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ATTORNEY GENERAL OPINION NO. 87-11

TO: Belton J. Patty
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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Whether it is lawful for late charges to be imposed upon (a) open-end credit accounts, or (b) interest-bearing consumer credit transactions, under the Idaho Credit Code?
2. If such charges may be imposed, must they be disclosed as "finance charges" as that term is defined in the Idaho Credit Code?

CONCLUSIONS:

1. Late charges may be lawfully imposed on open-end credit accounts as part of the finance charge. Late charges can only be imposed on interest-bearing consumer credit transactions if the transaction is a precomputed loan or a loan secured by an interest in real property.
2. Because of inconsistencies in definitions, if the creditor is subject to the Federal Consumer Protection Act, late charges must be disclosed as "other charges" but not as part of the "finance charge."

ANALYSIS:

Question 1:

Late charges on Open-end Credit

Idaho Code § 28-42-201(1) sets forth the general principle that:

With respect to a loan or credit sale, the rate of finance charge shall be that which is agreed upon between the parties to the transaction.

The definition of "finance charge" is found in § 28-41-301(18):

(18) "Finance charge":

(a) Except as provided in paragraph (b) of this subsection, "finance charge" means the sum of any of the following types of charges payable directly or indirectly by the debtor and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, as applicable:

1. Interest or any amount payable under a point, discount, or other system of charges, however denominated;
2. Time-priced differential, credit service, service, carrying, or other charge, however denominated;
3. Premium or other charge for any guarantee or insurance protecting the creditor against the debtor's default or other credit loss; and
4. Charges incurred for investigating the collateral or credit-worthiness of the debtor or for commissions or brokerage for obtaining the credit, irrespective of the person to whom the charges are paid or payable, unless the creditor had no notice of the charges when the credit was granted.

(b) The term does not include:

1. Charges as a result of default or delinquency if made for actual unanticipated late payment, delinquency, default, or other like occurrence, unless the parties agree that these charges are finance charges; a charge is not made for actual unanticipated late payment, delinquency, default or other like occurrence if imposed on an account that

is or may be debited from time to time for purchases or other debts and, under its terms, payment in full or of a specified amount is required when billed, and in the ordinary course of business the debtor is permitted to continue to have purchases or other debts debited to the account after imposition of the charge; . . . (Emphasis added.)

To paraphrase: (1) Virtually any charge paid by a debtor in connection with a credit transaction is part of the finance charge unless it is specifically excluded by the definition and (2) delinquency charges are not "finance charges" unless the parties agree that they are, or if the charge is imposed on the type of account described in the latter part of paragraph (b). The account described is an "open-end" account, which is defined in § 28-41-301(25):

(25) "Open-end credit" means an arrangement pursuant to which:

(a) A creditor may permit a debtor, from time to time, to purchase on credit from the creditor or pursuant to a credit card, or to obtain loans from the creditor or pursuant to a credit card;

(b) The amounts financed and the finance and other appropriate charges are debited to an account;

(c) The finance charge, if made, is computed on the account periodically; and

(d) Either the debtor has the privilege of paying in full or in installments or the creditor periodically imposes charges computed on the account for delaying payment and permits the debtor to continue to purchase on credit. (Emphasis added.)

This language closely tracks the specific language in the latter part of § 28-41-301(18)(b), describing the type of account in which delinquency charges may be included as finance charges. Both the definitions of "finance charge" and "open-end credit" refer to debiting an account from time to time for purchases, loans, or other debts; both refer to the debtor's option to pay the entire amount, installments, or specified amounts; and both contemplate that the debtor will continue to use the credit even after late charges have been imposed.

Therefore, this office concludes that late charges on open-end credit transactions are authorized by statute. They are included

in the "finance charge" and, as such, late charges can be imposed pursuant to Idaho Code § 28-42-201.

Late Charges on Simple Interest Consumer Loans

Idaho Code § 28-45-301 prohibits the parties to a consumer credit transaction from agreeing to the imposition of late charges in most instances:

Except for reasonable expenses incurred in realizing on a security interest, the agreement with respect to a regulated consumer credit transaction may not provide for any charges as a result of default by the debtor except those authorized by this act. A provision in violation of this section is unenforceable. (Emphasis added.)

The term "default" is not found in the "Definitions" section of the Idaho Credit Code, § 28-41-301. However, a default occurs whenever a debtor "fails to make a payment as required by agreement." Idaho Code § 28-45-107. The term "late charge" indicates that the debtor has failed to make a payment as required by agreement, i.e., not on time, but "late." Thus, a late charge is a charge resulting from default and is prohibited except where "authorized" by the Credit Code.

Specific authorization of late charges is found in Idaho Code § 28-42-301(1) and (2). These subsections allow such charges for precomputed loans and loans secured by a security interest in real property used or expected to be used as a residence by the debtor. As mentioned above, late charges may also be imposed on open-end credit transactions because § 28-41-301(18) provides that such charges are "not made for . . . default." Instead, such charges are "finance charges" and thus do not fall under the prohibition of § 28-45-301. A maxim of statutory construction, "expressio unius est exclusio alterius," states that where certain things are enumerated, things not enumerated are excluded. 2A Sutherland, Statutory Construction, § 47.33. The legislature's enumeration of three specific exceptions to the prohibition of late charges implies a legislative intent to exclude all other exceptions.

It has been argued that authorization to impose late charges can be found in Idaho Code § 28-42-201(1):

With respect to a loan or credit sale, the rate of finance charge shall be that which is agreed upon between the parties to the transaction. In addition to the finance charge permitted herein, a creditor may contract for and receive

any other charge unless expressly prohibited or limited by this act. (Emphasis added.)

In our opinion, this section does not authorize late charges. A section generally allowing the debtor and creditor to agree to "any other charge," § 28-42-201, cannot prevail over a section specifically prohibiting those parties from agreeing on late charges. § 28-45-301. This follows from the general rule of statutory construction that "where there is a general statute, and a specific or special statute, dealing with the same subject, the provisions of the special or specific statute will control those of the general statute." State v. Roderick, 85 Idaho 80, 84, 375 P.2d 1005 (1962); see also Guillard v. Department of Employment, 100 Idaho 647, 603 P.2d 981 (1979).

Section 28-45-301 only allows late charges where "authorized by this act." If late charges are authorized every time the creditor and debtor agree to such "other charges," then the statute's general prohibition of late charges in the context of regulated consumer credit transactions becomes meaningless. To interpret the section in that manner would destroy it altogether, and it is an elementary rule of statutory construction that "a statute should be construed to give effect to all its provisions, so that no part thereof will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another." Norton v. Dept. of Employment, 94 Idaho 924, 928, 500 P.2d 825 (1972). Thus, the section should be read as authorizing late charges only in the three situations specifically authorized by statute. This interpretation preserves all sections intact.

It might also be argued that late charges are authorized by Idaho Code § 28-41-301(18). That section provides that the term "finance charge" does not include:

Charges as a result of default or delinquency if made for actual unanticipated late payment, delinquency, default, or other like occurrence, unless the parties agree that these charges are finance charges (Emphasis added.)

For the same reasons stated above, this section cannot be read to authorize late charges merely by agreeing to label them as "finance charges." As stated by the leading treatise on the interpretation of legislation, "[s]tatutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible." 2A Sutherland, Statutory Construction, § 51.02. To harmonize the sections, § 28-41-301(18) should be read as authorizing the parties to label late charges as finance charges only in those instances where late charges are already specifically authorized. Thus, for precomputed loans and loans secured by interests in real property, the parties could agree to

the imposition of late charges as part of the "finance charge." Late charges would be prohibited in all other instances whether imposed under the rubric of "finance charge" or "any other charge."

Question 2:

Your second question asks whether late charges must be disclosed as "finance charges" as the term is defined in the Idaho Credit Code.

The Idaho Credit Code contains only one provision regarding disclosure:

A person upon whom the Federal Consumer Credit Protection Act, including regulations promulgated pursuant thereto, imposes duties or obligations, shall make or give to the debtor the disclosures, information, and notices required of him by that act and in all respects comply with that act.

Idaho Code § 28-43-201. Thus, the disclosure provisions of the federal law are controlling.

The federal definition of "finance charge" is found in both the statutes and the administrative regulations of the Federal Reserve Board. The statute, 12 U.S.C. § 1605, sheds no light on this question, but what is commonly called "Regulation Z" differs from the Idaho statutory definition. 12 C.F.R. § 226.4(c)2 excludes from the finance charge "[c]harges for actual unanticipated late payment, for exceeding a credit limit or for delinquency, default or similar occurrence."

For this reason, "late charges" are not required to be disclosed as a part of the "finance charge" as defined by the Idaho Credit Code. They must be disclosed in both the initial disclosure statement and in the periodic statements as "other charges." 12 C.F.R. § 226.6, 7.

AUTHORITIES CONSIDERED:

1. Idaho State Statutes:

Idaho Code § 28-41-301(18), (25)
Idaho Code § 28-42-201(1)
Idaho Code § 28-42-301
Idaho Code § 28-43-201
Idaho Code § 28-45-107
Idaho Code § 28-45-301

2. Idaho Cases:

State v. Roderick, 85 Idaho 80, 375 P.2d 1005 (1962).

Guillard v. Department of Employment, 100 Idaho 647, 603 P.2d 981 (1979).

Norton v. Dept. of Employment, 94 Idaho 924, 500 P.2d 825 (1972).

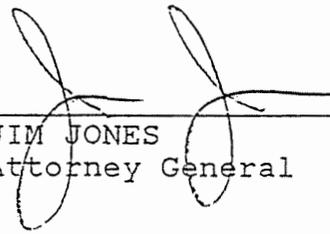
3. Federal Statutes:

12 U.S.C. § 1605

4. Other Authorities:

2A Sutherland, Statutory Construction, §§ 47.33, 51.02

DATED this 23rd day of September, 1987.



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