

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

J. Martin Harvey, Special Referee

Case No. 2015-CP-06-00070
Appellate Case No. 2016-001214

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SEP 05 2017

SC Court of Appeals

Quicken Loans, Inc.,

Appellant,

v.

Wayne D. Wilson, Calvin O. Wilson, III; Any other Heirs-at-law or Devisees of Ezekiel (Ellen) T. Wilson, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interests in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Park Sterling Bank.

Respondents,

RESPONDENTS' REPLY IN SUPPORT OF SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIR'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE PURSUANT TO RULE 213, SCACR

Respondents respectfully respond in Reply to the Return by Appellant Quicken Loans, Inc. (Quicken) opposing the Motion by the South Carolina Department of Consumer Affairs seeking leave to appear as an Amicus Curiae in this matter. This Reply further supports the Motion for Leave to Appear as Amicus Curiae filed by the South Carolina Department of Consumer Affairs (Consumer Affairs or Department) on August 18, 2017. It is interesting that

Quicken did not serve or provide a copy its Return opposing the Motion for Leave to Appear as Amicus Curiae filed by Consumer Affairs to Consumer Affairs when it is the party who is making the motion; thereby, failing to afford Consumer Affairs with the opportunity to timely address and respond as the moving party in support of its motion. Consumer Affairs' Motion for Leave to Appear as Amicus Curiae should be granted as the Department has an interest in the issue(s) pending before this Court and its Amicus Curiae Brief would be helpful. The Department has an interest in the matter, and can provide the Court guidance. The Department is the only entity or party that can provide insight based on its actual experience and application of the law.

I. The Department of Consumer Affairs Should Be Granted Leave to File An Amicus Brief in this Matter as the Department Has Shown Interest and that It Can and Will Provide Guidance to the Court.

The South Carolina Department of Consumer Affairs should be allowed to appear as an amicus curiae. The Department has fully complied with Rule 213, SCACR, by stating its interest as the Administrator of the Consumer Protection Code (Title 37) including Section 37-10-102 – the attorney preference requirement – that a lender must comply as part of a real estate secured transaction. Consumer Affairs further explained in its Motion for Leave why a brief of Consumer Affairs as an amicus curiae would be desirable to the Court.

Established in 1974 by the South Carolina Consumer Protection Code (“the Code”), Section 37-1-101 et seq., the Department is the administrator of the Code and regulates the consumer credit marketplace. In this capacity, the Department helps to formulate and modify consumer laws, policies and regulations; regulates the consumer credit marketplace; resolves complaints arising out of the production, promotion or sale of consumer goods or services in South Carolina, whether or not credit is involved; and promotes a healthy competitive business

climate with mutual confidence between buyers and sellers and to encourage the development of fair and economically sound credit practices that comply with the laws of South Carolina. S.C. Code Ann. §37-1-102(c) - (e).

The Department is the sole state agency designated by the General Assembly to construe and provide official legal interpretations of the Code which includes the attorney preference statute since 1982. See S.C. Code Ann. §§ 37-6-104(1)(b); 37-6-506; and 37-10-102. The Department's interpretations of law are afforded deference by the courts and will be upheld if a court determines that the interpretation is consistent with the plain language of the statute and with legislative intent. Lexington Law Firm v. S.C. Dep't of Consumer Affairs, 382 S.C. 580, 677 S.E.2d 591 (2009). Persons relying upon interpretations of the Code issued by the Department are also given a safe harbor for compliance unless and until it is changed or deemed invalid. Id; See S.C. Code Ann. §§ 37-6-104(4) and 37-6-503(3).

The Department has been administering and enforcing Section 37-10-102, the attorney preference statute since 1982. S.C. Code Section § 37-10-102, commonly referred to as the "attorney preference statute," provides in pertinent part:

"Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose:

(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction"

S.C. Code Ann. § 37-10-102(a). The purpose of § 37-10-102(a) is to protect consumers. Camp v. Springs Mortgage Corporation, 310 S.C. 514, 436 S.E.2d 304 (1993), and to accomplish that goal there must be "clear and prominent disclosure of all information necessary to ascertain the borrower's preference as to legal counsel." Davis v. NationsCredit Financial Services Corp.,

484 S.E. 2d 471, 472 (S.C. 1997). The provisions of § 37-10-102 are to be liberally construed to achieve this purpose. *Tilley v. Pacesetter*, 333 S.C. 33, 508 S.E.2d 16 (1998), citing S.C. Code § 37-1-102 (1976). Moreover, rights and benefits provided by § 37-10-102(a) cannot be waived by the consumer. S.C. Code Ann. § 37-1-107 (1976).

Pending on appeal before this Court is the Order of Special Referee, J. Martin Harvey, granting the consumer's motion for partial summary judgement that Quicken violated the attorney preference statute, S.C. Code Ann. § 37-10-102. R.pp. 1-23. The Respondent/Defendant Wilson moved "for partial summary judgment for violation of the South Carolina's Attorney Preference Statute found at S.C. Code Ann. § 37-10-102.....I [Special Referee Harvey] deny Plaintiff's motion and grant Defendant's motion." R.pp. 1; 8-10 (ascertaining the attorney preference from the borrower at the closing is in violation of § 37-10-102). The issues before the Court are one clearly involving the preference statute, S.C. Code Ann. § 37-10-102.

S.C. Code § 37-10-102 does not mandate how the lender is to "ascertain the preference." Instead, the statute provides "when" as follows:

The creditor may comply with this section by:

(1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator¹; or

(2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

¹The "administrator" is defined in S.C. Code § 37-1-301(2) and § 37-6-103 as "the officer appointed by the Commission on Consumer Affairs to administer this title."

S.C. Code § 37-10-102(a) (emphasis added). The preference of the borrower must be ascertained prior to the closing. *King et al. vs. American General Finance, Inc.*, 386 S.C. 82, 91, 687 S.E.2d 321 (2009), footnote 1. As the lower court found and stated in its Order granting summary judgment for the Respondent consumer, Special Referee Harvey stated:

. . . . ‘I would find that interpreting the present version of § 37-10-102(a) to allow the attorney preference to be ascertained at closing leads to an absurd result. The statute requires a lender to comply “prior to closing.” The statute requires the lender to ascertain the preference of the attorney to present the borrower in all matters related to the transaction. These tasks cannot be performed at the closing table. For the statute to have any meaning, the preferences must be ascertained in sufficient time for the attorney selected by the borrower to perform these tasks. . .

R.p. 10. The Special Referee states in his Order that both parties relied upon the November 7, 2011 from the closing and the Form was attached to the Order. R.pp. 23; 8-9 (discussion about using a pre-populated form eviscerates the very purpose of § 37-10-102 and renders it meaningless; thus, Quicken fails to ascertain the borrower’s attorney preference under the statute).

The “form distributed by the administrator” is set forth in an Administrative Interpretation issued by the Department of Consumer Affairs in 1983, shortly after the enactment of S.C. Code § 37-10-102. See, Administrative Interpretation No. 10.102(a)-8302 (the “AI”). In the A.I., the Administrator/Consumer Affairs, after first noting “the provisions of Section 37-1-102 and the Consumer Protection Code as a whole,” found that:

“ . . . in enacting § 37-10-102(a), the General Assembly had two main objectives: (1) to provide the borrower with the right to legal counsel of his choosing...; and (2) to make these rights known to the borrower (applicant) by a conspicuous disclosure and have the borrower make his preference known before he is inundated with other documents related to the transaction.”

The Administrator further stated:

“... by having the borrower affirmatively select an attorney or insurance agent, it becomes less likely that the borrower will ultimately acquiesce to the *lender's* choice of an attorney or insurance agent for whom the borrower would have to pay, even though that attorney or agent might actually represent the interests of the lender....”

Administrative Interpretation 10.102(a)-8302 (italics in original)

The AI has been specifically addressed and cited with approval at least twice by the South Carolina Supreme Court. *Davis v. NationsCredit Finance Inc.*, 326 S.C. 83, 484 S.E.2d 471(1997), *King v. American General*, 386 S.C.82, 687 S.E.2d 321(2009). Further, the General Assembly implicitly adopted the A.I. when it amended § 37-10-102(a) to specifically allow lenders to comply with § 37-10-102(a) by using the preference form supplied by the Administrator. *1996 Act No. 355, § 1*. The Department has demonstrated its interest and there is nothing its Motion to suggest any lack of neutrality by the Department or that the information will not be useful to the Court.

With regard to an amicus curiae request, this Court makes the decision based upon two requirements: the moving party need only state their interest and the reasons why. Rule 413, SCACR. Traditionally, the role of the *amici* has been to act as a friend of the court – which is to provide guidance on questions of law. *Yip v. Pagano*, 606 F.Supp. 1566, 1568 (D.N.J.1985), *aff'd*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 476 U.S. 1141, 106 S.Ct. 2248, 90 L.Ed.2d 694 (1986). The Department can provide guidance to the Court with is the role of the Amicus Curiae.

In federal trial courts, Amicus Curiae have “been allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance.” The aid of *amici curiae* has been allowed at the trial

level where they provide helpful analysis of the law, *see, e.g., Waste Mgmt.*, 162 F.R.D. at 36, they have a special interest in the subject matter of the suit, *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir.1970), or existing counsel is in need of assistance, *United States v. Gotti*, 755 F.Supp. 1157, 1158 (E.D.N.Y.1991); *News & Sun-Sentinel Co. v. Cox*, 700 F.Supp. 30, 32 (S.D.Fla.1988) (quoting *Donovan v. Gillmor*, 535 F.Supp. 154, 159 (N.D. Ohio), *appeal dismissed*, 708 F.2d 723 (6th Cir.1982)); *Bryant v. Better Bus. Bureau of Greater Maryland, Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996)

Review of the federal rule regarding Amicus Curiae and its related brief, there is no requirement that the amici be totally disinterested. Although “[a]n amicus ... is not a party to the litigation and participates only to assist the court[, n]evertheless, ‘by the nature of things an amicus is not normally impartial’ ... and ‘there is no rule ... that amici must be totally disinterested.’ ” *Tafas v. Dudas*, 511 F. Supp. 2d 652, 660–61 (E.D. Va. 2007) quoting *Waste Mgmt., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D.Pa.1995) (quoting *United States v. Gotti*, 755 F.Supp. 1157, 1158 (E.D.N.Y.1991) and *Concerned Area Residents for the Environment v. Southview Farm*, 834 F.Supp. 1410, 1413 (W.D.N.Y.1993)). Rule 213, SCACR, does not require neutrality or disinterest; in fact, Rule 413 requires interest. This argument by Quicken that the Department is not neutral or that it will advocate rather than act as a neutral friend of the Court is without merit.

CONCLUSION

It is in the public interest that the Department be allowed to provide an Amicus Curiae Brief to the Court in order to provide guidance on issues that directly impact its regulation of the consumer credit industry for both consumers and creditors. For these reasons stated herein, the Motion for Leave of the Department to file an Amicus Brief should be granted by the Court. The

Department has meet the requirements of "interest" and "why" as required under Rule 213,
SCACR.

Respectfully submitted, this 5th day of September, 2017.

ATTORNEYS FOR RESPONDENTS


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Columbia, South Carolina
September 5, 2017

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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Court of Common Pleas

J. Martin Harvey, Special Referee

Appellate Case No. 2016-001214

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Quicken Loans, Inc.,Appellant,

v.

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CERTIFICATE OF SERVICE

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Attorneys for Respondent

(addresses appear following the signature page)

September 5, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the Respondents' Reply in Support of South Carolina Department of Consumer Affairs' Motion for Leave to Appear as Amicus Curiae Pursuant to Rule 213, SCACR in the above-captioned matter was made upon all counsel of record this 5th day of **September, 2017**, by electronic mail and/or by depositing a copy of same in the U.S. Mail, postage prepaid, addressed as follows:

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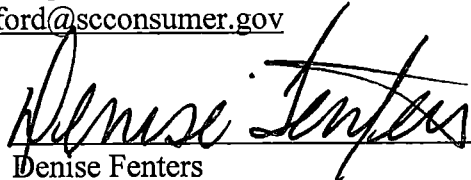
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Copies are also being forwarded on to opposing counsel in PDF format via electronic mail addressed as follows:

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Columbia, SC
September 5, 2017


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September 5, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Columbia, South Carolina 29201

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Re: Quicken Loans, Inc. v. Wayne D. Wilson, et al.
Appellate Case No.: 2016-001404
Civil Action No.: 2015-CP-06-00070
Our File No.: 8275.001

SEP 05 2017
SC Court of Appeals

Dear Mrs. Kitchings:

Enclosed please find the original and seven copies of Respondents' Reply in Support of South Carolina Department of Consumer Affairs' Motion for Leave to Appear as Amicus Curiae Pursuant to Rule 213, SCACR in connection with the above matter. We ask that you file the original a return a clocked copy to us via our courier.

By copy of this letter to counsel of record, we are herewith serving them with a copy.

With kindest regards, we are

Sincerely,


Steven W. Hamm
C. Jo Anne Wessinger Hill

SWH/CJWH/dwf

The Honorable Jenny Abbott Kitchings
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September 5, 2017

cc: B. Rush Smith, III
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