



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

June 5, 1980

ATTORNEY GENERAL OPINION NO. 80- 122

Mr. Robert Elliott
Kansas Consumer Credit Commissioner
Suite 1114 - State Office Building
535 Kansas Avenue
Topeka, Kansas 66603

Re: Consumer Credit Code -- Remedies and Penalties --
Recovery by the Administrator

Synopsis: Pursuant to K.S.A. 16a-6-113, the Consumer Credit Commissioner may proceed on behalf of consumers to recover the actual amount of excess finance charge, since this amount is more properly characterized as actual damages rather than a penalty. However, the recovery available in addition to the actual excess charge, as provided in K.S.A. 16a-5-201(3), is a penalty and the Commissioner is precluded by K.S.A. 16a-6-113 from proceeding to recover same. Cited herein: K.S.A. 16a-5-201(3), 16a-6-113.

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Dear Mr. Elliott:

You have asked our office to issue an opinion with respect to the authority of the Consumer Credit Commissioner (Administrator) to obtain a "double recovery" on behalf of a consumer, as provided in K.S.A. 16a-5-201(3), which states, in pertinent part:

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"A consumer is not obligated to pay a charge in excess of that allowed by this act, and if he has paid an excess charge he has a right to a refund of twice the excess charge. A refund may be made by reducing the consumer's obligation by twice the amount of the excess charge. If the consumer has paid an amount in excess of the lawful obligation under the agreement, the consumer may recover twice the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against debtors arising from the debt. Persons subject to the penalties in this subsection shall not include attorneys or collection agencies who do not purchase a consumer obligation." (Emphasis added.)

Pursuant to K.S.A. 16a-6-101, et seq., the administrator is given the power to proceed on behalf of consumers. Specifically, K.S.A. 16a-6-113 provides:

"[A]fter demand, the administrator may bring a civil action against a creditor for all amounts of money, other than penalties, which a consumer or class of consumers has a right explicitly granted by the provisions of sections 1 through 131 [16a-1-101 through 16a-9-102] of this act to recover." (Emphasis added.)

It is clear from this statute that the administrator may demand and bring an action to recover moneys for consumers in all instances, except one; namely, that the administrator has no such capability in the case of statutory penalties available to consumers. The question presented for our consideration, therefore, is whether the moneys recoverable under K.S.A. 16a-5-201(3) constitute a penalty.

Initially, it should be noted that 16a-5-201(3) denominates the amounts recoverable thereunder as penalties. However, an analysis of the label given to the remedy in question provides valuable insight. In 70 C.J.S. Penalties, §1a at page 389 the following is stated:

"Whether an exaction is a penalty is determined, not by the name or designation given it in the statute, but by the intrinsic nature of the exaction, and its character is not changed by the mode in which it is

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inflicted, whether by a civil action or a criminal prosecution. Accordingly, the term 'penalty' includes any extraordinary liability to which the law subjects the wrongdoer in favor of the person wronged, not limited to the damages suffered; and, on the other hand, the term does not include a liability imposed by statute merely for actual losses or damages occasioned by a violation of its provisions."

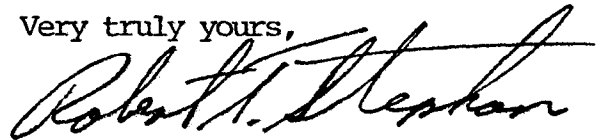
See in accord: Missouri-Kansas-Texas Rld. Co. v. Standard Industries Inc.,
192 Kan. 381, 384 (1964).

Based on this principle, we have analyzed the subject provisions and find that the "double recovery" available to the consumer includes a provision for the recovery of the actual amount of the excess charge and an additional amount equal to the amount of the excess charge.

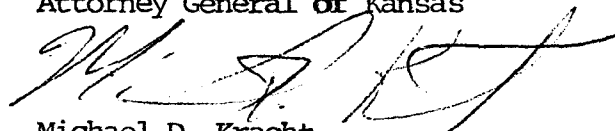
In applying the aforementioned analysis it is our opinion that the recovery up to the amount of the actual overcharge should be characterized as "actual damages" and not a "penalty." However, the amount recoverable in addition to these actual damages is properly identified as a penalty.

As such, it is our opinion that, pursuant to K.S.A. 16a-6-113, the administrator may proceed on behalf of consumers to recover the actual amount of excess finance charge, because this amount is not a penalty. However, it is our opinion that the recovery available in addition to the excess charge is a "penalty"; and as a result the administrator is precluded by K.S.A. 16a-6-113 from the recovery of same.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Michael D. Kracht
Assistant Attorney General

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