would still have to show the maintenance of procedures reasonably adapted to avoid the error. The maintenance of such procedures would almost certainly result in the proper filing under Section 37-3-305.

Id. (R. p. 726).

In the thirty-five years since the Department issued this Administrative Interpretation, it has never been overturned or overruled by the General Assembly and still stands in full force and effect after being challenged in court. See Bell Finance Co. v. S.C. Dep't of Consumer Affairs, 297 S.C. 111, 374 S.E.2d 918 (Ct. App. 1988), cert. denied, 298 S.C. 307, 380 S.E.2d 172 (1989). As such, the Department's interpretation should not have been overruled by the circuit court in

this case. 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. Employment 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 circuit court ruled that if it accepted the Department's argument based on the Bell Finance interpretation, "there would never be any instance in which the statutorily created defense would apply, and it would thus be rendered meaningless." (R. p. 21). This is a misinterpretation of the Section 37-5-202(7) defense. The Court of Appeals recognized the flaw in Cash Central's argument when holding the right to a refund of an excess charge is a distinct remedy under Section 37-5-202(2) and "[t]he provisions of subsections 37-5-202(2) and 37-5-202(7) are mutually exclusive." (Op. p. 14).

As stated previously, creditors are prohibited from keeping excess charges (i.e., charges the creditor was not legally permitted to collect). See e.g., S.C. Code Ann. §§ 37-2-416(3); 37-3-408(3); 37-3-409; 37-3-509; 37-4-104(2); 37-5-202(2); 37-5-202(6). Section 37-5-202(2) and (3) sets forth the rights of the consumer with respect to excess charges assessed by a creditor. Subsection (2) specifically states, "A consumer is not obligated to pay a charge in excess of that allowed by this title and has a right of refund of any excess charge paid." S.C. Code Ann. § 37-5-202(2) (2002). In addition to the right to recover excess charges, subsection (3) establishes the consumer's right to also recover a penalty of $100 to $1,000 from the creditor or person liable for making the excess charge or refusing to refund the excess charge. S.C. Code Ann. § 37-5-202(3) (2002). However, subsection (6) provides a creditor is not liable for a penalty under subsection (3) if the creditor notifies the consumer first and corrects the violation within 60 days after

notifying the consumer. S.C. Code Ann. § 37-5-202(6) (2002). Subsection (6) further provides, "If the violation consists of an excess charge, correction ***shall be made*** by an adjustment or refund." Id. (emphasis added). Thus, the statutory framework of Section 37-5-202 provides a creditor that proactively refunds excess charges collected from a consumer can be exempt from paying any additional penalty. However, Cash Central argues that even though it has refused to refund excess charges for more than six years after BOFI's first demand, it should be exempt not only from a penalty but also from ever refunding the excess charges based on Section 37-5-202(7). This could not have been what the General Assembly intended. For all of these reasons, this Court should deny Cash Central's Petition for Writ of Certiorari.

V. The Court of Appeals correctly decided as a matter of law that the defense provided in Section 37-3-201(6) does not excuse Cash Central from refunding excess charges.

Section 37-3-201(6), which is the only defense available to a lender for failing to file and/or post a maximum rate schedule, requires a lender to:

> ***demonstrate with competent evidence*** that ***(a)*** any failure to post rates properly filed under Section 37-3-305 or failure to properly file these rates under Section 37-3-305 was a result of a bona fide error or excusable neglect, ***(b)*** the rates were properly posted or properly filed when the error or neglect was discovered or brought to the lender's attention, ***and (c)*** that no other failure to post or file rates has been brought to the lender's attention by the Department of Consumer Affairs or by consumers within the previous forty-eight month period, then the maximum rate of loan finance charges assessable by the lender is the rate previously properly filed with the Department of Consumer Affairs, provided, however, the lender that has failed or neglected to post rates or to file rates is subject to a civil penalty of up to $5,000.00 payable to the Department of Consumer Affairs.

S.C. Code Ann. § 37-3-201(6) (2015) (emphasis added). A lender must prove it meets all three elements of the defense to avail itself of the remedy provided in this section. If the lender fails to do so, the lender must recast loans to 18% APR, regardless of whether it failed to file or failed to

post. See S.C. Code Ann. § 37-3-201(2)(b)–(c) (2002) and § 37-3-305(8) (2015). On the other hand, if a lender proves the three elements, the lender: (1) would be able to rollback its contracted rates to the rate ***previously properly filed*** with the Department; and (2) would be subject to a civil penalty up to $5,000.00. The remedy includes both parts: rolling back contracted rates ***and*** paying a penalty. The statute does not allow a lender to pick one or the other; the lender must do both.

The Court held the plain language of the statutes require a supervised lender to file and post its maximum rate schedule before contracting for a finance charge exceeding 18% APR. The Court also held that the exception in Section 37-3-201(6) did not permit Cash Central to retain finance charges in excess of 18% APR because Cash Central did not have a "previously properly filed" rate. (Op. p. 11). Cash Central argues the Court's Opinion ignores the legislative intent to excuse a failure to file the maximum rate schedule with the Department. (Pet. p. 20). The plain language of the statute, however, reveals this was not the legislative intent behind Section 37-3-201(6). See Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (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); Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (purpose of the SCCPC is to protect consumers). The General Assembly clearly intended to excuse a failure to file or post a maximum rate schedule only under very specific, prescribed circumstances as set forth in Section 37-3-201(6). Most importantly, the lender must have previously properly filed maximum rates with the Department in order to benefit from the Section 37-3-201(6) defense. Why would the General Assembly have intended to provide a defense to a business who began operating in South Carolina without first complying with South Carolina law?

Moreover, the General Assembly could have created a broader defense than Section 37-3-201(6). It didn't. Instead, the General Assembly clearly demonstrated an intent to minimize refunds under very specific circumstances when a business that has shown an ability to comply with applicable South Carolina law subsequently slips up and makes a mistake. It is disingenuous to argue that despite the plain language of the statute, the General Assembly intended to treat a compliant business who made a mistake the same as a business that never complied with the identical law in the first place. To reject the plain language of the statute and allow Cash Central to retain finance charges it did not legally collect would be an absurd result. Statutes should not be construed so as to lead to an absurd result. Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001); see 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).

Finally, Cash Central argues that because it had no "previously properly filed" rate, logic dictates it would be required to recast loans to 0% APR, which would be an absurd result. (Pet. p. 21). The Department agrees this is absurd. As explained numerous times throughout this case and as explained in the Court's Opinion (p. 11), any supervised lender is permitted to charge up to 18% APR on consumer loans solely by virtue of holding a supervised lender license. To suggest that a supervised lender would ever be required to recast loans to anything other than 18% APR is illogical and contrary to the plain language of the statutes.[7] For all of these reasons, this Court should deny Cash Central's Petition for Writ of Certiorari.

[7] For examples of how the Section 37-3-201(6) defense works in practice, see Final Brief of Appellant at pages 20–21 regarding a failure to file while maintaining the same maximum rate, Final Reply Brief of

CONCLUSION

Every holding in the Court's Opinion issued on September 1, 2021, is supported by cogent reasoning and sound interpretation of South Carolina law. The Court properly held:

1. The plain language of Sections 37-3-201(2) and 37-3-305 requires a supervised lender to file and post its maximum rate prior to contracting for and receiving finance charges in excess of 18% APR.
2. The defense of substantial compliance is not available to a lender who must strictly comply with the statutory prerequisites of filing and posting a maximum rate schedule prior to contracting for and receiving finance charges in excess of 18% APR. Moreover, where Cash Central was required to file and post a maximum rate schedule and undisputedly failed to do one of these requirements entirely, Cash Central as a matter of law could not and did not prove substantial compliance.
3. The specific defense provided in Section 37-3-201(6) prevails over the general defense of Section 37-5-202(7) regarding a failure to file a maximum rate schedule.
4. The defense provided in Section 37-3-201(6) does not permit a lender to retain charges in excess of 18% APR when the lender did not have a previously properly filed rate.

Further, Cash Central fails to present any special and important reason justifying discretionary review of the Court of Appeals' Opinion by this Court. The company's arguments presented also fail to meet the parameters of Rule 242(d)(4), SCACR.

Appellant at pages 11 regarding a failure to file when increasing the maximum rate and 11–12 regarding a failure to post.

For all the reasons stated herein, Cash Central's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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