

Alert: Urgent Alert to All Finance Companies

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McGlinchey Consumer Financial Services Alert

New York Ends Licensing Exemption for Out-of-State Finance Companies

This email alerts you to an important development in New York sales finance company licensing law. On Friday, December 29, 2006, the New York State Banking Department Legal Division issued to the public a Staff Interpretation dated November 23, 2006 regarding New York State Banking Law Section 492.

By way of background, licensing of all sales finance companies (motor vehicle and other chattel) in New York State is governed by New York Banking Law ("NYBL") Article 11-B (NYBL §§ 491-502).

NYBL § 492(1) requires any entity engaging "in the business of a sales finance company in this state to obtain a license therefor...from the Superintendent, as provided in this article." NYBL § 491(7) defines a "sales finance company" to include any entity "engaged, in whole or in part, directly or indirectly, in the business of purchasing or otherwise acquiring retail installment contracts... [entered into in this state]."

Any person who violates or participates in the violation of NYBL § 492(1) is guilty of a misdemeanor, and, upon conviction, will be fined not more than five hundred dollars or imprisoned for not more than six months or both, in the discretion of the court. It is important to note that NYBL is silent regarding the continued validity and enforceability of retail installment contracts held by an unlicensed sales finance company.

Notwithstanding the requirement of NYBL § 492(1), by the "December 6, 1993 Letter," the New York State Banking Department confirmed that it would not seek to compel the licensing under NYBL Article 11-B of a sales finance company "which has no physical presence in New York State and transacts or conducts all of its business from outside the state." Moreover, licensing will not be required "even though the Corporation's employees will, on occasion visit retail dealers in New York." The December 6, 1993 Letter also indicated that an entity that

purchased retail installment sales contracts from a sales finance company, rather than from a dealer (i.e., a secondary market or bulk purchasers), would also not require a license.

The December 6, 1993 Letter also noted that in order for the transaction to be exempt, the retail installment contracts “will be presented to the Corporation via facsimile transmission or mail outside of New York and payment [by] the retail buyer’s shall be to...locations [outside New York].” The Banking Department also confirmed that it would not seek to compel licensing of a subsidiary of the Corporation formed for the limited purpose of holding, servicing, or facilitating the securitization of the portfolio transferred to it by a licensed sales finance company.

Finally, the December 6, 1993 Letter noted that the decision whether to seek a New York Sales Finance Company license must take into account Schleimer v. McPherson, 60 AD2d 837, 838 (2nd Dept. 1978); appeal dismissed, 44 NY 2d 730 (1978). In Schleimer, an action to enforce a motor vehicle retail installment contract, the court held:

Plaintiff, as an installment sale financier, is required to be licensed under Section 492 of the Banking Law. She has failed to obtain such a license notwithstanding the fact that she had conducted this business for more than fifteen years. The fact that she resides in New Jersey does not exempt her from this requirement, since she finances between 150 and 200 automobile purchases in New York each year. In light of the fact that Plaintiff obtained the installment contract in violation of the statute which was assigned to protect New York consumers, she should not be permitted to enforce the contract. The Appellate Term properly dismissed the complaint.

(Emphasis supplied.)

Accordingly, the Banking Department would not require a sales finance company without a physical presence in New York state to obtain a sales finance company license, notwithstanding the fact that there was appellate authority holding that retail installment contracts held by such an entity would be unenforceable. Numerous Banking Department opinion letters subsequently reiterated the position of the December 6, 1993 Letter.

The November 23, 2006 Letter turns the prior practice in New York on its head. Unfortunately, the Banking Department has not given consideration to the impact of its sudden change of policy and approval of Schleimer.

Now, instantly, every retail installment contract held by an unlicensed sales finance company potentially may be unenforceable, and the unlicensed sales finance company is violating the NYBL by conducting an unlicensed sales finance business. Moreover, there are now serious questions regarding the need to license secondary market aggregators and securitization entities.

The lawyers in our Albany, New York office are in discussions with the Banking Department about these and other related issues.

Related people

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