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ADVISORY RULING #29

(Formerly Administrative
Interpretation #32)

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Dear

You have inquired whether the Credit Code (M3C) permits the recovery of attorney's fees incurred by a creditor in realization of secured collateral following default on a credit sale agreement. It is my opinion that the Code does not permit the recovery of attorney's fees under these circumstances.

Section 2.507 of the Code prohibits "the payment by the consumer of attorney's fees or any other collection cost" with respect to a credit sale. Section 3.402 of the Code provides:

§ 3.402 Limitation of default charges - Except for reasonable expenses incurred in realizing on a security interest, the agreement with respect to a consumer credit transaction may not provide for any charges as a result of default by the consumer other than those authorized by this Act. A provision in violation of this section is unenforceable.

However, section 9.504 of the Uniform Commercial Code provides that reasonable attorney's fees and legal expenses may be included in the agreement as part of the reasonable expenses of realization of collateral unless they are prohibited by law. It is therefore necessary to determine whether the exception in section 3.402 was intended by the Legislature to include attorney's fees.

The Uniform Consumer Credit Code (U3C) provides enacting states with alternative provisions dealing with attorney's fees in section 2.507. The alternatives range from an outright prohibition of attorney's fees to language permitting attorney's fees under various circumstances. Maine chose to prohibit attorney's fees entirely with respect to credit sales. In fact, Maine uses non-uniform language to achieve its purpose by prohibiting "attorney's fees or any other collection cost." Apparently a considerable amount of discussion among the

voluntary drafting committee centered around the language utilized in § 2.507 as enacted by the Maine legislature. The U3C comment following the language in § 2.507 prohibiting attorney's fees states: "In providing that no charge may be made for attorney's fees, this section reflects a policy decision to follow some small loan acts in treating this expense, like other collection costs, as part of the creditor's cost of doing business, rather than as a charge to be imposed on the defaulting consumer. The provisions made

in this Act for note ceilings and additional charges are generous enough to justify this treatment of attorney's fees and collection costs as part of general overhead."

In the comments to U3C, §3.402, the Commissioners indicate the open-ended nature of this section by referencing the question of attorney's fees as a charge which would not be allowed if a particular state chose to exclude attorney's fees by enacting the alternative language for § 2.507 which prohibited such charges.

During the course of reviewing this question I contacted William Warren, Dean of the School of Law at U.C.L.A. to request his views as one of the original drafters of the U3C. Professor Warren indicated, during the course of our tele-phone conversation, that the discussions relating to the provisions on attorney's fees were so prolonged and the issue so thoroughly debated that there could be no doubt that where a state chose to enact language in § 2.507 prohibiting attorney's fees, the prohibition was fully applicable to § 3.402.

In any event, § 2.507 establishes the legislative intent relating to the allowance of attorney's fees in credit sales. Reliance upon the language in § 3.402 to carve out a substantial exception to that explicitly stated policy would be misplaced where the ambiguous language supplied by the U3C drafters in § 3.402 was intended to cover the various alternative provisions available to the states in § 2.507.

A serious question also exists as to whether any expenses incurred in realizing on a security interest may be allowed under the M3C where the legislature chose to enact the non-uniform language "or any other collection cost" in § 2.507. This particular language will not be found in any of the Uniform drafts proposed by the Commissioners or in any of the "Code" versions enacted elsewhere. It could be argued that the legislative intent, so clearly set forth in § 2.507, must take precedence over the U3C language in § 3.402 where the two sections may be in conflict.

Respectfully,

John E. Quinn
Superintendent

JEQ/jh