

**BANKING AND FINANCE: MONEY AND INTEREST.**

**CONTRACTS: CREDIT CARDS.**

**GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.**

**Credit card issuer and cardholder may determine, by agreement, late charges and fees to be imposed in connection with extension of revolving credit. Such agreement or contract is in derogation of common law in Commonwealth and precludes application of common law doctrine that liquidated damages not be out of proportion to anticipated damages. Restriction on imposition of late charge not to exceed 5%, payable within 7 calendar days, does not apply to agreed-upon late charges imposed in connection with extension of revolving credit.**

The Honorable Walter A. Stosch

Member, Senate of Virginia

September 23, 1998

You inquire regarding the application of certain of the money and interest provisions in Chapter 7.3 of Title 6.1, §§ 6.1-330.49 through 6.1-330.90 of the *Code of Virginia*. You first ask whether § 6.1-330.63(A), pertaining to credit card issuers, precludes the application of the common law doctrine that liquidated damages not be out of proportion to anticipated damages.

You relate that § 6.1-330.63(A) authorizes banks and consumers to contract for credit card charges and fees without regulatory interference. You advise that § 6.1-330.63(A) was amended at the 1992 Session of the General Assembly for the purpose of eliminating the five-percent ceiling on late charges to allow these and other credit-related fees to be market driven, e.g., contracts between consumers and lenders or retailers. You also relate that the intent of the General Assembly in removing the fee limitation, except an agreed-upon contractual fee limitation, is to create a free market for credit card holders and issuers whereby the contract between them governs their relationship in accordance with applicable Virginia law.<sup>1</sup>

For the purposes of this opinion, I shall assume that you refer to the term "credit card" as defined in § 11-30(b),<sup>2</sup> to mean "any instrument or device, whether known as a credit card, credit plate, or by any other name, issued with or without fee by an issuer<sup>[3]</sup> for the use of the cardholder<sup>[4]</sup> in obtaining money, goods, services, or any other thing of value." Furthermore, I shall assume that a cardholder has requested, in writing, the issuance of a credit card, and used the credit card.<sup>5</sup> Finally, I shall assume the existence of a credit card agreement, or contract, wherein the cardholder authorizes the issuer to purchase the sales slips for purchases made by the cardholder or to make cash advances to the cardholder, and the cardholder promises to pay the issuer for all credit extended, including any and all service charges that may be generated by a revolution of the account.

Section 6.1-330.63(A) provides, in part:

Notwithstanding any other provision of this chapter, any bank or savings institution may<sup>[6]</sup> impose finance charges and other charges and fees at such rates and in such amounts and manner as may be agreed by the borrower under a contract for revolving credit or any plan which permits an obligor to avail himself of the credit so established.

I can find no common law doctrine that addresses the amount credit card issuers may charge in late fees and interest. The credit card agreement may, however, be construed to be a contract, and, therefore, the common law doctrine regarding liquidated damages clauses contained in a contract represents a close analogy for the purposes of responding to your inquiry.

At common law, a liquidated damages clause contained in a contract will be construed as an unenforceable penalty, and thus subject to relief in a suit in equity, where the actual damages suffered for breach of the contract are susceptible of definite measurement.<sup>7</sup> The common law continues in full force in the Commonwealth, except as altered by the General Assembly.<sup>8</sup> In reviewing established rules regarding the construction of statutes in derogation of the common law, the Supreme Court of Virginia declares:

The common law will not be considered as altered or changed by statute unless the legislative intent is plainly manifested. A statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended. When an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule.<sup>[9]</sup>

When the terms of a statute are "directly and irreconcilably" at odds with a common law rule, the rule is considered abrogated.<sup>10</sup>

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature.<sup>11</sup> A principle of statutory construction requires that statutes be read in accordance with their plain meaning and intent.<sup>12</sup> Another dictates that statutes may be construed only where there is ambiguity.<sup>13</sup> Otherwise, the clear and unambiguous words of the statute must be accorded their plain meaning.<sup>14</sup> When the language of the statute is plain and unambiguous, it is presumed that the legislature intended what it plainly expressed, and no room is left for statutory interpretation.<sup>15</sup>

It is my opinion that the language of § 6.1-330.63(A) is absolutely clear and unambiguous. The plain meaning of § 6.1-330.63(A) is that an issuer of a credit card may impose such charges and fees at such rates, and in such amounts, as is agreed to by the cardholder in the credit card agreement, or contract. In this statutory provision, the General Assembly clearly allows the issuer and cardholder to determine, by agreement, all late charges and fees to be imposed in connection with the extension of revolving credit. The provision is, in my view, clearly, "directly and irreconcilably" at odds<sup>16</sup> with the common law of liquidated damages clauses in contracts. Consequently, I must conclude that § 6.1-330.63(A) is in derogation of the common law in the Commonwealth, and that such provisions preclude the application of the common law doctrine that liquidated damages not be out of proportion to anticipated damages.

You next ask whether the limitations in § 6.1-330.80(A) apply to agreed-upon late charges under § 6.1-330.63(A) imposed when the user of a credit card makes one or more late payments.

Several additional principles of statutory construction apply to this request. Statutes dealing with the same subject matter must be read together to give effect to the legislative intent.<sup>17</sup> Such statutes should not be considered in isolation, but must be construed to produce a harmonious result, giving effect to all provisions if possible.<sup>18</sup> As amended by the General Assembly in 1992, § 6.1-330.63(A) begins with the phrase "[n]otwithstanding any other provision of this chapter."<sup>19</sup> When a statute begins with such a phrase, it is presumed that the General Assembly intended to override any potential conflicts with earlier legislation in that instance.<sup>20</sup> Finally, the General Assembly is presumed to be aware of the law existing at the time it adopts a statute.<sup>21</sup> Moreover,

the General Assembly is presumed to be aware of its own previous enactments.<sup>22</sup> Section 6.1-330.80 was enacted by the 1987 Session of the General Assembly.<sup>23</sup>

Section 6.1-330.80(A) generally permits "[a]ny lender or seller" to impose a late charge on borrowers "for failure to make timely payment of any installment due on a debt, ... provided that such late charge does not exceed five percent of the amount of such installment payment and that the charge is specified in the contract between the lender or seller and the debtor." The language of this statute is to be given its "plain, obvious, and rational meaning."<sup>24</sup> By its plain language, § 6.1-330.80 applies broadly, and generally, to any "lender" or "seller." A "loan" is, among other things, "the creation of debt pursuant to a lender credit card or similar arrangement."<sup>25</sup>

Section 6.1-330.63(A) specifically permits "any bank or savings institution [to] impose ... charges and fees at such rates and in such amounts and manner as may be agreed by the borrower under a contract for revolving credit or any plan which permits an obligor to avail himself of the credit so established." The more specific statute must be deemed controlling over any general statute.<sup>26</sup> Consequently, it is my opinion that the restriction on the imposition of a late charge in § 6.1-330.80(A) not to exceed five percent, payable within a seven calendar day period, does not apply to agreed-upon late charges imposed in connection with the extension of revolving credit under § 6.1-330.63(A).

<sup>1</sup>You also refer to a 1992 report of the Economic Recovery Commission, which recommends, as a strategy to promote economic growth in Virginia, amending Virginia's banking and credit laws to allow "banks to set competitive rates with credit card providers across the county," thus enabling Virginia banks to compete and keep credit card jobs. 2 H. & S. Docs., *Report of the Joint Subcommittee to Study the Measures Necessary to Assure Virginia's Economic Recovery*, H. Doc. No. 37, at 14 (1992).

<sup>2</sup>Section 11-30 is a portion of Chapter 6 of Title 11, §§ 11-30 to 11-34, entitled "Credit Cards."

<sup>3</sup>"*Issuer*" means the business organization or financial institution or its duly authorized agent which issues a credit card." Section 11-30.

<sup>4</sup>"*Cardholder*" means the person ... named on the face of a credit card to whom or for whose benefit the credit card was issued by an issuer." Section 11-30.

<sup>5</sup>Both § 11-31 and the Truth-in-Lending Act prohibit the issuance of unsolicited credit cards, thus requiring a card issuer to provide some type of request or application form. See 15 U.S.C.A. §§ 1642-1645 (West 1998).

<sup>6</sup>The word "may" is primarily permissive. See *Pettus v. Hendricks*, 113 Va. 326, 330, 74 S.E. 191, 193 (1912).

<sup>7</sup>When the breach of contract consists of failure to pay the amount of money when due, or where the agreed-upon amount grossly exceeds the actual damages, the liquidated damages clause usually will be construed as an unenforceable penalty. See *Taylor v. Sanders*, 233 Va. 73, 75, 353 S.E.2d 745, 747 (1987); see also *301 Dahlgren Ltd. Partnership v. Board of Sup.*, 240 Va. 200, 396 S.E.2d 651 (1990); *Winslow v. Dawson*, 1 Va. 153, 154, 1 Wash. 118, 119 (1792).

<sup>8</sup>"The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." Section 1-10.

<sup>9</sup>*Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988) (citations omitted).

<sup>10</sup>*Id.*

<sup>11</sup>See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

<sup>12</sup>See *Ambrogi v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982) (statutory construction is not required when language of statute is clear and unambiguous).

<sup>13</sup>See *id.* at 386-87, 297 S.E.2d at 663 (when statute is unclear, intent of legislature is to be gathered from legislative history).

<sup>14</sup>*Broadnax v. Com.*, 24 Va. App. 808, 485 S.E.2d 666 (1997); *Diggs v. Commonwealth*, 6 Va. App. 300, 302, 369 S.E.2d 199, 200 (1988).

<sup>15</sup>See *Town of South Hill v. Allen*, 177 Va. 154, 12 S.E.2d 770 (1941); 1997 Op. Va. Att'y Gen. 117, 118.

<sup>16</sup>*Boyd v. Commonwealth*, 236 Va. at 349, 374 S.E.2d at 302.

<sup>17</sup>See *Commonwealth v. Sanderson*, 170 Va. 33, 195 S.E. 516 (1938). I note that § 6.1-330.63 specifically applies to charges and fees that banks and savings institutions may impose in connection with contracts for revolving credit.

<sup>18</sup>See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7 (1957); *Commonwealth v. Jones*, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953); 1995 Op. Va. Att'y Gen. 146, 147; *id.* at 199, 202 n.12.

<sup>19</sup>1992 Va. Acts Sp. Sess. ch. 4, at 4, 4.

<sup>20</sup>See Op. Va. Att'y Gen.: 1996 at 197, 198; 1987-1988 at 1, 2.

<sup>21</sup>See *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 331 S.E.2d 476 (1985).

<sup>22</sup>17 M.J. *Statutes* § 46 (Repl. Vol. 1994 & Supp. 1997); Op. Va. Att'y Gen.: 1997 at 167, 169; 1994 at 60, 62.

<sup>23</sup>See 1987 Va. Acts ch. 622, at 1026, 1032-33.

<sup>24</sup>See *Yeatts v. Murray*, 249 Va. 285, 288, 455 S.E.2d 18, 20 (1995).

<sup>25</sup>*Black's Law Dictionary* 936 (6<sup>th</sup> ed. 1990).

<sup>26</sup>See *Dodson v. Potomac Mack Sales & Service*, 241 Va. 89, 400 S.E.2d 178 (1991); *Barr v. Town & Country Properties*, 240 Va. 292, 396 S.E.2d 672 (1990); *Va. National Bank v. Harris*, 220 Va. 336, 257 S.E.2d 867 (1979).