THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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; and Park Sterling Bank, Respondents.

Appellate Case No. 2016-001214

Appeal From Barnwell County
James Martin Harvey, Jr., Special Referee

Opinion No. 5613
Heard September 10, 2018 – Filed January 9, 2019

REVERSED

Benjamin Rush Smith, III, Allen Mattison Bogan, Carmen Harper Thomas, and Brian Montgomery Barnwell, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Charles L. Dibble, of Dibble Law Offices, and Steven W. Hamm, of Richardson Plowden & Robinson, PA, both of

Columbia, Daniel Webster Williams, of Bedingfield & Williams, of Barnwell, and C. Bradley Hutto, of Williams & Williams, of Orangeburg, all for Respondents.

Carolyn Grube Lybarker and Kelly H. Rainsford, both of Columbia, for Amicus Curiae South Carolina Department of Consumer Affairs.

SHORT, J: Quicken Loans, Inc. (Quicken) filed this foreclosure action against 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; and Park Sterling Bank (collectively, Respondent). Quicken appeals the special referee's order granting Respondent's motion for partial summary judgment, arguing the special referee erred in (1) holding Quicken violated the Attorney Preference Statute (the Act); (2) finding unconscionability is a remedy for a violation of the Act; (3) failing to find Respondent's counterclaim time-barred by the statute of limitations; (4) denying Quicken's jury trial demand and motion to amend the pleadings; and (5) relying on confidential information subject to a protective order in an unrelated case. We reverse.

BACKGROUND FACTS

On November 7, 2011, Calvin and Ezekiel (Ellen) T. Wilson applied to Quicken for a loan to be secured by a mortgage on their residence. Mr. Wilson died on September 20, 2013, and Mrs. Wilson died on November 17, 2014. Wayne D. Wilson is the personal representative of Mrs. Wilson's estate.

Quicken telephonically takes information for the loan application from the borrower. Quicken's operating system prompts Quicken's banker to ask the borrower the following question, "Will the borrower select legal counsel to represent them in this transaction?" If the borrower responds, "no," the attorney preference form is prepopulated to read, "I/We will not use the services of legal counsel." There is no list of acceptable attorneys provided to the borrower in the event he does not have a preference. If the borrower responds, "yes," the system

populates the form to read: "Please contact lender with preference." Quicken's system does not permit an attorney name to be entered at the time of the telephonic application. The system cannot generate an application package without asking the attorney preference question. Once the application is completed, it is sent electronically or by mail to the borrower. Any applications in which the form is prepopulated with "I/We will not use the services of legal counsel" is forwarded to Quicken's affiliate company, Title Source, Inc., which acts as the settlement agent in the transaction and subcontracts with attorneys to perform the settlement services.

The Wilsons signed the prepopulated form, entitled "Attorney/Insurance Preference Check List," and declined services of legal counsel. This form appears nearly identical to the form promulgated by the South Carolina Department of Consumer Affairs (DOCA), except Quicken's form is prepopulated with responses. Similar to the DOCA form, Part 1 of the Quicken form states, "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." Unlike the DOCA form, however, Part 1(a) of the Quicken form is prepopulated to read, "I/We will not use the services of legal counsel." Under Part 1(b), the Quicken form, similar to the DOCA form, initially states, "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: . . . ." Unlike the DOCA form, which provides blank lines to fill in an attorney's name and the borrower's signature, the Quicken form is prepopulated with the responses, "Not Applicable."

Quicken presented the affidavit of Carlton D. Robinson, the closing attorney, who averred he explained it was his practice to explain the legal effect of the Attorney/Insurance Preference Checklist to borrowers, and he would not have proceeded with the closing if the Wilsons had any dissatisfaction with him representing them during the closing. The transaction was completed on December 14, 2011.

Quicken filed this mortgage foreclosure action in March 2015. Respondent answered and counterclaimed, arguing Quicken waived its right to foreclose by using a prepopulated form for the loan and mortgage in violation of South Carolina

common law and statutes.[1] Quicken filed an answer to the counterclaim, denying the allegations.

Quicken moved for an order of reference to the special referee, which was granted on September 1, 2015. Quicken subsequently demanded a jury trial and moved to transfer the case to the general docket. Respondent moved for partial summary judgment, arguing it was entitled to judgment as a matter of law based on Quicken's use, at the closing of the loan and mortgage, of an attorney preference form that violated South Carolina law. Quicken cross-moved for summary judgment and responded to the motion, arguing (1) Respondent's claims were barred by the statute of limitations; (2) it complied with the statute governing the attorney preference form; (3) an alleged violation of the statute does not render the note and mortgage unconscionable; (4) Respondent could not establish unconscionability in any event; and (5) the borrower's claim did not survive her death. Quicken also moved to amend the pleadings to assert additional claims and renew its request for a jury trial and transfer to the general docket.

After hearing argument on the motions, the special referee granted Respondent's motion for partial summary judgment, denied Quicken's motion for summary judgment, denied Quicken's requests for a jury trial and transfer to the general docket, and granted in part and denied in part Quicken's motion to amend. This appeal followed. Respondent moved to certify and transfer the case to our supreme court. Quicken filed a return, objecting to certification. By order dated August 4, 2016, the supreme court denied the motion.

STANDARD OF REVIEW

"Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Whether a form complies with the requirements of the Act is a question of law. *See id.* (finding the question of whether a form complied with section 38-77-350(A) regarding the meaningful offer of underinsured motorist coverage was a question of law). "Questions of law may be decided with no particular deference to the trial court." *Id.* (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008)).

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[1] Respondents Wayne D. Wilson and Calvin Wilson, III, filed a separate answer and counterclaim. Quicken moved to strike the pleading as untimely filed.

LAW/ANALYSIS

I. ATTORNEY PREFERENCE STATUTE

Quicken argues it did not violate the Act. We agree.

The Attorney Preference Statute (the Act) provides in part the following:

> 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) (2015). The Act, part of the Consumer Protection Code, is to be liberally construed. *See* § 37-1-102 (2015) (providing the Consumer Protection Code "shall be liberally construed and applied to promote its underlying purposes and policies"). The purpose of the Act is to protect consumers. *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993). The Act provides a "creditor may comply with this section" by performing one of the following:

> (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 administrator; 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.

§ 37-10-102(a) (2015); *see Davis v. NationsCredit Fin. Serv. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (holding that "a lender substantially complies with

section 37-10-102 if the borrower receives a clear and prominent disclosure of the statutorily required information").

The form distributed by the administrator, DOCA, provides a safe harbor for the creditor. § 37-10-102(a). In this case, Quicken used the DOCA form, but prepopulated the form according to the borrower's telephonic responses during the pre-application process. DOCA interpreted the legislative intent of section 37-10-102(a) in 1983 as follows:

> [I]t would appear that in enacting [the Act,] 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 th[is] right[] 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.

S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 10.102(a)-8302 at 2 (1983). DOCA described the penalties for "[a] creditor that fails to ascertain the preference of the borrower as to the choice of attorney" by reference to section 37-10-105, which provides for the creditor's forfeiture of the finance charges and other penalties. *Id.* No. 10.102(a)-9301 at 3 (1993).

Although DOCA argues Quicken violated the Act in its amicus brief, DOCA also noted, "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 . . . ." We are mindful of the respectful consideration we must give to an agency's interpretation of a statute within its purview. *See Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009) (noting that an agency's construction of a statute within its purview is entitled to respectful consideration and, absent compelling reasons, should not be rejected). However, we find Quicken did more than simply update its data processing system. Quicken verbally ascertained the Wilsons did not have an attorney preference and received confirmation from them in writing.

We find Quicken complied with the Act because an agent of Quicken asked the Wilsons if they would be using preferred legal counsel and only prepopulated the

form after the Wilsons responded they did not have counsel of preference. Quicken sent the prepopulated form, and the Wilsons signed it and sent it back without indicating they had any questions. There is nothing in the Act requiring Quicken to provide a list of available attorneys or to ascertain an applicant's preference in writing. We conclude Quicken's telephonic ascertainment as to preference, including the subsequent delivery of the form for signature, satisfies the requirements of the Act.

II. REMAINING ISSUES

Based on our finding Quicken did not violate the attorney preference statute, we decline to address its remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

Based on the foregoing, the order on appeal is

REVERSED.

HUFF and WILLIAMS, JJ., concur.