1972 S.C. Op. Atty. Gen. 53 (S.C.A.G.), 1972 S.C. Op. Atty. Gen. No. 3260, 1972 WL 20407

Office of the Attorney General

State of South Carolina
Opinion No. 3260
February 2, 1972

***1 SUBJECT: Legality of service charges on revolving sales contracts.**
Bona fide revolving sales credit charges, like other sales credit charges constitute time price differential and not interest and are not subject to the usury statute.

TO: Senator John C. Lindsay

QUESTION:

Is the monthly service charge on a revolving sales account subject to the interest limitation of the Usury law?

The law is well settled in this and most other states that in order for a charge to constitute usury:
There must be a loan of money or a forbearance of an existing indebtedness; unless it appears that the transaction in question was in substance a loan or the forbearance of a debt, there is nothing upon which to predicate a charge of usury. 55 Am. Jur., Usury § 16 at p. 336.

Adhering to this rule, our Supreme Court said in its most recent decision on the subject:
It is manifest that any person owning property may sell it at such price and on such terms as to time and mode of payment as he may see fit, and such sale, if bona fide, cannot be usurious. Brown v. Crandall, 218 S.C. 124, 127; 61 S.E. 2d 761 (1950).

Decisions from other jurisdictions, while helpful, must be considered in the light of the fact that (1) the language of the various usury statutes vary, (2) the many cases interpreting the usury and other statutes over several centuries have developed diverse principles which might require different conclusions in different states and (3) the form of any given contract might dictate a different result in the same or different states.

It is everywhere conceded that where the 'time price' doctrine prevails, a charge for the privilege of deferring payment of the purchase price of goods or services is not a charge for the use of money and is not interest. By the terms of our Usury Statute it is applicable only to 'interest'. Interest is defined as the compensation allowed by law or fixed by the parties for the use or forbearance of money. Shealy v. U.S., D.C. S.C., 37 F. 2d 918. 919 (1930).

It would appear then that a service charge on a revolving charge account, where the sales are bona fide, can be 'interest' only if such charge is for 'forbearance of a debt'.

Forbearance is an 'act by which a creditor waits for payment of a debt due him by a debtor after it becomes due (Emphasis added). Blacks Law Dictionary, Forbearance at p. 773. See also Words and Phrases Vol. 17, Forbearance and Forbearance of Money at p. 338–41.

The question then resolves itself to whether a service charge on a revolving sales contract is a charge for the privilege of deferring payment of the purchase price or whether it is a charge for foregoing a present right to collect a debt which is due and payable.

Since contracts vary in terms it would be impossible to give an all inclusive answer to this question. We can only apply the foregoing principles to a typical contract. It seems the most proper approach would be to apply them to the J. C. Penny Co. contract which was held to be usurious in Wisconsin [1] and the Sears, Roebuck and Company contract which was held not to be usurious in Tennessee. [2]

***2** Both of these contracts permitted a debtor to charge purchases from the creditor to the account of the debtor. The debtor had the option to either pay the entire balance within a stated time after he was billed or to defer payments and incur a credit service charge of one and one half per cent per month computed on the outstanding balance.

The Wisconsin court apparently assumed that the balance was 'due and payable' within one month after each billing date. The Court specifically noted that the contract before it did not so state but concluded that an <u>option</u> to either pay in thirty days or defer payments and a <u>requirement</u> that the balance be paid in thirty days is 'in substance' the same. See headnote (2) of the J. C. Penny Co. decision, cited above.

It was argued in that case that 'to constitute forbearance, an agreement must extend the maturity date of a debt existing at the time the extension is entered into . . .' In this connection it was contended that there is no debt <u>payable</u> at the time a purchase is made under the charge plan; that the debtor elects at a later date to either pay the balance in cash or create a debt payable in installments pursuant to the credit plan. The Court held that the argument was without merit because 'the purchase of goods creates an obligation to pay for them' and such obligation is created at the time the decision is made to charge the purchase.

It appears to us that the concept of forbearance has somewhat strained by the Wisconsin Court. It is true that charging merchandise to an account creates at that time an obligation to pay for them. It does not follow, however, that such a debt is 'then due and payable' within the meaning of the legal definition of 'forbearance'. That term implies that by the terms of some agreement the debtor has a present right to collect an amount of money.

It would seem that the Court's concept of forbearance would equally apply to a conditional sales contract, for in that case a debt is created at the time such a contract is executed in the same sense that a debt is created upon charging a purchase on a revolving charge account. In neither case is the balance immediately 'due and payable'. In either case an amount is due and payable only on a date when the terms of the agreement say such amount must be paid.

It also appears to us that there is a real and significant difference between a contract which creates a legal right of the debtor to collect an entire balance after thirty days and a contract which creates a right to collect only an installment after thirty days.

The Penny contract provided in essence that as a service to its customers, they may 'charge' purchases to an account and may treat such purchases as cash purchases by paying all balances within thirty days after they received a statement. It did not create a right in the debtor to collect such balance after thirty days. Therefore, such balance was not 'then due and payable'. The exercise of the customers 30 day option to defer payments or 'pay cash' did not constitute a new agreement. The customer acquired no new right and the seller gave up no right.

***3** Stripped of the legalese, the transaction was a bone fide sale of goods. The buyer was given the privilege of deferring payment. For that privilege he agreed to pay an additional amount of money for the goods in the form of a monthly credit service charge. Such service charge would not begin to apply until a debt was outstanding for more than thirty days after a statement was received. The buyer could therefore pay the balance during the grace period without incurring the credit service charge.

If the purchaser had bought the same items on a conditional sales contract which stated that the service charge would be 18% per annum (as required by Federal law), but that no service charge would be made for the first thirty days of the contract and the debtor may pay the entire balance within such thirty days, would this make the credit charge 'interest'? We think Brown v. Crandall says not and we can see no substantive difference between the two contracts.

The Sears contract in Tennessee presented a stronger case for a finding of forbearance than did the Penny contract in Wisconsin. The Sears contract was held not usurious. The Sears contract contained a promise by the purchaser to pay 'the full amount of all merchandise purchased within thirty days from the date of each billing statement'. If this promise gave to Sears a legal right to collect such balance within thirty days, then the election was with the creditor and not with the debtor. The creditor could elect to sue then and there upon failure to pay such balance or it could then and there forbear such right and permit the buyer to pay installments. This language standing alone would create a 'forbearance' as we perceive that term. However, the contract contained a second promise which read 'If I do not pay the full amount for all merchandise purchased within 30 days from the date of each billing statement . . . I will pay the time sale price for each item purchased . . ..' The 'time sale price' was the 'cash sale price' and '1 ½% of the balance at the beginning of each month . . ..'

The Court did not discuss this aspect of the contract but apparently found by implication that the alternative promises created an option on the part of the buyer or, stated another way, the first promise did not create a right of the creditor to collect the balance within thirty days. If Sears had no legal right to collect such balance after thirty days, than it could not forbear such right. Therefore, as the Court held, there was no forbearance.

'The statute of Anne applied only to a loan or forbearance of money, and in the construction of this statute it was held that where property was sold, even though the contract provided in terms for payment of a fixed price payable in the future with interest at a greater rate than that allowed by statute, the transaction was, nevertheless, not usurious since everything that the buyer promised must be deemed consideration for the sale of property, not interest on a loan or forbearance of money.' (Emphasis added). Williston on Contracts (Rev. ed.) Vol. 6, Section 1685; cited in Dennis v. Sears, Roebuck and Company, 223 Tenn. 415 , 446 S.W. 2d 260 (1969).

***4** From the debtor's point of view, the argument is appealing that there should be no distinction between sales and loans for purposes of limiting charges for credit. The law is well settled, however, that there is a distinction which is based upon the very real economic fact that you cannot limit the credit charge in sales credit without also limiting the retail price of merchandise. If you prohibited sales credit service charges outright, it is obvious that credit sellers would simply raise the sales price to a level to include the cost of operating a credit department. The result would be that the costs of credit would be spread among cash and credit buyers alike and cash buyers would, where practical, make purchases in adjoining states where cash prices are lower.

These are the factors which have always been the basis of the distinction and it appears to us that they are applicable to conditional sales contracts and revolving sales contracts alike.

Based upon the foregoing, it is the opinion of this Office that our Supreme Court would follow the reasoning of the Tennessee Court and hold that bona fide revolving sales credit charges, like ordinary sales credit charges constitute 'time price differential' and not interest.

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Footnotes

1 State v. J. C. Penny Co. —— WISC. ——, 179 N.W. 2d 641 (1970).

2 Dennie v. Sears, Roebuck & Co. 223 TENN. 415 446 S.W. 2d 260 (1969).

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