STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

J. Martin Harvey, Special Referee

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Appellate Case No. 2016-001214

Circuit Court Case No. 2015-CP-06-00070

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Quicken Loans, Inc., ..... Appellant,

v.

Wayne D. Wilson; Calvin O. Wilson, III; Any other Heirs-In-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 a class designated as John Doe; any unknown minors or persons under a disability being a class designated as Richard Roe; Park Sterling Bank, ..... Respondents.

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# BRIEF OF AMICUS CURIAE SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS

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**SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS**
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## STATEMENT OF THE FACTS

Amicus Curiae South Carolina Department of Consumer Affairs adopts as its statement of the facts those statements set forth in Respondents' Brief to this Court. The text of the statement appears on page iv of Respondents' Brief.

## INTEREST OF AMICUS

The Department is the state's consumer protection agency. In 1974, the General Assembly enacted the South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 et seq., and created the Department. The Department regulates the consumer credit marketplace; helps to formulate and modify consumer laws, policies and regulations; 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. See S.C. Code Ann. §§ 37-1-102, 6-104, and 6-117. The purposes of the Consumer Protection Code include: (1) to further consumer understanding of the terms of credit transactions; (2) to protect consumer buyers, lessees and borrowers against unfair practices by some suppliers of credit, having due regard for the interests of legitimate and scrupulous

creditors; and (3) to permit and encourage the development of fair and economically sound credit practices. S.C. Code Ann. § 37-1-102(2)(c)–(e).

The Consumer Protection Code, which became effective on January 1, 1975, granted the Department's Administrator the power, *inter alia*, to "counsel persons and groups on their rights and duties under [Title 37]." S.C. Code Ann. § 37-6-104(1)(b). From inception, the Consumer Protection Code has required the Department to administer and enforce the Code and has recognized both the rulemaking and interpretative responsibilities of the Administrator. See S.C. Code Ann. §§ 37-6-104(1)(b) and (e); 6-403(1)(c); 6-506(2) and (3). Indeed, the General Assembly recognized that every possibility could not be set forth in the Consumer Protection Code and, therefore, the Administrator would need the authority to fill in the gaps or address situations not contemplated at the time the Code was enacted.

To ensure the provisions of Title 37 are faithfully administered and enforced, the Administrator may "adopt, amend and repeal rules and regulations, not inconsistent with law, to interpret and explain provisions of this title, carry out the purposes and policies of this title, to prevent circumvention or evasion thereof or to facilitate compliance therewith." S.C. Code Ann. § 37-6-506(2); see also S.C. Code Ann. § 37-6-104(1)(e) (Administrator may "adopt, amend, and repeal substantive rules when specifically authorized by this title, and adopt, amend, and repeal procedural rules to carry out the provisions of this title"). Section 37-6-506(3) recognizes the Department may also issue opinions, interpretations, or statements that creditors can rely on and the Department's regulations set forth the procedure for requesting and issuing such interpretations. See S.C. Code Ann. Regs. 28-25 (Declaratory Rulings) and 28-26 (Administrative Interpretations). Moreover, the Administrator shall "make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the

administrator in the discharge of his functions." S.C. Code Ann. § 37-6-403(1)(c). Thus, the Administrator's interpretations should be publicized and shared freely with those businesses responsible for complying with the Code.

The Department has issued more than one hundred Administrative Interpretations. While certain parties may incidentally benefit more than others from a particular interpretation, none of the interpretations was issued to promote the private benefit of any particular group. Rather, each of these interpretations represent the Administrator's best effort at construing the statutes involved to provide guidance to debtors and creditors alike. Furthermore, persons relying upon the Department's interpretations are provided a safe harbor for compliance unless and until the interpretations are changed or deemed invalid. Lexington Law Firm v. S.C. Dep't of Consumer Affairs, 382 S.C. 580, 677 S.E.2d 591 (2009); see also S.C. Code Ann. §§ 37-6-104(4) and 6-506(3).

The Department is the sole state agency designated by the General Assembly to construe and provide official legal interpretations of the Consumer Protection Code, which includes the attorney insurance preference statute. See S.C. Code Ann. §§ 37-6-104(1)(b); 6-506; and 10-102. Since 1982, the Department has been administered and enforced the requirement to ascertain the borrower's preference and has issued two Administrative Interpretations of the law. The Department has previously and continues to administer and enforce Section 37-10-102 to require the:

1. Lender must provide written notice to the borrower of the right to select an attorney and an insurance agent in the time period and manner specified in the statute;

2. Lender must ascertain the borrower's preferences; and

3. Lender must comply with the borrower's preferences (subject to the right of refusal contained in 37-10-102(a)).

Additionally, the Department provided a safe harbor for compliance with the attorney insurance preference requirement where the form used by the lender is substantially similar to the form provided by the Administrator; is given to the borrower in the time period and manner specified in the statute; a choice of attorney and insurance agent is made by the borrower; the form is signed and dated by the borrower; and the choice is honored by the lender. *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-8302 (1983) (attached as Appendix B).

Over the past two years, violations of Section 37-10-102(a) have been cited more frequently by the Board of Financial Institutions-Consumer Finance Division ("CFD") during examinations of mortgage lenders.[1] In many circumstances, there may be a form substantially similar to the Department's in the borrower's file but the form is not completed and, therefore, does not evidence the borrower's preference was ascertained. For example, the form does not contain anything in the attorney or insurance designee sections at all. Another example is where the form does not contain an attorney or insurance designee but rather "TBD" in those blanks. In these examples, if the form is signed by the borrower, it may show the borrower was aware of the right to choose an attorney or insurance agent, but it does not prove such right was exercised by the borrower.

The Department has taken into consideration other evidence lenders offer to prove the borrower exercised the right and the lender in fact ascertained the borrower's preference. The evidence presented by lenders in an attempt to prove compliance with Section 37-10-102(a) has evolved over time. Some recent examples include:

1. An email from the borrower to the lender choosing the attorney or insurance agent;
2. An email from another party such as the borrower's real estate agent;
3. Company system notes entered by the lender's employee.

[1] The CFD is responsible for licensing and regulating mortgage lenders in South Carolina. S.C. Code Ann. § 37-22-110(6) and (11). As such, the Department provides counsel and guidance to the CFD regarding enforcement of, *inter alia*, the attorney insurance preference statute.

The Department reviews evidence submitted to determine compliance with the attorney insurance preference requirement. In some circumstances, emails from a borrower have been deemed sufficient to show the lender ascertained the borrower's preference. However, notes in a company data processing system have not been deemed sufficient to evidence the borrower is the one who chose the attorney or agent, absent any influence from an outside party.

As the Department continues to administer and enforce the attorney insurance preference statute, even while this appeal and other cases are pending before various courts, it is incumbent upon the Department to ensure the law is administered uniformly. S.C. Code Ann. § 37-1-102(2)(g). Several matters are currently pending before the Department pertaining to compliance with Section 37-10-102. In doing research for the ongoing matters, the Department became aware of this appeal on August 16, 2017.

On August 18, 2017, the Department filed a Petition and Motion for Leave to Appear as Amicus Curiae in this appeal. This Court issued an Order to the Department to serve and conditionally file its amicus curiae brief within twenty days. The Order was mailed to the Department by letter dated September 13, 2017, and received by the Department on September 14, 2017. The Department timely files this conditional amicus curiae brief and requests this Court consider it when ruling on this appeal.

## ARGUMENTS

### HISTORICAL BACKGROUND OF ATTORNEY INSURANCE PREFERENCE

Prior to 1982, the right to select an attorney and an insurance agent was set forth in Section 29-3-210, which provided in pertinent part:

> In the event a bank, mortgage banker, insurance company, building and loan association as defined in § 34-1-10, or other lending institution makes a loan to a borrower in the amount of five thousand dollars or more that is secured by a real estate mortgage, the lender shall ascertain the preference of the borrower as to the legal counsel that shall be employed to represent the borrower in all matters of the transaction and the insurance agent to furnish required insurance in connection with the loan and shall comply with such preference. . . . In the event that the borrower does not express any preference of a legal counsel or an agent for the purpose of such transaction, the lending institution may, subsequent to inquiry, refer the borrower to an attorney of the lender's selection.

S.C. Code Ann. § 29-3-210 (1976) (attached as Appendix A). In addition, the law included Section 29-3-220, which provided:

> Any bank, mortgage banker, insurance company, building and loan association, or other lending institution shall not coerce in any manner or require as a condition precedent to make any loan in excess of five thousand dollars that the borrower employ a particular attorney or purchase insurance from a particular agent or company as provided herein; provided, the insurance company meets the approval of the lender.

S.C. Code Ann. § 29-3-220 (1976) (attached as Appendix A).

By virtue of 1982 Act No. 385, the General Assembly repealed Sections 29-3-210 and 29-3-220 and created Chapter 10 of Title 37, including Section 37-10-102.[2] Act No. 385, 1982 S.C. Acts 2283 § 56, 57. This section required creditors to ascertain, on the first page of the credit application, the borrower's preference as to the attorney selected to close the loan and the insurance agent selected to provide required insurance coverage. This statute became effective on June 30, 1982. On July 20, 1982, an attorney representing a creditor sought a Departmental opinion on how

[2] Of particular import is the absence of the last sentence contained in Section 29-3-210, which permitted a lender to select an attorney for the borrower when the borrower had no preference.

the statutory requirement that notice be provided on the first page of the application could be reconciled with the requirements of federal law and the requirements of secondary market purchasers or guarantors such that the mortgages would not be rendered unmarketable.

Pursuant to its authority to issue interpretative opinions, the Department issued Administrative Interpretation No. 10.102(a)-8302, in which the Department advised that a creditor's use of a form substantially the same as the one included in the Interpretation complied with the preference requirements and could be provided as a separate sheet as long as it was presented to the borrower prior to or contemporaneously with the application. *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-8302 (1983). To reach this result, the Department construed the language of Section 37-10-102(a) (1982), particularly the language indicating the borrower's preference must be ascertained on the first page of the credit application.

The Department also reasoned that the purposes of Section 37-10-102 (1982) were to provide the borrower with the right to choose the attorney who would represent the borrower and the insurance agent who would provide the required insurance coverage and to make these rights known to the borrower before the borrower is inundated with other documents related to the transaction. It did not appear to the Department that the precise physical placement of the disclosure was as crucial as its timing. When the borrower's preference for an attorney and insurance agent is determined at the time the application is taken, the chosen attorney or agent would have sufficient time to effectively represent the borrower and the borrower would be less likely to be influenced by the lender's preferred choice.

Administrative Interpretation 10.102(a)-8302 also addressed the situation where a borrower might have no preference in response to a suggestion that the lender's only option was to give the borrower a copy of the local Yellow Pages to find an attorney. *S.C. Dep't of Consumer*

*Affairs, Admin. Interpretation No.* 10.102(a)-9301 (1993), p. 3 (attached as Appendix C). The Department provided a checklist, now typically referred to as an attorney insurance preference form, that a lender could use to comply with Section 37-10-102(a). The checklist provides the option to a borrower who has expressly indicated no preference as to the attorney and/or the insurance agent to select one from a list provided by the lender. Further, a lender could use the "checklist in substantially the following form" provided by the Department as a safe harbor for compliance. *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-8302 (1983), p. 3.

In 1984, the General Assembly amended Section 37-10-102(a) to specify that the insurance agent to be chosen by the borrower is for the purpose of furnishing required hazard and flood property insurance although it provided an exception for loans on property subject to the South Carolina Horizontal Property Act. Act No. 355, 1984 S.C. Acts 1631 § 10. The General Assembly, however, did not change any language in the statute that would alter or overrule the Department's 1983 Interpretation pertaining to the process of notifying a borrower of his rights and ascertaining the borrower's preferences. The General Assembly subsequently made other substantive changes to Section 37-10-102 in 1989 (changing the assumption fee amount in subsection (b)(3)) and in 1991 (deleting subsection (c) which required a disclosure statement entitled "Assumption Notice"). See Act No. 164, 1989 S.C. Acts 556 § 3; Act No. 142, 1991 S.C. Acts 497 § 23. Neither of these changes addressed a borrower's attorney or insurance preference though.

In 1993, the Department issued Administrative Interpretation No. 10.102(a)-9301 to address questions about the remedies available to a borrower when a creditor has failed to ascertain a borrower's preference. In the analysis, the Department reflected on the 1983 Interpretation, including the Department's recognition that a borrower may have no preference and could be

referred to a list of acceptable attorneys. The Department clarified, however, that the list allowed by the 1983 Interpretation as well as the lender's right of refusal allowed in Section 37-10-102(a) should not be regarded as allowing a lender to force a particular attorney on a borrower. The Department reiterated that a lender who fails to ascertain the preference of the borrower violates Section 37-10-102(a) "whether by outright failure to disclose or by improperly forcing or steering the borrower to the attorney or insurance agent of the lender's choice." *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-9301 (1993), p. 3.

In 1995, Mary Davis filed a case in state court seeking to bring a class action against NationsCredit Financial Services Corporation for, *inter alia*, violations of Section 37-10-102. The case was removed to the United States District Court, District of South Carolina on August 17, 1995. By order dated April 16, 1996, the federal court certified three questions regarding provisions of the Consumer Protection Code to the South Carolina Supreme Court. The first and only question answered by the Supreme Court was whether it was a violation of Section 37-10-102 for a lender to use a separate piece of paper to ascertain a borrower's preferences of legal counsel and hazard insurance, rather than including a preference statement on the first page of the credit application. Davis v. NationsCredit Fin. Servs., 326 S.C. 83, 484 S.E.2d 471 (1997). The facts certified to the Court declared Ms. Davis received an attorney and hazard insurance preference statement contemporaneously with her credit application. Id. at 84 and 86, 484 S.E.2d at 471 and 472. In the Court's decision, it concluded that a lender substantially complies with Section 37-10-102 if the borrower receives a clear and prominent disclosure of the statutorily required information. Id. at 86, 484 S.E.2d at 472. The Court explained that it would elevate form over substance to find a violation where a borrower had received the preference statement albeit on a separate piece of paper. Id.

While Ms. Davis's case was pending, the General Assembly considerably amended Section 37-10-102(a). In a bill introduced on March 21, 1996, and enacted only seventy-seven (77) days later, the General Assembly deleted the requirement that information regarding the borrower's preferences be on the first page of the application. Act No. 355, 1996 S.C. Acts 2185 § 1. The General Assembly also added explicit information about two options a lender could use to comply with Section 37-10-102(a). Id. For the first option, the General Assembly permitted the information to be included on or with the credit application using a *form substantially similar to one provided by the Administrator*, codifying the conclusions the Department reached in its 1983 Interpretation. For the second option, the General Assembly provided that a lender could notify the borrower of the preference information by delivering a written notice to the borrower no later than three business days after the application is received or prepared, but again gave a safe harbor if the lender uses a *form substantially similar to one provided by the Administrator*. The timing of the notice to the borrower is significant. It is a threshold requirement for complying with Section 37-10-102.

However, the timing of ascertaining the borrower's preference was not ignored. The General Assembly made sure to add language that the borrower's preferences must be ***ascertained*** "prior to closing." Act No. 355, 1996 S.C. Acts 2185 § 1. In the Department's experience, prior to the changes in 1996, the borrower oftentimes would sign the Attorney Insurance Preference form at the closing table. This negated the purpose and intent of Section 37-10-102 that the borrower be able to choose which attorney would represent him in all matters of the transaction, which includes those leading up to and at the closing table.

The General Assembly has not amended Section 37-10-102 since 1996. Nonetheless, lenders continue to have problems complying with this statute.

## I. THE SPECIAL REFEREE CORRECTLY HELD THAT QUICKEN VIOLATED THE ATTORNEY INSURANCE PREFERENCE STATUTE THROUGH USE OF A PREPOPULATED FORM.

As the Department reasoned in Administrative Interpretation No. 10.102(a)-8302, the purposes of Section 37-10-102 are to provide the borrower: (1) with the right to choose the attorney who would represent the borrower and the insurance agent who would provide the required insurance coverage, and (2) to make these rights known to the borrower. *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-8302 (1983); R. 210-213. The Department set forth a form therein that could be utilized by creditors, those persons the General Assembly imposes a duty upon to satisfy the notice component of Section 37-10-102(a) as well as the duty to ascertain the borrower's preferences. R. 181. Lenders who use a form substantially similar to the Department's are protected by a safe harbor. S.C. Code Ann. § 37-6-506(3). Lenders who elect to use a method different from that set forth in Administrative Interpretation 10.102(a)-8302 do not have the privilege of the safe harbor and must undertake the burden of proving compliance with the statute.

While the record indicates Quicken utilized a form substantially similar to the Department's, the language prepopulated on the form rendered it insufficient for the purposes of satisfying Administrative Interpretation 10.102(a)-8302 and Section 37-10-102. R. 181, 183. It is well established in South Carolina that an attorney representing the interests of the borrower is a necessary component in real estate closings. See State v. Buyers Service, 292 S.C. 426, 357 S.E.2d 15 (1987). Further, and of even greater importance, the choice of attorney is a right given to the borrower. S.C. Code Ann. § 37-10-102(a); Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998).

In fashioning the attorney insurance preference form, the Department opined, "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 agent for whom the borrower would have to pay, even though the attorney or agent might actually represent the interests of the lender." *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-8302 (1983) (emphasis in original); R. 211. Thus, on the "safe harbor" form, two areas are available for the borrower to complete: section 1(a) when knowing which attorney the borrower desires to employ and section 1(b) for utilization when the borrower has no preference. R. 212-213. Present in both sections is "I select" accompanied by a space for the attorney's name and borrower(s) signature(s). Under South Carolina law, the borrower does not have an option to bypass being represented by counsel in a real estate transaction. See State v. Buyers Service, 292 S.C. 426, 357 S.E.2d 15 (1987); S.C. Code Ann. §§ 37-10-102(a) and 1-107(1). Likewise, lenders do not have a choice of whether to provide notice to the borrower of the right to choose counsel. S.C. Code Ann. § 37-10-102(a); see also S.C. Code Ann. § 37-1-107(1). In the case at hand, however, Quicken deprived the Wilsons of a choice through adding "**I/We will not use the services of legal counsel**" to section 1(a) prior to presenting the form to the couple for signature. The addition of "**Not Applicable**" to all lines of section 1(b) further solidifies the removal of choice from the Wilsons.

Quicken incorrectly argues the form indicates the Wilsons' choice of "no preference" and, according to their position, when such a "choice" is ascertained by the lender, nothing further is required on the lender's part. Resp. Br. pp. 10–11. This argument fails on several points:

1. The form in fact does not indicate a choice of "no preference" as the section reserved for this event, 1(b), contains the prepopulated language "**Not Applicable**," and

2. The form did not provide the borrowers a choice of attorney, as their signatures appear under the prepopulated statement "**I/We will not use the services of legal counsel,**" an option, unbeknownst to the Wilsons, that is not available pursuant to South Carolina law.

The concept of Section 37-10-102 was not a new one when passed in 1982. Several provisions contained therein originated from Title 29 of the Code of Laws, specifically Section 29-3-210 (repealed). It is significant, however, that the prior law contained a provision permitting the lender to refer a borrower to an attorney if no preference was expressed as long as the lender did not coerce the borrower. S.C. Code Ann. § 29-3-210; see also S.C. Code Ann. § 29-3-220. These sections were repealed and Section 37-10-102(a) was added without the provision that would allow a lender to refer the borrower to an attorney selected by the lender. Act No. 385, 1982 S.C. Acts 2283 § 56, 57. Further, subsequent amendments to the statute are void of any reference to this practice. This indicates a clear rejection of the practice of allowing the lender to choose the attorney who it wants to represent the borrower.

The Department took this legislative history into account when issuing Administrative Interpretation 10.102(a)-8302 and determined the list referenced in section 1(b) of the form is an added precaution that ensures the choice is the borrower's and not the lender's.[3] Once provided a list, the borrower must still make a choice. Conversely, if the borrower has no preference and is not provided a list the likelihood is that the lender will select the attorney. This scenario seems to describe the current case before this Court to a "T" as 95% of loans were closed by an attorney selected by Title Source. ROA 255, 257-260.

Quicken argues providing a list is not explicitly required by the law, which is correct. The General Assembly, however, in the 1996 amendments referenced the form distributed by the

[3] The Department reiterated such reasoning in 1993 when issuing an administrative interpretation on the applicability of Section 37-10-102(a) to the sales and consumer loan chapters of the Code. *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-9301 (1993).

Department. Act No. 355, 1996 S.C. Acts 2185 § 1. That form, which was in existence and remained unchanged in the thirteen years prior to the 1996 session, references the provision of a list if a borrower has no preference. See *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-8302 (1983). Failing to properly utilize the form in a transaction takes the lender out of the safe harbor and shifts the burden of proving compliance onto the lender—a burden Quicken failed to prove in light of the above.

The Department acknowledges that the method of obtaining the preference outlined in its Administrative Interpretation 10.102(a)-8302 is not the only way to obtain compliance with Section 37-10-102. Several matters have recently come before the agency pertaining to compliance with this law. In circumstances where a lender uses a form substantially similar to the model created by the Department but is void of the borrower's preference, alternative evidence of ascertaining the choice is considered. At the core of the Department's review is whether the information presented for consideration is from the borrower, as the purpose of the statute is to ascertain the preference directly from the borrower, so as to ensure it is the borrower's choice and no one else's.

The manner in which Quicken presented its AIP Checklist to the Wilsons resulted in a failure to ascertain the Wilsons' preference. Quicken did not properly utilize the Department's form as a vehicle to comply with Section 37-10-102 nor did they meet the burden of proving compliance with the law as the attorney meant to represent the interests of the borrowers at closing was not chosen by the borrowers, but rather the lender. As such, the Department encourages the Court to uphold the Special Referee's ruling that Quicken violated the attorney insurance preference statute.

## II. QUICKEN INDUCED A WAIVER OF RIGHTS WHEN PREPOPULATING THE ATTORNEY INSURANCE PREFERENCE CHECKLIST, AN ACTION PROHIBITED BY THE CONSUMER PROTECTION CODE AND RISING TO THE LEVEL OF UNCONSCIONABILITY.

### A. Waiver of the borrower's right to choose an attorney to represent the borrower's interests in a real estate transaction is expressly prohibited by the Consumer Protection Code.

Section 37-10-102(a) has two components: (1) the providing of notice to the borrower of the right to select an attorney and insurance agent and (2) ascertaining such preferences. See S.C. Code Ann. § 37-10-102(A); *S.C. Dep't of Consumer Affairs, Admin. Interpretation Nos.* 10.102(a)-8302 (1983) and 10.102(a)-9301 (1993). The form provided by the Department serves as a conspicuous disclosure of the borrower's right to be represented by an attorney, and engage an insurance agent, of his or her own choosing as well as a vehicle to make the borrower's preference known to the lender. This right is explicitly granted by the Consumer Protection Code, a right which the General Assembly desired to protect through a prohibition on waiver. Pursuant to Section 37-1-107(1), a consumer "may not waive or agree to forgo rights or benefits under this title."

Comments to the Consumer Protection Code serve to illuminate its provisions. Comment 1 to this section explains, "[t]his policy, precluding consumers from waiving or forgoing rights under the SCCPC by contract is based on the assumption that the consumer debtor needs protection against his own contract impropriety, and the ***frequent occurrence of unequal bargaining power between creditor and debtor***." Kathleen Goodpasture Smith, South Carolina Consumer Protection Code: Text with Comments p. 38 (4th ed. 2001) (emphasis added). The General Assembly enacted the Consumer Protection Code to protect consumers and determined that taking away rights granted by the Code would be against public policy. See Camp v. Springs Mortgage Corp., 310

S.C. 514, 516, 426 S.E.2d 304, 305 (1993). Likewise, the South Carolina Supreme Court determined protection was needed for borrowers entering into real estate transactions. See State v. Buyers Service, 292 S.C. 426, 357 S.E.2d 15 (1987); Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998).

A consumer may obtain a couple of mortgages in a lifetime, if fortunate enough. Lenders, however, engage in real estate transactions on a daily basis and have far greater knowledge of the duties, rights, and responsibilities of the parties to a transaction. In fact, it is a requirement of mortgage lenders operating in this state to know of, and comply with, all state and federal laws applicable to conducting such business. S.C. Code Ann. § 37-22-190(B). Quicken took advantage of this unlevel playing field when prepopulating its AIP Checklist and completing the form in a manner that would lead a reasonable borrower to believe that a choice to not be represented by counsel in a real estate transaction existed. How would the borrower be aware that this waiver of a right provided by the Consumer Protection Code was an option Quicken took upon itself to create and that such a waiver is prohibited under South Carolina law?

Even if the borrower may have had a remote knowledge of duties and responsibilities in the Consumer Protection Code, the additions of "**I/We will not use the services of legal counsel**" and "**Not Applicable**" essentially converted the vehicle meant to give notice of the borrower's right to choose, and to ascertain the choice, into an ambiguous, confusing and illegal document. The waiver language ("**I/We will not use the services of legal counsel**") is misleading and directly contradicts the statement contained one line above it advising the borrower of the right to select legal counsel. Placing "**Not Applicable**" in the section reserved for a borrower having no preference further mischaracterizes the choices that are truly available to a borrower pursuant to Section 37-10-102. After reviewing the form, the Wilsons could reasonably think that the choice

they had was whether or not they wanted an attorney to represent them in the transaction with Quicken as opposed to *who* the attorney would be to represent them. The form implies counsel was not required in this transaction. The content of the form constitutes an explicit waiver of the Wilsons' right to choose an attorney.

Quicken attempts to bolster its argument of the Wilsons choosing or otherwise acquiescing to the attorney chosen by Quicken by referencing a form presented for signature to the Wilsons at closing. R. 386. The form does not provide any disclosures of rights but merely states "Borrower Preferences" prior to listing the attorney and insurance agent. Id. Again, it is questionable as to the Wilsons' understanding of the right to choose counsel based on the prior form presented to them. Further, the Wilsons may have believed they had to sign that form—as they must sign the other deluge of forms presented at closing—to get the loan. Lastly, 37-10-102(a) requires the lender ascertain the preference ***prior to closing***. See also King v. American General, 386 S.C. 82, 687 S.E.2d 321 (2009).

### B. Eliciting and obtaining a waiver of the borrower's right to choose an attorney to represent the borrower's interests in a real estate transaction is unconscionable.

Quicken turned the vehicle meant to give notice to the borrowers of their right to counsel and to ascertain that choice into a vehicle to obtain a waiver of said rights. This conduct of obtaining a waiver of the right to choose an attorney or otherwise steering borrowers into choosing an attorney of the lender's preference, as opposed to the borrower's, eviscerates the meaning of 37-10-102(a) and inhibits its consumer protection purpose. Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993); State v. Buyers Service, 292 S.C. 426, 357 S.E.2d 15 (1987); Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998). Such action arises to a level of unconscionability under the Code.

Statutory provisions of the Consumer Protection Code shall be liberally construed and applied to promote the Title's underlying purposes and policies. S.C. Code Ann. § 37-1-102(1); Davis v. NationsCredit Financial Services, 326 S.C. 83, 86, 484 S.E.2d 471,472 (1997). Specific purposes of the Consumer Protection Code include: (1) to further consumer understanding of the terms of credit transactions; (2) to protect consumer buyers, lessees and borrowers against unfair practices by some suppliers of credit, having due regard for the interests of legitimate and scrupulous creditors; and (3) to permit and encourage the development of fair and economically sound credit practices. S.C. Code Ann. §§ 37-1-102(2)(c)–(e). In short, the primary purpose of the Consumer Protection Code is to protect consumers. Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993).

There are several interrelating sections at the core of the current controversy: Sections 37-1-107(1), 37-10-102(a), 37-10-105(C) and 37-5-108. Section 37-10-105(C) permits a court to analyze the terms of a transaction and/or ***conduct*** engaged in when determining the existence of unconscionability.[4] If found, several remedies are available to the court, including the authority to refuse to enforce the agreement or to issue a monetary award based upon the fees received by the creditor or paid by the debtor to a third party. See S.C. Code Ann. § 37-10-105(C)(1)–(4). Section 37-5-108, the Code's general unconscionability section referenced within Section 37-10-105(C), provides guidelines to use when determining the existence of unconscionability. These factors, however, are not an exhaustive list. S.C. Code Ann. § 37-5-108(4) and (5); Kathleen Goodpasture Smith, South Carolina Consumer Protection Code: Text with Comments p. 300, Comment 4 (4th ed. 2001). Further, these sections must be read in light of the other sections of the Code to ensure it is given its proper effect. See TNS Mills, Inc. v. S.C. Dep't of Revenue,

[4] The Department has similar authority via Section 37-6-111, which also refers to terms or conduct.

331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (citations omitted) ("In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something."). The Consumer Protection Code simply and plainly states a consumer "may not waive or agree to forego rights or benefits under this title." S.C. Code Ann. § 37-1-107(1). When reading this provision together with Section 37-10-102(a), it is clear the right of a borrower to choose an attorney to represent her interests in the transaction cannot be waived.

It is noteworthy, though, that the prohibition on waiver of rights granted pursuant to the Consumer Protection Code does not address the lender. The question, then, is what would prevent a person subject to the Title from attempting to elicit and/or actually obtaining a waiver of rights? The answer is the unconscionability provisions. This conclusion is supported by the language utilized by the General Assembly in referencing that terms of a transaction or agreement as well as conduct engaged in could be determined unconscionable. S.C. Code Ann. §§ 37-10-105(C) and 5-108. Elements for consideration are given, but are explicitly not an exhaustive list, recognizing the broad applicability of the notion of unconscionability and the varied fact patterns that may be presented to a court to make a determination. S.C. Code Ann. § 37-5-108(4)(a) and (5). Finding otherwise fails to give meaning to the General Assembly's intent and gives little incentive for compliance, especially in situations where the borrower pays little to nothing in attorney's fees as the monetary penalty would be deemed by lenders merely as a cost of doing business.

Further, the failure to find Quicken's conduct unconscionable would create different standards for similar conduct, which is an absurd result. Section 37-5-108 requires a court, when a case of unconscionable debt collection is before it, to consider whether the person subject to the

Consumer Protection Code used "fraudulent, deceptive, or misleading representations in connection with the collection of a consumer credit transaction." S.C. Code Ann. § 37-5-108(5)(c). At the very least, and as stated in Argument II(A) above, Quicken engaged in misleading representations when obtaining a waiver of attorney preference from the Wilsons. Reading the statutes to allow a lender to engage in certain conduct during the process of entering into a transaction that is otherwise prohibited once the transaction is consummated and the lender begins taking payments, or otherwise enforcing rights under the contract, is an absurd result the General Assembly clearly did not intend.

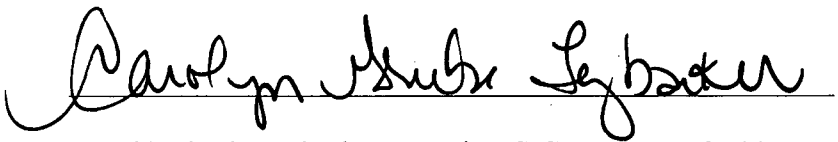
Quicken took it upon itself to create an option for the borrower that does not exist under South Carolina law—the option to not be represented by counsel in a real estate transaction. The method utilized to obtain such a waiver of rights is unconscionable as a matter of law. The Department urges the Court to uphold the Special Referee's ruling to this effect.

## CONCLUSION

Amicus Curiae Department of Consumer Affairs submits the Special Referee correctly ruled Quicken failed to comply with Section 37-10-102(a) and in doing so obtained an illegal waiver of rights from the Wilsons, an unconscionable act. The requirement for a lender to ascertain a borrower's preference as to the legal counsel that shall be employed to represent the borrower in all matters of the transaction has been in place for more than 42 years in South Carolina. A lender does not get to the closing table without first complying with the notice and ascertain portions of Section 37-10-102(a). Complying with the borrower's preference is the final step of compliance occurring at closing.

As the Department stated in its 1993 opinion, "A creditor that fails to ascertain the preference of the borrower as to the choice of attorney or insurance agent violated section 37-10-102(a), whether by outright failure to disclose or by improperly forcing or steering the borrower to the attorney or insurance agent of the lender's choosing." *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-9301 (1993).

Respectfully submitted,



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March 6, 2018

Columbia, South Carolina

ARTICLE 3

SELECTION OF ATTORNEY AND INSURANCE COMPANY

SEC.



## § 29-3-210. Borrower's right to select attorney and insurance company.

In the event a bank, mortgage banker, insurance company, building and loan association as defined in § 34-1-10, or other lending institution makes a loan to a borrower in the amount of five thousand dollars or more that is secured by a real estate mortgage, the lender shall ascertain the preference of the borrower as to the legal counsel that shall be employed to represent the borrower in all matters of the transaction and the insurance agent to furnish required insurance in connection with the loan and shall comply with such preference. The lender may require that the attorney or agent so chosen be able to provide reasonable security to the lender by way of mortgage title insurance in a company acceptable to the lender and other insurance in a company acceptable to the lender. *Provided, however,* if title insurance is made a condition of the loan at any point during the negotiations, it must remain a condition all the time thereafter regardless of which attorney ultimately closes the transaction. In the event that the borrower does not express any preference of a legal counsel or an agent for the purpose of such transaction, the lending institution may, subsequent to inquiry, refer the borrower to an attorney of the lender's selection.

**HISTORY: 1962 Code § 45-57; 1974 (58) 2716.**

## § 29-3-220. Lender shall not coerce borrower into employing a particular attorney or insurance company or agent.

Any bank, mortgage banker, insurance company, building and loan association, or other lending institution shall not coerce in any manner or require as a condition precedent to make any loan in excess of five thousand dollars that the borrower employ a particular attorney or purchase insurance from a particular agent or company as provided herein; *provided,* the insurance company meets the approval of the lender.

**HISTORY: 1962 Code § 45-58; 1974 (58) 2716.**

# The State of South Carolina

## Department of Consumer Affairs

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STEVEN W. HAMM
ADMINISTRATOR
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October 11, 1983

Administrative Interpretation No. 10.102(a)-8302

FORM FOR INDICATION OF BORROWER'S PREFERENCE FOR LEGAL COUNSEL AND INSURANCE AGENT MAY BE INCORPORATED INTO APPLICATION DOCUMENT BY USE OF A RUBBER STAMP OR MAY BE PROVIDED ON A SEPARATE SHEET.

The Department of Consumer Affairs has been asked whether a lender may avoid having the borrower's preference indication required by S. C. Code Ann. § 37-10-102(a) (1976, as amended) on the application form itself.

Section 37-10-102(a) provides, in pertinent part:

> The creditor shall ascertain the preference of the borrower as to the legal counsel that shall be employed to represent the debtor in all matters of the transaction relating to the closing of the loan and the insurance agent to furnish required insurance in connection with the mortgage and shall comply with such preference and the loan application on the first page thereof shall contain such information as is necessary to ascertain these preferences of the borrower.

Certain lenders have preprinted application forms for mortgage loans and would be required to reprint a large number of application forms if the above section were read to strictly require that the preference be placed physically on the first page of the application. Other lenders use applications which comply with the requirements of buyers on the secondary market. For example, the Federal Home Loan Mortgage Corporation (Freddie Mac) requires a particular application form to be filled out and that form leaves no room for the borrower's preference checklist on the first or front page. Alteration of this form would likely damage that loan's marketability to Freddie Mac.

The primary rule of statutory construction is to ascertain and effectuate the legislative intent. Bankers Trust of South Carolina v. Bruce, 275 S. C. 35, 267 S.E.2d 424 (1980). While courts are to apply terms of a statute according to their literal meaning, courts will disregard the literal import of words if application of the literal meaning of the words would result in unjust or absurd consequences, or would defeat the plain legislative intent. Martin v. Ellisor, 266 S. C. 377, 223 S.E.2d 415 (1976); State ex rel. McLeod v. Montgomery, 244 S. C. 308, 136 S.E.2d 778 (1964)].

While South Carolina has no formal legislative history, the General Assembly has provided some guidance in S. C. Code Ann. § 37-1-102 (1976, as amended)




TELEPHONES (AREA CODE 803)

ADMINISTRATION 758-3017 | CONSUMER COMPLAINTS 758-2040 WATS 1-800-922-1594 | PUBLIC INFORMATION 758-7546 | NOTIFICATION 758-8587 | CONSUMER ADVOCACY 758-8996

which reads in pertinent part:

> (1) This title shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (2) The underlying purposes and policies of this title are:
>
> (a) To simplify, clarify and modernize the law governing retail installment sales, consumer credit and usury.
>
> . . . .
>
> (c) To further consumer understanding of the terms of credit transactions and to foster competition among the suppliers of consumer credit so that consumers may obtain credit at reasonable costs;
>
> (d) To protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors;
>
> (e) To permit and encourage the development of fair and economically sound consumer credit practices; . . .

Section 37-10-102(a) was taken largely from S. C. Code Ann. §§ 29-3-210 and 29-3-220 (1976) which provide a similar right to select an attorney and an insurance agent. The provision that these preferences should be expressed on the first page of the loan application, however, was added by Section 37-10-102(a) and the original Sections 29-3-210 and 29-3-220 were repealed by Section 57 of Act 385 of 1982.

This evidences no legislative intent to either make loan transactions in South Carolina unmarketable on the secondary market (which would make credit less available) or to bring these transactions into potential conflict with federal law. On the contrary, given the provisions of Section 37-1-102 and the Consumer Protection Code as a whole, it would appear that in enacting Section 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 to an insurance agent of his choosing if insurance is required by the lender, 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. 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 agent for whom the borrower would have to pay, even though that attorney or agent might actually represent the interests of the lender.

If space permits, a borrower's preference checklist which is designed to determine those preferences set forth in Section 37-10-102(a) may be printed on a rubber stamp and stamped on any empty space on the first page of the loan application in which it will be legible and conspicuous. A borrower's preference checklist may also be printed on a separate sheet which would be presented to the borrower prior to or contemporaneous with the application form. If a separate sheet is presented to the consumer as the first sheet he or she sees, for purposes of compliance with Section 37-10-102(a) it may be deemed the first page of the application.

For enforcement purposes, a legible checklist in substantially the following form will be deemed in compliance:

Date_____

1.) I (we) have been informed by (the lender) that I (we) have a right to select legal counsel to represent me (us) in all matters of this transaction relating to the closing of the loan.

(a) I select _____ (Attorney's Name). _____ (Borrower's Signature)

_____ (Borrower's Signature)

(b) Having been informed of this right, and having no preference, I asked for assistance from (the lender) and was referred to a list of acceptable attorneys. From that list I select _____ (Attorney's Name).

_____ (Borrower's Signature)

_____ (Borrower's Signature)

2.) I (we) have been informed by (the lender) that I (we) have a right to select an insurance agent to furnish required _____ insurance in connection with this mortgage transaction.

(a) I select _____ (Agent's Name). _____ (Borrower's Signature)

_____ (Borrower's Signature)

(b) Having been informed of this right, and having no preference, I asked for assistance from (the lender) and was referred to a list of qualified agents. From that list I select _____.
Agent's Name

_____
Borrower's Signature

_____
Borrower's Signature

This form may be oversimplified for certain transactions, particularly if a number of insurance coverages are required. We believe, however, it can be lengthened within the same format.

In summary, the attorney and insurance agent preference need not be indicated directly on the application form so long as the borrower is presented a clear and conspicuous disclosure of this right prior to or contemporaneously with the application form. Use of the above form for these purposes will be deemed compliance with Section 37-10-102(a) by this Department if such form is filled out correctly.

Steven W. Hamm
Administrator

STEVEN W. HAMM
ADMINISTRATOR
AND
CONSUMER ADVOCATE

# The State of South Carolina

## Department of Consumer Affairs

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COLUMBIA, S.C. 29250-5757

EQUAL OPPORTUNITY EMPLOYER



September 7, 1993

ADMINISTRATIVE INTERPRETATION NO. 10.102(a)-9301

IN A FIRST LIEN MORTGAGE LOAN TRANSACTION IN WHICH THE DEBT IS INCURRED PRIMARILY FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES, WHERE THE LENDER FAILS TO DISCLOSE THE BORROWER'S RIGHT TO SELECT COUNSEL TO REPRESENT THE BORROWER IN CLOSING THE TRANSACTION, THE LENDER IS SUBJECT TO THE PENALTIES SET FORTH IN SECTION 10.105 AS WELL AS COSTS AND ATTORNEY'S FEES.

IN A CONSUMER LOAN TRANSACTION SUBJECT TO THE REQUIREMENTS OF SECTION 37-3-404(2) IN WHICH THE LENDER HAS FAILED TO DISCLOSE THE BORROWER'S RIGHT TO SELECT COUNSEL TO REPRESENT THE BORROWER IN CLOSING THE TRANSACTION, THE CREDITOR IS SUBJECT TO A CIVIL PENALTY OF $100.00 TO $1,000.00 IN ADDITION TO THE PENALTIES SET FORTH IN SECTION 10.105, AS WELL AS ATTORNEYS' FEES AND COSTS.

BORROWERS SEEKING LOANS SECURED BY A FIRST MORTGAGE SUBJECT TO SECTION 37-10-102 HAVE A RIGHT TO SELECT ATTORNEYS TO REPRESENT THEM AND ARE ENTITLED TO A DISCLOSURE OF THIS RIGHT. LENDERS THAT HIRE THIRD PARTIES TO ABSTRACT TITLES VIOLATE SECTION 37-10-102 IF THEY FAIL TO DISCLOSE TO THE BORROWERS THEIR ATTORNEY SELECTION RIGHTS.

IN JUNIOR LIEN CONSUMER LOAN TRANSACTIONS, SECTION 37-3-404(2), REQUIRES CREDITORS TO COMPLY WITH SECTION 37-10-102 WHENEVER THE CREDITOR REQUIRES THE BORROWER TO PAY FOR ATTORNEYS' FEES OR FOR INSURANCE. IF THE LENDER REQUIRES THE BORROWER TO PURCHASE A TITLE ABSTRACT OR TITLE INSURANCE WITHOUT DISCLOSING TO THE BORROWER THIS SELECTION RIGHT, THE CREDITOR VIOLATES SECTIONS 37-3-404(2) AND 37-10-102(a).

The Department has been asked the following questions:

> In a first lien mortgage loan transaction incurred for personal, family or household purposes, where the creditor has failed to ascertain the borrower's preference as to legal counsel and the borrower has been required to pay either a commercial title company or an attorney

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ACCOUNTING
734-9450

PUBLIC INFORMATION
734-9462

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WATS 1-800-922-1594

INVESTIGATORS
734-9461
ENFORCEMENT
734-9460

CONSUMER ADVOCACY
734-9464
FAX: 734-9365

selected by the creditor for a title examination, what remedies are available to the borrower?

In a consumer loan transaction, where a creditor has failed to ascertain the borrower's preference of legal counsel, and where the creditor has required the borrower to pay a commercial title company or an attorney selected by the creditor for a title examination, what remedies are available to the borrower?

Section 37-10-101 of the S. C. Code Ann. states:

> "[e]xcept as otherwise provided in other chapters of this Title, this chapter applies to designated loan transactions other than consumer loan transactions §§ 37-3-104 and 37-3-105)."

Although there is no indication of what makes particular loans "designated," the reference to the two Chapter Three sections is part of the law, as added by Section 56 of Act 385 of 1982. Section 37-3-105 (3) of the clearly provides that Chapter 10 applies to loans otherwise excluded from the Consumer Protection Code because they are secured by a first or equivalent security interest in real estate. See S.C. Code Ann. § 37-3-104 (1) (Supp. 1992).

Section 37-10-102 states, 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 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 and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (§ 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference, and the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower....

This Department in Administrative Interpretation No. 10.102(a)-8302 indicated its belief that the General Assembly sought to provide a substantive right to choose counsel and to provide meaningful disclosure of this right. The interpreta-

tion recognized, however, that a borrower might have no preference and could be referred to a list of acceptable attorneys. The Department considered at that time that any such lists would be inclusive instead of exclusive. The interpretation was issued in response to the suggestion by certain parties that if the consumer had no preference the creditor's only option was to give the consumer a copy of the local Yellow Pages to find an attorney. While § 37-10-102(a) appears to indicate that a creditor may refuse an attorney for reasons such as the inability to provide acceptable title or other insurance, the Department did not then and does not now regard the list or the right of refusal as allowing a creditor to force on a borrower an attorney other than the attorney of the borrower's choice.

A creditor that fails to ascertain the preference of the borrower as to the choice of attorney or insurance agent violates § 37-10-102(a), whether by outright failure to disclose or by improperly forcing or steering the borrower to the attorney or insurance agent of the lender's choice.

Section 37-10-105 sets forth the penalties for the violation of Chapter 10. See Camp v. Springs Mortgage Corp., ____ S.C.___, 426 S.E. 2d 304 (1993). Section 10.105 states:

> With respect to a loan transaction subject to the provisions of this chapter, any person who shall receive or contract to receive a loan finance charge or other charge or fee in violation of this Chapter shall forfeit-
>
> (a) the total amount of the loan finance charge andthe costs of the action; and the unpaid balance of the loan shall be repayable without any loan finance charge; and
>
> (b) double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party, to be collected by a separate action or allowed as a counterclaim in any action brought to recover the unpaid balance.
>
> A creditor may not be held liable in an action brought under this section if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

Its provisions are largely self-explanatory. If the lender assessed or contracted to assess any charge or fee, including attorney's fees or insurance premiums, in violation of § 37-

10-102(a), the lender is subject to the penalties enumerated. The question posed, however, suggests that certain transactions might involve payment only to a commercial title abstractors. This raises the related question of whether a lender might be in violation of § 37-10-102 but not be subject to the § 37-10-105 penalties because it has not technically required the payment of an "attorney's fee."

To answer this question, it is necessary to address the differing requirements of § 37-10-102(a) and § 37-3-404(b) separately according to lien priority.

## I. FIRST MORTGAGE TRANSACTIONS

It is the opinion of the Department that the borrower in a first mortgage loan subject to the provisions of §37-10-102(a) is entitled to select counsel to represent him or her, and is entitled to disclosure of this right. This is true without regard to whether the transaction is a purchase money transaction or a home equity transaction. It is likewise true whether the creditor seeks to assess traditional attorneys' fees or seeks to hire third party abstractors to abstract the chain of title. It is true for a number of reasons. First, the creditor cannot ascertain the borrower's preference, nor place such preference information on the application without disclosing the right of selection to the borrower. The requirement of compliance with §37-10-102(a) is triggered by the taking of an application for a covered loan, not by the determination to charge or not to charge an attorney's fee or insurance premiums.

In addition, the Supreme Court in State v. Buyers Service, Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) held that preparation of title abstracts for persons other than attorneys, as well as other closing related activities traditionally related to real estate practice, would be considered the unauthorized practice of law if done by unlicensed persons. The determination of what activities constitute the practice of law is the exclusive province of the Supreme Court. Nevertheless, when the abstract is prepared by a third party for the purpose of ascertaining lien priority or marketability of title, this would appear to be an attorney's services as contemplated by Buyers Service, and the borrower is entitled to choose the attorney and to a disclosure of this right.

## II. SECOND MORTGAGE CONSUMER LOANS

Second mortgage loans, whether they are purchase money or home equity loans, are consumer loans if they meet the definition set forth in S.C. Code Ann. §37-3-104 and are not otherwise excluded from the Consumer Protection Code.

The requirement for an attorney or insurance agency preference disclosure in such transactions is set forth in S.C. Code Ann. § 37-3-404(2):

> With respect to a consumer loan that is secured in whole or in part by a lien on real estate the provisions of § 37-10-102(a) apply whenever the lender requires the debtor to purchase insurance or pay any attorney's fees in connection with examining the title and closing the transaction (emphasis added).

Unlike first mortgage consumer purpose loans, in junior lien consumer loans the right to select an attorney or an insurance agent is triggered by the creditor's requirement that the borrower purchase insurance or pay any attorney's fees. It is not triggered simply by taking an application because it is conceivable that a lender might take an application for a loan in which neither attorneys' fees nor insurance were required. Once triggered, however, the selection right exists for both the attorney and for property insurance coverage, and the determination of these preferences should be documented either on the application or attached to the application as set forth in Administrative Interpretation No. 10.102(a) - 8302. For a creditor to properly ascertain these preferences, it must appear on the documentation that these rights were properly and conspicuously disclosed.

The question again arises as to whether a creditor may avoid these requirements by requiring the borrower to buy title insurance protecting the creditor's interest only. Section 37-3-404(2) clearly imposes the requirements of § 37-10-102(a) on a creditor when either insurance or an attorney's fee is required. Thus, the borrower has the right to select a closing attorney and have this right properly disclosed if the creditor requires the borrower to purchase hazard and flood insurance.

Likewise, where the creditor requires the borrower to purchase title searches or abstracts from an abstracting company, it raises an issue of whether such services are sufficiently akin to attorney's services to trigger the attorney preference requirements. If the borrower is required to pay for closing costs which include abstracts upon which creditors rely for a determination of lien priority or marketability of title, the § 37-10-102(a) preference requirements are triggered, and the borrowers' rights to such preferences must be disclosed.

Moreover, it appears that even if the creditor required the borrower to buy title insurance which did not include charges for abstracts (such as policies relying exclusively on previously prepared abstracts) the title insurance would nevertheless trigger the preference and disclosure requirement

pursuant to § 37-3-404(2). Title insurance is insurance, and the limitations on the borrower's ability to choose a title insurance agent as set forth in § 37-10-102(a) by §10 of Act 355 of 1984 for first mortgage transactions did not address the requirement under § 37-3-404(2) that the preference disclosures must be made in consumer loan transactions if the creditor required the borrower to purchase any insurance.

Practitioners should be aware of the case of White & White v. TRW Real Estate Loan Services, Inc., No. 91-3306 (D.S.C., Feb. 23, 1993) appeal docketed, No. 93-1335 (4th Cir. 1993). In that case, Plaintiffs challenged TRW's preparation and sale of property reports as the unauthorized practice of law. The District Court, per Judge William Traxler, granted TRW summary judgment and Plaintiffs are presently appealing the ruling to the Fourth Circuit Court of Appeals. The Court rejected the Plaintiffs' contention that TRW engaged in unauthorized practice by distinguishing TRW's activities from the title abstracts contemplated by State v. Buyers Service, Inc., Supra. The result in White & White v. TRW, if it correctly states South Carolina law, does not alter this opinion. The Department was not asked to and does not undertake to determine what sort of services constitute "title abstracts." We merely note that whatever services actually constitute "title abstracts" appear to likewise constitute law practice as contemplated by the South Carolina Supreme Court in State v. Buyer's Service Inc.

## III. REMEDIES

Finally, the requesting party suggests that the remedies of § 37-10-105 should be considered cumulative with those of § 37-5-202. Section 37-5-202(8) provides that where a creditor is found to have violated "this title, the Court shall award the consumer the costs of the action and to his attorneys their reasonable fees." "[T]his title" clearly applies to the entire Title 37. See § 37-1-101. The Department is aware of no reason § 37-5-202(8) should not be taken at its literal import.

In addition, Section 37-5-202(1) provides:

> If a creditor has violated any provision of this Title applying to . . . attorney's fees (§ 37-2-413 and § 37-3-404) . . . the consumer has a cause of action to recover actual damages and also a right in an action other than a class action, to recover from the person violating this title a penalty in the amount determined by the court not less than one hundred dollars nor more than one thousand dollars.

While § 37-10-102 deals with attorney's fees, the parenthetical reference to § 37-3-404 is likewise part of the law [See, Section 48 of Act 385 of 1982] and does not include references to § 37-10-102(a). Because penalty provisions are already treated in § 37-10-105 and because the South Carolina courts recognize the Rule of "Expressio Unius Est Exclusio Alterius" (or expressed mention implies exclusion of the unmentioned) [Home Building and Loan Association v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938); Pennsylvania Nat. Mut. Cas. Ins. Co. vs. Parker, 282 S.C. 546, 320 S.E. 2d 458 (Ct. App. 1984).] the Department is not convinced that a first mortgage creditor violating § 37-10-102(a) is subject to the penalties under § 37-5-202(1) as well as those listed in § 37-10-105.

The same result does not necessarily follow for consumer loans subject to attorney and insurance agent preference provisions. As that Section is written, a violation of § 37-10-102(a) by a consumer lender is literally a violation of § 37-3-404(2). The Department is aware of no reason creditors violating § 37-3-404(2) should not be made subject to the penalties of both Chapters 5 and 10 of the Consumer Protection Code. We are aware of comments stating that a different position should be adopted because of certain of Professor Haynsworth's Comments. The Comment, in its full context, states:

> This Section [§ 10.105] recodifies the penalty for usury in former S.C. Code § 34-31-50. Like the other sections in this chapter, it applies only to loan transactions that are not consumer credit transactions. The remedies for violations of the consumer credit provisions of the SCCPC are contained in Part 2 of Chapter 5. H. Haynsworth, South Carolina Consumer Protection Code And Comments (S.C. Bar-C.L.E. Division, 2d ed.) 250 (1990).

Initially, we note that these Comments are not official reporter's comments. Id. at i. Nevertheless, read in context, we believe it is consistent with our opinion as above set forth. Applied as strictly as one commenter suggests, its second sentence would be plainly erroneous, in that § 37-10-102 clearly applies to consumer loans by the operation of § 37-3-404(2). We understand it to mean only that Chapter 10 penalties should not be generally applied to excess charges violating Chapter 3. An act simultaneously violating both provisions, however, is subject to both penalties.

In conclusion, it is the opinion of this Department that when a first mortgage lender violates the provisions of § 37-10-102(a), it is subject to the following penalties:

1. The forfeiture of the loan finance charge and adjustment of the unpaid balance to pay principal only [§ 37-10-105(a)];

2. Loss of double the amount of excess finance charge or other excess charges actually received by the creditor or paid by the debtor to a third party [§ 37-10-105(b)]; and

3. Costs and attorney's fees [§ 37-5-202(8)].

In case of violations of § 37-3-404(2) the creditor is subject to a civil penalty of $100.00 to $1,000.00 under § 37-5-202(1) in addition to the penalties set forth above.

Steven W. Hamm
Administrator

by: _____
Philip W. Porter
Deputy for Regulatory Enforcement

STATE OF SOUTH CAROLINA
In the Court of Appeals



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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

J. Martin Harvey, Special Referee

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Appellate Case No. 2016-001214

Circuit Court Case No. 2015-CP-06-00070

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Quicken Loans, Inc., ..... Appellant,

v.

Wayne D. Wilson; Calvin O. Wilson, III; Any other Heirs-In-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 a class designated as John Doe; any unknown minors or persons under a disability being a class designated as Richard Roe; Park Sterling Bank, ..... Respondents.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies the Amicus Curiae Brief on behalf of the South Carolina Department of Consumer Affairs in this matter complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

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March 16, 2018
Columbia, South Carolina