absent during the school year after March 7, 1945, would be entitled to five (5) accumulative days to be carried over to the succeeding school year and to be available to him in case of subsequent illness.

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OFFICIAL OPINION NO. 9

February 1, 1946.

Mr. V. G. Walmer, Supervisor,
División of Small Loans and Consumer Credit,
Department of Financial Institutions,
State House,
Indianapolis, Indiana.

Dear Sir:

This is in answer to your letter which reads as follows:

"Under Section 10 of the Retail Installment Sales Act, the Department of Financial Institutions is authorized to fix the amount which a licensee under that Act may pay to a retail seller from and out of the finance charge on a given retail installment contract. Pursuant to this authority, by General Order No. 1, effective at July 2, 1935, as amended July 6, 1942, effective July 10, 1942, the Department fixed the amount of participation in the finance charge which may be described in general terms as 2% of the unpaid balance of the cash price on new merchandise and 5% of the unpaid balance of the cash price on used merchandise. Heretofore Licensees under the Retail Installment Sales Act have paid some part or all of this authorized participation over to retail sellers. The amount of the payment depended upon the bargain made between the licensee and the retail seller."

"Lately some licensees have made arrangements with insurance agents in various cities and towns in the State whereunder they have agreed to pay those agents a certain amount of the finance charge, but
not in excess of the participation fixed by departmental regulation and such amount again being dependent upon the bargain of the parties, if the insurance agent makes an arrangement with the retail seller whereby the latter will sell his paper to the particular licensee. This does not mean that the retail seller is paid nothing from the finance charge. On the contrary, generally the retail seller will receive an amount from the finance charge. As stated above, up to this time the Department is not advised that the sum total of the payments to the insurance agent and to the retail seller exceeds the maximum participation in the finance charge allowed by departmental regulation.

"We desire to ask whether the Retail Installment Sales Act and the present regulations prevent licensees under that Act from making arrangements with insurance agents of the character above described and whether the Department can, under such law and regulations, revoke the license of any finance company that continues such an arrangement after notice from the Department that the arrangement is by it considered to be unlawful and in violation of its regulation on dealer participation in finance charge.

"We are inclined to the view that the Legislature never contemplated participation in the finance charge by an insurance agent and, moreover, that such participation is contrary to the public interest. Should you conclude that the present regulation is not broad enough to exclude participation in the finance charge by insurance agents, will you advise the Department whether under its power to make rules and regulations, in Section 25 of the Act, and its power to regulate the amount of participation in the finance charge, authorized by Section 10 of the Act, the Department can lawfully make a rule or regulation denying to any licensee the right to pay insurance agents a part of the finance charge and also denying those licensees the right to make bonus payments to insurance agents, whether or not they are claimed to be a part of the finance charge? Your attention is directed to the
fact that unless insurance agents can be thus pre-
cluded, finance companies not only can pay dealers the
amount of the authorized participation, but as well
can pay other persons, including insurance agents, a
bonus for originating business for them."

Before answering your inquiry specifically, it is advisable
to make some inquiry into the purpose and scope of the
Retail Installment Sales Act.

This Act being Chapter 231, page 1206, Acts of 1935 (58-
901 et seq. Burns' 1933 R. S.) followed an extensive study
made by the Department of Financial Institutions into In-
diana Consumer Credit Laws. It appeared at the time that
study was made there were not less than 140 finance com-
panies in Indiana which were engaged in buying retail in-
stallment contracts. These retail installment contracts
usually took the form of a conditional retail contract between
the retail seller and the purchaser of consumer goods. All
of the finance companies did business upon a discount basis.
That is, they purchased the contracts from the retail seller
at something less than the face amount of the contract. The
amount of discount was fixed by the finance company and
was usually called a "finance charge" or "time price differ-
ential." It appeared at that time that the finance charge
varied greatly with different companies and different goods.
In terms of interest upon the diminishing unpaid balance,
the finance charge ranged from 18.7% to 44.4%, on new
automobiles and much higher in other cases.

Also at the time of this legislation, both the Indiana
Supreme Court in Newkirk v. Burson (1867) 28 Ind. 435 and
the U. S. Supreme Court in Hogg v. Ruffner (1861) 66 U. S.
115, had held that a vendor could sell merchandise at a
higher price on credit than he had fixed for the same mer-
chandise when payment was to be cash and not violate the
usury laws. It thus appeared that the usury laws were in-
adequate to regulate the business of installment selling and
there were many attendant evils in the business, such as the
inability of the purchaser to determine the actual price of
goods and how much discount he was paying which seemed
to call for regulation under the police power. This was the
evil at which the legislature was striking in the requirement
of the retail installment act that every retail sale be evidenced by written instrument and the written instrument should show (Section 4—58-904 Burns' 1933 R. S.) the cash price of the goods, and among other things, the amount of the finance charge. Thus, any purchaser would be able to compare finance charges as between dealers and would be protected from exorbitant discounts. I use the term "exorbitant" advisedly in place of the word "usurious". It does not seem to me that the question of usury is involved. In other words, the "discount" or "time price differential" was not a question of interest, but a question of the difference between cash and installment price.

Thus construed, the Retail Installment Sales Act is a true police regulation of a legitimate business for the protection of the consumer public. Conversely stated, the Retail Installment Sales Act does not grant any rights or privileges to finance companies which they had not previously enjoyed. It is restrictive in nature.

It bestows upon the Department of Financial Institutions the power to set maximum finance charges. Section 6 (58-906 Burns' 1933 R. S.) provides in part as follows:

"* * * The finance charge contracted for in any retail installment contract may not exceed the maximum finance charge than authorized by the Department as in this provided. * * *"

Section 26 then specifically authorizes the Department to fix the fair maximum finance charge that may be contracted for in other retail installment contracts. The general purpose of the Act is well stated in the brief of the Attorney General in Paul V. McNutt v. McHenry Chevrolet Co., Inc., (1936) 298 U. S. 190 as follows:

"Second. The challenged Act in recognition of the futility of any attempt to shape usury statutes so as to effectually regulate such business, adopted the plan of providing for the fixing of maximum finance charges, which bears a similar relation to the established method of financing retail installment sales as interest bears to the forebearance of money, upon such a basis as would protect the retail installment
buyer from unreasonable prices for credit in addition to providing for a disclosure of such charges and their several items and upon such a basis as would insure sufficient capital for the purpose of supplying such credit."

The following principles are fundamental in the construction of a police regulation which restricts the operation of a legitimate business.

"The privilege of entering into or making contracts, the parties being sui juris, is at common law, both a liberty and a property right. Off & Co. v. Morehead, (1908), 235 Ill. 40, 85 N. E. 264, 126 Am. St. 184, 20 B.R.A. (N.S.) 167, 14 Ann. Cas. Any statute which attempts to restrict this right is in derogation of the common law and must be strictly construed; it will not be extended by implication or by construction to classes or persons not fairly within the letter of such statute. * * *

Meier Electric, Etc., Co. v. Dixon (1924) 81 Ind. App. 400 at 402.

"Statutes which interfere with legitimate enterprise or limit the right to construct or operate legitimate industries are to be given a strict construction. * * *


The first above quotation is particularly apropos in that the case involves a construction of the Indiana Bulk Sales Law which is a similar police regulation. At the time of the enactment of the Retail Installment Sales Act the legislature must have been aware from the report of the Department of Financial Institutions that it was customary for the purchasers of retail installment contracts to rebate a certain amount of discount to the dealer in order to secure his business. This rebate was variously known as "pack" or "dealer participation". It is apparent from the legislation that rebates to insurance agents were not considered a problem at the time of the enactment of Retail Installment Sales Act because Section 10—(58-910 Burns' 1933 R. S.) in placing
certain police restrictions on rebates refers only to dealers. It reads in part as follows:

“No licensee shall enter into any agreement with any retailer seller regarding the purchase of any retail installment contract whereby the retailer seller shall receive, directly or indirectly, any benefit from or part of any amount collected or received from any retailer buyer, as a finance charge or as the cost of the insurance to the retailer buyer, in excess of an amount fixed and determined by the department and no licensee shall directly or indirectly pay any part of the amount collected as a finance charge or retailer buyer’s cost of insurance to any retailer seller on any retail installment contract purchased from him in excess of the amount so fixed; and the department shall fix such maximum amount which may be so paid but without regard to any differentiation as to whether the retail installment contract is sold to the licensee with recourse on the seller in the event of the default of the buyer or without such recourse or under an agreement by which the seller agrees to repurchase the specific goods described in the retail installment contract if such buyer in such contract defaults and such goods are repossessed.”

Therefore, in view of the fact that this is restrictive legislation, we are not justified in reading into the law any restrictions as to bonuses or rebates to other persons. It is apparent that rebates to other persons were not contemplated and we cannot supply that defect by administrative or judicial construction. It is my opinion therefore that no limitation in the Retail Installment Sales Act which would prevent a bonus to an insurance agent who secures business for the finance company, but such bonus will necessarily be limited by the maximum limitation upon the finance charge.

A study of rules and regulations of the Department of Financial Institutions with respect to retail installment sales discloses no regulation which could be applied to this situation. Pursuant to the power vested in the Department by Section 10, it has in Section 3 of Retail Installment Sales General Order No. 1 set the maximum participation of the retailer seller only in the finance charge.
The only remaining question is whether such a rule or regulation may be promulgated by the Department which would limit insurance agents' participation. The general rule-making power of the Department with respect to retail installment sales is found in Section 25 (58-925 Burns' 1933 R. S.) of the Act which reads as follows:

“The department shall have authority from time to time to make, amend and rescind rules and regulations necessary to carry out and enforce the provisions of this act, including rules and regulations governing the business done in this state by licensees, the content of reports required from licensees and the manner and extent of examinations made of the business of licensees. Among other things, the department shall have authority to prescribe forms in which required information shall be set forth, items or details to be shown in balance sheets and earning statements and methods to be followed in the preparation of accounts necessary to reflect factors in the business of the licensee to be reckoned with by the department when fixing a maximum finance charge on retail installment contracts. The rules and regulations of the department, other than those issued pursuant to the authority vested in the department by section twenty-six (58-926) of this Act, shall be published and be effective in the manner and at the time prescribed by the department. No provision of this act imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the department, notwithstanding that the rule or regulation may, after the act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.”

Since the Act limits the operation of an otherwise legitimate business, since rule-making power vested in an administrative body should be limited to those expressly given or necessarily implied, and since the Act itself is so definitely confined to rebates to dealers only, I am of the opinion that no authority is vested in the Department to make a rule or regulation which would limit bonuses or rebates to an
insurance agent who produces business for the finance company.

OFFICIAL OPINION NO. 10

February 1, 1946.

Hon. Earl S. Cummings, Attorney,
For the Division of Public Safety,
State of Indiana,
Room 149, State House,
Indianapolis 4, Indiana.

Dear Sir:

Your letter of January 21, 1946 has been received in which you request an opinion on the following question:

"Under Section 4 of Chapter 355, Acts 1945, is an aggrieved party entitled to a Court Review of an order or act of the Commissioner?"

You further desired to know if the right of appeal granted in Section 3 (d) of the Act would carry over and be applicable to any act of the commissioner performed under the authority prescribed in Section 4 of said statute.

On the latter question it is submitted the right of review contained in Clause (d) of Section 3 of Chapter 355 of the Acts of 1945 is restricted to any order or act of the commissioner under Section 3 (c) or the statute or any other section to which it may relate. It is clear, however, that Section 3 (c) relates only to future responsibility and since Section 4 deals only with present responsibility, the specific provisions of Section 3 (d) would not apply to Section 4 of said Act.

However, on the main question presented as to the right of a review by a court of competent jurisdiction of an order or act of the commissioner under Section 4 of said statute it is submitted the question of the inherent right of review by a court of competent jurisdiction of orders or findings of an administrative agency was fully covered in an opinion and supplemental opinion of this office under date of March