

1984 S.C. Op. Atty. Gen. 250 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-108, 1984 WL 159915

Office of the Attorney General

State of South Carolina

Opinion No. 84-108

August 29, 1984

***1 SUBJECT: Banks and Banking, Interest, Loans, Mortgages and Foreclosures, Statutes**

A consumer finance company may charge a borrower a service charge of not more than ten dollars for a dishonored check or draft given to the company in payment of an existing debt.

TO: John E. Thomas
Assistant Director
Consumer Finance Division
State Board of Financial Institutions

QUESTION:

Whether a restricted lender licensed under the provisions of Section 34-29-10, et seq., may charge a borrower the ten dollar fee authorized by Section 34-11-70, as amended by Act No. 422 of 1984.

OPINION:

Act No. 422 of 1984 permits the payee of any draft, check or other written order to charge the drawer a service charge of not more than Ten (\$10.00) Dollars if the instrument is dishonored when presented for payment in whole or part of any existing debt. You have inquired as to whether restricted lenders may make this charge, since it is not listed as a permitted charge under Section 34-29-140 of the Consumer Finance Law.

Section 34-29-140 sets forth the maximum charges permitted in the form of a finance charge, initial charge, delinquent charge, and deferment charge, all of which may be received in connection with a loan transaction under Section 34-29-10, et seq., of the Code. Subsection (e) of that statute provides, inter alia, that:

In addition to the charges and fees provided for by this Chapter, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, or received . . .

A violation of the above provision results in the loan being void, the licensee has no right to collect principal, interest or any charges whatsoever, and members, officers, directors and agents being subject to misdemeanor charges.

Act 422, which took effect on May 31, 1984, provides that the charge can be imposed if the dishonored draft, check or other written order is presented for payment in whole or in part of any then existing debt including, 'but not limited to,' consumer credit transactions. Therefore, it appears that Act 422 would apply to loan transactions as well as credit transactions. Furthermore, Act 422 provides that the Ten (\$10.00) Dollar service charge is made 'solely to compensate the payee of the instrument for incurred expenses in processing the dishonored instrument.' Thus, the Legislature indicates that the charge should not be considered as having been made in connection with the loan transaction. Moreover, the charge for returned checks would not be a charge anticipated at the time of the consummation of the loan agreement and, therefore, would not be a condition of the extension of credit.

While it might, in some instances, be possible for the lender to recover the cost of collecting the returned check by a delinquency charge (Section 34-29-140(e)), this would not be possible if the parties have not agreed in writing to the imposition of a delinquency charge, or if the returned check is paid before it has been delinquent for five days or more.

*2 In summary, it is the opinion of this office that the charge permitted by Section 34-11-70, as amended by Act No. 422 of 1984, is not governed by the provision of Section 34-29-10, et seq. This cost is incurred by a consumer not as a result of the extension of credit and, therefore, is not a finance charge under [Section 34-29-140 of the Code](#).

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