



THOMAS J. MILLER
ATTORNEY GENERAL

Department of Justice

CONSUMER PROTECTION DIVISION

ADDRESS REPLY TO:
HOOVER BLDG., SECOND FLOOR
1300 EAST WALNUT
DES MOINES, IOWA 50319
515/281-5826

June 26, 1987

Dear

You have requested the advice of the Iowa Consumer Credit Code Administrator on the question of whether () must send a Notice of Right to Cure Default when subsequent to the consumer's default in a consumer credit transaction secured by a mobile home, the mobile home is "abandoned." More specifically, you question whether an abandonment of the mobile home after a default may be treated like a "voluntary surrender" of the collateral or security in which case no Notice of Right to Cure Default would be required.

As you note in your correspondence, the Iowa Consumer Credit Code (ICCC), Iowa Code § 537.5110 (1987) treats a "voluntary surrender" differently from a case where the creditor must take steps to enforce an obligation after default.

"A creditor ..., if the consumer has a right to cure the default, shall give the consumer the notice of right to cure provided in section 537.5111 before commencing any legal action in court ... and before repossessing collateral."

Iowa Code § 537.5110(2) (1987).

"A consumer has a right to cure default unless, ... the creditor has given the consumer a proper notice of right to cure with respect to a prior default which

occurred within three hundred sixty-five days of the present default, or the consumer has voluntarily surrendered possession of goods that are collateral and the creditor has accepted them in full satisfaction...." [Emphasis Added.]

Iowa Code § 537.5110(3) (1987).

"If the consumer has a right to cure a default:

a. A creditor shall not accelerate the maturity of the unpaid balance of the obligation, demand or take possession of collateral, otherwise than by accepting a voluntary surrender of it, or otherwise attempt to enforce the obligation until twenty days after a proper notice of right to cure is given." [Emphasis Added.]

Iowa Code § 537.5110(4)(a) (1987).

It is clear that the intent of § 537.5110 is that no Notice of Right to Cure Default is needed when the consumer voluntarily surrenders possession of the goods. This language in the ICCC is based on §§ 5.110 to 5.111 of the 1974 Uniform Consumer Credit Code (U.C.C.C.) which has been interpreted to mean:

"The notice is calculated to give the consumer enough information to understand his predicament and to encourage him to take appropriate steps to alleviate it. However, if the default is coupled with a voluntary surrender of possession of goods that are collateral for a debt, it is considered that the consumer regards a continuing relationship at an end, and no notice is provided for."

C.C.H. Consumer Credit Guide, Vol. 1, § 6260, 1974 U.C.C.C.-
Comment section 5.110, p. 6720.

The term "voluntary surrender" is not defined in either the 1974 U.C.C.C. or the ICCC. By way of analogy, the term "voluntary surrender" is defined in administrative regulations promulgated under the Wisconsin Consumer Act. Wisc. Admin. Code § Bkg. 80.68. Rather than following the Iowa approach of allowing "self-help" repossession after Notice of Right to Cure, the Wisconsin consumer credit statute and regulations promulgated there-

under provide that the creditor must use judicial remedies except in the case of voluntary surrender of the property. Voluntary surrender is limited by the Wisconsin regulations to situations where the consumer receives notice of his right to a pre-repossession hearing and no misrepresentations are made concerning the surrender.

The Federal Home Loan Bank Board (FHLBB) regulations governing first mortgages on mobile homes do require a creditor who has opted for the pre-emption of state usury limits under the federal DIDMCA of 1980 to provide a Notice and 30-day cure period. The creditor is not required to provide the FHLBB notice in case of "abandonment;" however, the rule does not address the question of whether an abandonment is a form of voluntary surrender. Since Iowa has opted out of the DIDMCA of 1980, the FHLBB rule does not apply to Iowa transactions and is, at best, a useful analogy. Even if the rule could be said to apply, a state notice statute which was more protective, would not be pre-empted.

An abandonment of property, in contrast to a voluntary surrender of possession to another party, occurs when "... the owner has relinquished all right, title, claim and possession, with the intention of not reclaiming it or resuming its ownership, possession or enjoyment." [Emphasis Added.] Black's Law Dictionary 13, (Rev. 4th Ed. 1968). Abandonment differs from surrender in that surrender requires an agreement. Noble v. Sturm, 178 N.W. 99, 103 (Mich. 1920). Abandonment of realty is a question of fact.... There is no presumption that realty is abandoned. Bennet v. Bowers, 28 N.W.2d 618, 238 Iowa 702 (Iowa 1947). An abandonment of a mobile home should, for purposes of this question, be regarded the same as abandonment of realty.

In a voluntary surrender of possession to the creditor, the consumer debtor and the creditor are aware of their respective rights and duties and, therefore, no Notice to Cure to the consumer is necessary. However, in an apparent abandonment even though it is logical to assume that the consumer has terminated his relationship with the creditor, there can be no general conclusion that the consumer, in every instance, knows he may cure the default but has chosen not to do so.

The administrator recognizes that the creditor may fear that property which has apparently been abandoned may be destroyed; nevertheless, since there is no means to assure that a true abandonment has occurred, we are unable to conclude that the burden of sending a Notice once in every 365 days is so great as to absolve the creditor from the requirement. If Notices are promptly sent when debtors are in default, it is unlikely that many homes will have been abandoned within 30 days of the first missed payment (10 days overdue plus 20 days notice). Accord-

ingly, the administrator must conclude that "voluntary surrender" of possession under the ICCA does not include an apparent abandonment.

Please be advised that this letter is merely advice of the administrator and is neither a rule of the administrator nor an opinion of the Attorney General.

I hope this letter answers your inquiry. If you would like to discuss the matter further, please contact the undersigned.

Sincerely,

A handwritten signature in cursive script that reads "Linda T. Lowe".

LINDA THOMAS LOWE
Assistant Attorney General

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