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ATTORNEY GENERAL OPINION NO. 88- 30

The Honorable Ben Foster
State Representative, Eighty-Fifth District
State Capitol, Room 156-E
Topeka, Kansas 66612

Re: Contracts and Promises--Interest and
Charges--Interest; Late Payment Charges

Consumer Credit Code--General Provisions and
Definitions; Definitions--Finance Charge; Late
Payment Charges

Synopsis: The assessment by a cable television company of
a reasonable late payment charge which reflects the
cost of collection of delinquent accounts is not
"interest" pursuant to K.S.A. 16-201 et seq.,
nor is it a "finance charge" as defined by K.S.A.
1987 Supp. 16a-1-301(18) of the uniform consumer
credit code. This conclusion assumes that actual
efforts to collect are undertaken and the
delinquent subscribers are not given alternative
options for payment. Cited herein: K.S.A. 16-201
et seq.; K.S.A. 1987 Supp. 16a-1-301; 15
U.S.C.A. §1602; 12 C.F.R. §226.8.

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Dear Representative Foster:

As State Representative for the Eighty-Fifth District, you
request our opinion of whether a late payment charge imposed
on a cable television subscriber's delinquent account
constitutes "interest" or a "finance charge" pursuant to

Kansas usury laws (K.S.A. 16-201 et seq.) or the uniform consumer credit code (UCCC), K.S.A. 16a-1-101 et seq.
The information you have provided describes the late payment charge as follows:

1. The cable television service in question is provided to subscribers on a monthly basis.
2. Invoices are sent in advance for the following month's service and are payable within ten days of receipt.
3. Any subscriber with a past due balance on the date the next month's invoice is produced is assessed a late payment charge of 5% of the past due balance.
4. The late payment charge reflects the additional operational and administrative costs associated with a subscriber's failure to make timely payment for cable service, including:
 - a. costs of paper, postage, computer time and manpower for past due notices generated and mailed to delinquent subscribers;
 - b. cost of manpower in attempts to collect by telephone;
 - c. costs of manpower and travel expenses associated with collections by technicians sent to disconnect service.
5. Though it is not clear, it appears that at least some of these costs are accrued prior to the assessment of the late payment charge.
6. The cable company offers no option of payment by installments, no written agreement is entered into with the subscriber, and failure to pay in full will eventually lead to termination of services.

"Interest" has been defined by the Kansas Supreme Court as "compensation allowed by law or by agreement of the parties for the use or forbearance of money." Jones v. Kansas Gas and Electric Co., 222 Kan. 390, 397 (1977). In the Jones case, the court indicated that a reasonable late fee which reflects the costs of collection is not "interest." 222 Kan. at 397. See Clark, Interest Rates in Kansas: The Decline and Fall of Ezekiel, 49 J.B.A.K. 81, 96 (1980). In support of this conclusion, the court cites Ferguson v. Electric Power Board of Chatanooga, Tennessee, 378 F.Supp.

787, (E.D. Tenn. 1974), aff'd mem., 511 F.2d 1403 (6th Cir. 1975). In Ferguson, an electricity distributor's practice of billing on a "net" and "gross" rate basis, the gross rate being 10% in excess of the net rate and payable if the customer does not pay the net bill within ten days of the billing date, was held not to be a violation of Tennessee's usury laws because the 10% was a delinquent charge and not interest. 378 F.Supp. at 790. In construing a definition of interest similar to that accepted by the Kansas courts, the court in Ferguson, citing Wilson v. Dealy, 434 S.W.2d 835 (Tenn. 1968), held that "a charge imposed because of late payment of a debt comes within the definition of 'interest' only where it is paid 'as consideration for the creditor's forbearance of asserting his right of collection'." 378 F.Supp. at 790. Since the electricity distributor continued in its attempts to collect the delinquent amount, it did not forbear its right of collection and thus the charge was not considered interest.

Based on these authorities and the information given, we must conclude that the late payment charge does not constitute interest for purposes of Kansas usury statutes. The charge is not in consideration for forbearance of the cable company's right to collect, nor is it merely compensation for the extension of credit. The cable company considers the account delinquent and proceeds with efforts to collect, payments by installments or at a later time are not options, and the charge assessed reflects the costs of collection.

In Bright v. Ball Memorial Hospital Ass'n, Inc., 616 F.2d 328 (7th Cir. 1980), it was held that a bona fide late payment charge does not constitute a "finance charge" within the meaning of the Federal Truth in Lending Act, 15 U.S.C.A. §§1601 et seq., and Regulation Z, 12 C.F.R. §226.8(a):

"Regulation Z, 12 C.F.R. § 226.4(c) distinguishes between 'late payment' and 'finance' charges:

"A late payment, delinquency, default, reinstatement, or other such charge is not a finance charge if imposed for actual unanticipated late payment, delinquency, default, or other such occurrence.

. . . .

"In an effort to clarify the difference between a 'late payment charge' and a 'finance charge,' the Federal Reserve Board has issued an interpretive rule. 12 C.F.R. § 226.401. In this rule, which has been held valid, Kroll v. Cities Service Oil Co., 352 F.Supp. 357, 363 (N.D.Ill.1972), the Board considered a vendor which billed its customers so that the full bill was due within a stipulated period after billing, with no installment payment option. If the bill was not paid in full by the end of the period, the vendor imposed a periodic charge on the unpaid balance until fully paid. The Board stated:

"When in the ordinary course of business a vendor's billings are not paid in full within that stipulated period of time, and under such circumstances the vendor does not, in fact, regard such accounts in default, but continues or will continue to extend credit and imposes charges periodically for delaying payment of such accounts from time to time until paid, the charge so imposed comes within the definition of a 'finance charge'. This rule indicates that whether a charge ostensibly imposed for late payment is a 'finance charge' depends on whether the vendor regards accounts not paid within the required period to be in default and whether the vendor continues to extend credit to the customer in default. See Continental Oil Co. v. Burns, 317 F.Supp. 194, 196 (D.Del.1970).

"Whether or not the vendor considers its customers' accounts delinquent must be judged by its actions taken as a whole. [Citations omitted.] Particularly relevant is whether the vendor continued to extend credit to its customers after the time of default, though the continued extension of credit under exigent circumstances should not defeat a finding

that the charges are in fact 'late payment' charges. [Citations omitted.]

"Also particularly relevant is whether the vendor takes 'commercially reasonable' efforts to correct the delinquency situation both through clear notification to its customer that the customer is delinquent, [citations omitted] and through efforts to collect the delinquent account [citations omitted]." 616 F.2d at 336, 337.

In applying these rules, the Bright court held that because Ball Memorial Hospital made commercially reasonable efforts to collect delinquent accounts (sending notices that payment is overdue, attempting to make contact by telephone in an effort to collect on the accounts, and eventually referring the delinquent accounts to a collection agency), the charges assessed were bona fide late payment charges and thus not finance charges.

The court in Bright states further that "[s]ince the charges assessed against appellant's accounts were bona fide 'late payment' charges, their imposition did not constitute the consummation of a credit transaction. . . ." 616 F.2d at 338. Though this case was determining whether the charges in question were finance charges pursuant to the Truth in Lending Act, we find its arguments and conclusions convincing in a determination of whether similar charges are finance charges for purposes of the UCCC. The definition of "credit" and "creditor" in the Truth and Lending Act, 15 U.S.C.A. §§1602(e) and 1602(f), are virtually identical to the UCCC definitions of these terms. "Credit" is defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." K.S.A. 1987 Supp. 16a-1-301(14). A right to defer payment is not considered as granted if the creditor actively pursues collection procedures rather than offering the option of paying in installments or at a later date. "Creditor" is defined as "a person who regularly extends credit in a consumer credit transaction which is payable by a written agreement in more than four installments or for which the payment of a finance charge is or may be required. . . ." K.S.A. 1987 Supp. 16a-1-301(16) (emphasis added). If there is no extension of credit, or if there is an extension of credit which is not payable by written agreement in more than four installments or which does not require payment of a finance charge, then the entity to

whom money is owed is not deemed to be a creditor for purposes of the UCCC. As we stated previously, the assessment of a reasonable late payment charge and initiation of commercially reasonable collection procedures indicate that the customer has not been granted the right to defer payment and thus there is no extension of credit as defined by the UCCC. Further, "finance charge" is defined at K.S.A. 1987 Supp. 16a-1-301(18) as "the sum of: (i) all charges payable directly or indirectly by the consumer and imposed directly as an incident to or as a condition of the extension of credit, including. . . . (b) the term does not include: (i) . . . delinquency charges. . . ." Though these definitions are somewhat circular, it would appear that late payment charges are not finance charges for purposes of the UCCC.

You have also inquired as to what circumstances would subject the cable television company's practice of imposing a late payment charge to the provisions of the UCCC. Professor Barkley Clark's article on interest rates in Kansas is instructive on this point:

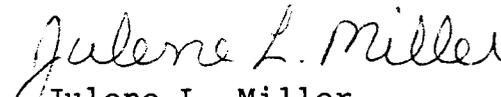
"If [a creditor] wants to collect such late charges, however, it is very important that delinquent [subscribers] not be 'carried along' by acquiescence. If no collection efforts are undertaken when a [subscriber] goes into default, a court would be disposed to treat the arrangement as an open-end credit plan subject to the Kansas rate ceilings and the disclosure requirements of Truth in Lending. The creditor must make commercially reasonable efforts to correct the delinquency situation through clear notification to its [subscriber] and through continuing efforts to collect the unpaid bill. The late charge should be set forth clearly on all billings (or at least periodically) and should be set at a level which is removed from standard interest charge impositions. A late charge of two to five percent per month is fairly standard among some vendors. The billing statement should make it clear that bills are to be paid in cash within a specified period of time after receipt, and that the firm does not extend credit. If the firm can then demonstrate that

reasonable efforts are indeed made to keep accounts current, a court would be hard-pressed to hold that the late charge was disguised interest or was unreasonable. The moral of this story is that the Kansas ceilings described earlier in this article do not apply at all if the charge imposed does not constitute 'interest.'" Clark, Interest Rates in Kansas: The Decline and Fall of Ezekiel, 49 J.B.A.K. 81, 96 (1980).

In conclusion, the assessment by a cable television company of a reasonable late payment charge which reflects the costs of collection of delinquent accounts is not "interest" pursuant to K.S.A. 16-201 et seq., nor is it a "finance charge" as defined by K.S.A. 1987 Supp. 16a-1-301(18) of the uniform consumer credit code. This conclusion assumes that actual efforts to collect are undertaken and the delinquent subscribers are not given alternative options for payment.

Very truly yours,


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