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The State of South Carolina

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August 21, 1989

The Honorable Robert B. Brown
Member, House of Representatives
Drawer 660
Marion, South Carolina 29571

Dear Representative Brown:

By your letter dated July 5, 1989, you state:

> I would like an Attorney General's opinion on the following question with reference to sections 38-51-410, 38-51-420 and 38-51-440:
>
> > Should a designated carrier insurance company honor a request for policy cancellation from a designated agent when all or part of the premium payment to the agent was made with a check returned from the bank to the agent "stop payment" or "insufficient funds", the agent having already remitted the premium payment to the company?

Apparently, you intended to reference S.C. Code Ann. §§38-43-410, 38-43-420, and 38-43-440 (1976) because 1987 S.C. Acts 155, §1 recodified former §§38-51-410, 38-51-420, and 38-51-440 as §§38-43-410, 38-43-420, and 38-43-440, respectively.

Of course, statutory construction is, ultimately, the province of the courts. Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942).

In interpreting a statute, the primary purpose is to ascertain the intent of the legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987); Multi-Cinema, Ltd. v. South Carolina Tax Comm'n, 292 S.C. 411, 357 S.E.2d 6 (1987). When

interpreting a statute, the legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in the light of the intended purpose of the statutes. Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983).

Where a statute is clear and unambiguous, there is no room for construction and the terms of the statute must be given their literal meaning. Duke Power Co. v. South Carolina Tax Comm'n, 292 S.C. 64, 354 S.E.2d 902 (1987). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. South Carolina Tax Comm'n, supra. In determining the meaning of a statute, it is the duty of the court to give force and effect to all parts of the statute. State ex rel. McLeod v. Nessler, 273 S.C. 371, 256 S.E.2d 419 (1979). In construing a statute, words must be given their plain and ordinary meaning, without resort to subtle or forced construction for the purpose of limiting or expanding its operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). The legislature is presumed to have fully understood the import of words used in a statute and intended to use them in their ordinary and common meaning, unless that meaning is vague and indefinite, or in their well-defined legal sense, if any. Powers v. Fidelity & Deposit Co. of Maryland, 180 S.C. 501, 186 S.E. 523 (1936).

Section 38-43-410 provides:

> When, pursuant to the written or oral request of an insured or applicant for insurance, an insurance agent or agency advances all or any part of the premium for an insurance policy to the insurer in behalf of the insured or applicant for insurance, the agent or agency is entitled to recover from the insured or applicant for insurance, in addition to the amount advanced, a service charge equal to the greater of one-half percent or one dollar and fifty cents a month for any unpaid balance. The agent or agency has a lien equal to the amount of the unpaid balance and service charges upon any unearned premium on the policy held by the insurer and subject to refund by the insurer under the policy.

Section 38-43-420 provides:

> Advances made by an agent, agency, or producer of record in behalf of an insured or applicant for insurance and any lien arising

> therefrom under this article must be confined to premiums for policies desired by the insured or applicant for insurance and no charges other than those set forth in this article may be made by any agent, agency, or producer of record in connection with, or related to, the advance of premiums. The agent, agency, or producer may not require, as a condition to the advancing of the premiums, that the insured purchase any other policy, commodity, product, or service.

And, §38-43-440 provides:

> In the event that the insured or applicant for insurance fails to pay one or more installments within five days after the due date under any memorandum of the transaction delivered to him by the agent, agency, or producer, the agent, agency, or producer may call upon the insurer to cancel the policy and refund any unearned premiums on a pro rata basis to the agent, agency, or producer in discharge of the lien provided under §38-43-410. The insurer, upon paying any refund of unearned premiums accompanied by a statement detailing the computation, a copy of which is mailed to the insured at the address shown in the policy, has no further liability to the insured with respect to the return of unearned premiums.
>
> In the event of any other refund of unearned premium resulting from termination of the policy, reduction in the premium, or otherwise, the refund of premium must be made to the agent, agency, or producer in recognition of his, or its, lien, and payment of a refund to the agent, agency, or producer by the insurer accompanied by a statement detailing the computation, a copy of which is mailed by the insurer to the insured at the address shown in the policy, except as to errors in the computation, discharges the insurer's obligation to the insured with respect to the refund.
>
> Failure of an agent, agency, or producer to declare a default or move to perfect his or

> its lien because of the insured's failure to pay when due one or more installations of his obligation for premium advanced does not constitute a waiver on the part of the agent, agency, producer, or insurer nor is the agent, agency, or producer estopped or precluded from asserting and perfecting the lien with respect to any subsequent default nor is the insurer estopped or precluded from recognizing and discharging the lien with respect to the subsequent default.

The threshold issue involved in your inquiry is whether an insured's or applicant for insurance's check returned from the bank to the agent "stop payment" or "insufficient funds" is the same as the insured's or applicant for insurance's failure to pay one or more installments within five days after the due date under any memorandum of the transaction delivered to him by the agent, agency, or producer pursuant to §38-43-440. "Fail" has been defined:

> Fault, negligence, or refusal. Fall short; be unsuccessful or deficient. . . .
>
> Fail also means: involuntarily to fall short of success or the attainment of one's purpose; to become insolvent and unable to meet one's obligations as they mature; to become or be found deficient or wanting; to keep or cease from an appointed, proper, expected, or required action, Romero v. Department of Public Works, 17 Cal.2d 189, 109 P.2d 662, 665; to lapse, as a legacy which has never vested or taken effect; to leave unperformed; to omit; to neglect; to be wanting in action. . . .

Black's Law Dictionary 534 (5th ed. 1979). "Pay" has been defined: "To discharge a debt by tender of payment due; to deliver to a creditor the value of a debt, either in money or in goods, for his acceptance. U.C.C. §§2-511, 3-604. To compensate for goods, services or labor. . . . " Black's Law Dictionary 1016 (5th ed. 1979).

> A negotiable instrument [,such as a check,[1]] is dishonored by nonpayment when it is duly presented for payment and payment is refused or cannot be obtained, or when presentment is excused and the instrument is overdue and unpaid. Thus a demand note is dishonored when it is not paid upon presentment, whether nonpayment results from an actual refusal or, in the absence of such refusal, from the fact that payment cannot be obtained. [Footnotes omitted.]

11 Am. Jur.2d Bills and Notes §739. Accord 10 C.J.S. Bills and Notes §367. S.C. Code Ann. §36-3-507 (1976) governs dishonor of commercial paper under the Uniform Commercial Code and provides:

> (1) An instrument is dishonored when
>
> (a) a necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is reasonably returned by the midnight deadline (§36-4-30); or
>
> (b) presentment is excused and the instrument is not duly accepted or paid.
>
> (2) Subject to any necessary notice of dishonor and protest, the holder has upon dishonor an immediate right of recourse against the drawers and indorsers.

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[1] S.C. Code Ann. §36-3-104 (1976) of the Uniform Commercial Code concerning commercial paper defines "negotiable instrument" to include "a 'check' if it is a draft drawn on a bank and payable on demand." S.C. Code Ann. §36-3-104(2)(b) (1976). Accord 11 Am. Jur. 2d Bills and Notes §16 ("Under the uniform laws (as before) a check is a bill of exchange or draft drawn on a bank and payable on demand, and is a negotiable instrument when it conforms with the statutory requisites, even though it is possible for the drawer to stop payment thereon. . . . [Footnotes omitted.]"); 10 C.J.S. Bills and Notes §23 ("Negotiable instruments regulated wholly by the law merchant, except where they are controlled by statutory provisions, include such instruments as. . . checks . . . [Footnotes omitted.]").

> (3) Return of an instrument for lack of proper indorsement is not dishonor.
>
> (4) A term in a draft or an indorsement thereof allowing a stated time for re-presentment in the event of any dishonor of the draft by nonacceptance if a time draft or by nonpayment if a sight draft gives the holder as against any secondary party bound by the term an option to waive the dishonor without affecting the liability of the secondary party and he may present again up to the end of the stated time.

Thus, an insured's or applicant for insurance's dishonored check (or a check returned from the bank to the agent "stop payment" or "insufficient funds") certainly appears equivalent to an insured's or applicant for insurance's failure to pay as contemplated by the language of §38-43-440. Cf. 1989 S.C. Acts 148, §20 (Amending S.C. Code Ann. §56-10-280 (1976)(Insurance Requirements Relating to Motor Vehicle Registration), to provide that certain contracts or policies may be cancelled within the first sixty days under, inter alia, the following circumstances: "a check or bank draft tendered by the insured for payment of premium is returned unpaid for insufficient funds or other reason by the insured's financial institution. . . . ").

Section 38-43-440 also contains other requirements for its provisions to be effective. For example, the insured or applicant for insurance must fail to pay "one or more installments within five days after the due date under any memorandum of the transaction delivered to him by the agent, agency, or producer. . . . " Whether or not five days have elapsed or whether the necessary memorandum was delivered would require a factual analysis. Of course, this Office does not have the authority of a court or other fact-finding body and is not able, in a legal opinion, to adjudicate or investigate factual questions. S.C. Att'y Gen. Op., Jun. 15, 1989.

For the above reasons, an insured's or applicant for insurance's check returned from the bank to the agent "stop payment" or "insufficient funds" appears to be the same as a insured's or applicant for insurance's failure to pay as contemplated by the provisions of §38-43-440. Whether such a dishonored check meets all of the requirements of §38-43-440 to warrant an insurance company to honor a request for cancellation of the related policy would require a factual analysis beyond the scope of this Office.

If I can answer any further questions, please let me know.

Sincerely,

Charles W. Gambrell, Jr.

Charles W. Gambrell, Jr.
Deputy Attorney General

CWGjr./fg

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